The following information is for:

Clearinghouse Rules

98-188

and

98-191

CR 98-188

State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
Joe Leean, 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 than 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

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,

Joe Leean
Secretary

Attachments

State Representative
GREGG UNDERHEIM
Chair: Assembly Committee on Health
Chair: Assembly Committee on State & Federal Relations

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April 14, 1999

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

Dear Secretary Leean:

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

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

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

Sincerely,

GREGG UNDERHEIM
Chair
Assembly Committee on Health

GU/sjl
cc: Members of the Assembly Committee on Health

Testimony of

David Miller

Director of State Relations

On Senate Clearinghouse Rule 98-191

Before the Senate Committee on Health, Utilities, Veterans and Military Affairs

April 28, 1999

Wisconsin Caregiver Law and the University of Wisconsin System

The Wisconsin Caregiver Law requires, among other things, that criminal background checks be performed on all current and prospective employees and contracting individuals who have access to vulnerable populations in certain health-care and day-care facilities. The Department of Health and Family Services (DHFS) is in the process of drafting permanent regulations to implement the law. In an early draft of its emergency rules, DHFS included "students and interns completing educational clinical or in-service requirements" in its list of persons required to undergo background checks.

The UW System believes that this law is well-intentioned, but students should not be required to undergo background checks for the following reasons:

- **Students are Supervised During Field Placements:** Professionals at the caregiving facilities and UW Faculty fully supervise the interns throughout their training. Constant supervision and evaluation of students' activities by professionals and faculty members motivates students to behave professionally and ensures that students do not engage in any form of misconduct.
- **Students Interns are not Employees:** Students are affiliated with the caregiving facility for a short period of time (generally one semester) and are not employees of the institutions. Students are required to perform internships as part of their learning experience.
- **Administrative Costs:** Unlike a private business that only performs background checks on employees once every four years, the UW System may have to perform checks on approximately 11,000 students currently enrolled in internships with caregiving institutions and on 2,000-3,000 NEW students every semester. Facilities that host internships are requesting that affiliation agreements with UW System institutions be rewritten to stipulate that each campus program will be responsible for completing the background checks. Costs per each check have been estimated at $35.00 including the costs of criminal transcripts and staff time.
- **Students are Informed About the Caregiver Law:** UW System institutions operating internship programs with entities affected by the Caregiver Law are ensuring that current and prospective students receive information and advising about the law and its potential impact on their employment in fields covered by the law.

An Alternative Solution

To eliminate an excessive number of unnecessary background checks but to ensure that students are well-advised that employment in the career they are pursuing requires a criminal background check, the results of which may prevent them from gaining employment in that area, the UWS proposes the following:

Upon admission to the academic program in a field covered by the Caregiver Law, the student would be offered two options:

(1) To elect to have the background check performed immediately to ensure that there are no impediments to employment in the field for which the program is preparing the student, or

(2) To sign a request to defer the check until the student seeks employment in the field because they do not have anything in their background that would violate the Caregiver Law.

State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
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May 12, 1999

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State Representative
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Chair: Assembly Committee on Health
Chair: Assembly Committee on State & Federal Relations

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Sincerely,

GREGG UNDERHEIM
Chair
Assembly Committee on Health

GU/sjl
cc: Members of the Assembly Committee on Health

UNIVERSITY OF WISCONSIN-EAU CLAIRE
EAU CLAIRE, WI 54702-4004

Office of Dean of Students
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April 14, 1999

APR 1 9 1999

Senator Rodney C. Moen
Wisconsin State Senate
State Capitol – P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Moen:

The purpose of this letter is to alert you to the University's serious concerns over the impact of the Wisconsin Caregiver Law, including the recent amendments to the rules. It has the potential to negatively affect the University-student relationship and the quality of education.

Should the University be required to complete background checks on students' eligibility to participate in practical educational experiences, the results will be discrimination to educational access based on criminal history. The University cannot condition the acceptance of students into programs and/or practical experience opportunities (internships, clinical practice, etc.) on criminal background checks. Our mission is to provide educational opportunity for the State's individuals. Such a requirement would result in a University-Student adversarial role and be contrary to our educational mandate and the letter and spirit of our mission.

An essential component of many of our academic programs is a required or elected internship, clinical experience, service-learning option, etc. Students are asked to demonstrate what they have learned through practical application. The results are graduates who have demonstrated their ability, are more adaptable, and are better equipped to deal with career complexities and changes in the labor market. A bill which results in reducing or eliminating the practical experience components of programs is educationally unacceptable.

In addition to academic implications, the University is not fiscally positioned to handle hundreds of background checks annually. Well-trained staff who know how to perform and interpret the results of background checks would be essential to reduce liability concerns.

In summary, we believe the inclusion of students as "covered Persons" under the Wisconsin Caregiver law poses student, academic, and fiscal concerns.

Sincerely,

Ann M. Lapp
Dean of Students

sr

c: Chancellor Donald Mash
Interim Provost/Vice Chancellor Thomas Miller

UNIVERSITY OF WISCONSIN MILWAUKEE

School of Nursing

UWM ®

April 23, 1999

Senate Committee on Health, Utilities, Veterans and Military Affairs

Thank you for the opportunity to provide you with information as to how the Wisconsin Caregiver Law has impacted the University of Wisconsin-Milwaukee School of Nursing. Although the School of Nursing is not a regulated agency under the law, all of our students at the undergraduate and masters level are required to have clinical experiences in regulated agencies in order to meet the requirements of the curriculum. As a result of this, in November of 1998 we informed our students of their need to have criminal background checks completed. Since that time, we have processed 403 student and 11 faculty and staff Background Information Disclosure forms and completed the necessary Department of Justice forms. Thirty of these required additional background checks in other states because the student has resided in another state within the past three years. We anticipate that each semester we will need to complete background checks for an additional 90-100 students who are beginning the clinical component of the curriculum. Because we place up to 400 students in as many as 50 different regulated entities a semester it is requiring extensive staff time to process the original background check and then to ensure that the proper information has been copied and forwarded to the appropriate clinical agency so that they can be in compliance with the law. It is also important to point out that all of our students are supervised while participating in required clinical practicum experiences.

One of our greatest concerns has been the impact on our students. Upon receipt of the reports from the Department of Justice it was necessary to meet with two students to inform them that the Department of Justice records indicated that the disposition on an arrest involving a crime on the bar with rehabilitation list was not available and until further information was available they would not be able to participate in their clinical practicum experience. In both cases, further investigation by our campus Police Department found the ultimate disposition of these cases did not involve conviction of a crime that would bar a student from clinical practice. The arrests in question had occurred in 1990, 1991, 1993, and 1994. One of the students reported to me that attempts had been made for several years to have the record updated to accurately reflect the disposition with no success. This student was entering the last semester of the curriculum and was visibly upset and tearful at the possibility that progression in the curriculum and graduation was at risk after more than three years of satisfactory work in the nursing program. In addition, one of our students had to be informed that progression in the curriculum would be stopped until a finding from the Rehabilitation Review Panel was provided to the School indicating that the student was deemed rehabilitated.

There has also been a great deal of confusion among regulated agencies identified by the law and their responsibility related to student placements in their agencies. Several

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agencies believe that the determination of whether a student could be placed in a regulated entity rested with the School and not with the agency. This required numerous conversations both with the clinical agencies as well as with our campus Office of Environmental Health, Safety, and Risk Management to reinforce that the determination for students with a conviction of a crime in the substantially related category must be made by the regulated entity.

I appreciate the opportunity to provide you with information to assist you in your deliberations regarding legislation that will serve to protect vulnerable populations from harm by those providing care to them.

Sincerely,

Susan Dean-Baar

Susan Dean-Baar, PhD, RN, FAAN
Associate Dean for Academic Affairs

Executive Summary

Background Check and Abuse Reporting Reform

April 8, 1999

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

- All employees of covered entities and all contractors with significant patient care responsibilities (including medical staff) will have their backgrounds checked. The definitions of "client" and "entity" are substantially unchanged from the current statute except as noted below. The scope of the background check information is unchanged from the current statute. Students fulfilling educational requirements will not be included.

- All "entities" (i.e. providers licensed or certified by DHFS) will continue to have their backgrounds checked. EMTs were added to the list of DHFS licensees who are excluded from the background check requirement.

- The proposal also imposes an employment and licensing bar for "serious crimes" on "caregivers". Caregivers include all DHFS licensees and some but not all employees and contractors.

- The definition of a "caregiver" who may be barred from employment is based on "significant, regular patient or client care responsibilities," with clerical, maintenance, dietary, and support workers excluded.

- The "serious crimes" triggering the employment and licensing bar are the five crimes now listed in the statute, together with substantiated reports of abuse, neglect, or misappropriation of property.

- Rehabilitation review by DHFS will be available for caregivers convicted of serious crimes. Employment or contracting may continue while DHFS conducts its review.

- For employees or contractors who are not caregivers, and for caregivers who have not been convicted of a serious crime, the employer will exercise its fully informed discretion on whether to hire, subject to current fair employment laws.

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

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

Proposed Background Check and Abuse Reporting Reform Language

April 8, 1999

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

Section 50.065

(1) In this section:

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

(b) "Caregiver" means:

1. A person who is or is expected to be an employe or contractor of an entity and who is expected to have significant, regular client care responsibilities as part of their duties for such entity, and who is not licensed, certified or registered by the Department of Health and Family Services under (1)(b)2.; or

2. A person who has or is actively seeking a license, certification or registration to operate an entity from the Department of Health and Family Services.

3. Clerical, administrative, maintenance, dietary, and other support workers whose duties for an entity do not include significant, regular client care duties are not caregivers.

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

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

1. Licensed or certified child care under ch. 48.

2. Kinship care under s. 48.57 (3m) or long-term kinship care s. 48.57(3n).

3. A person certified as a medical assistance provider, as defined in s. 49.43 (10), who is not otherwise approved by the Department of Health and Family Services as a hospital under s. 50.35 or licensed or certified by or registered with the Department of Health and Family Services.

4. An entity, as defined in s. 48.685(1) (b).

5. A public health dispensary established under s. 252.10

6. A person certified as an emergency medical technician under s. 146.50.

(e) "Serious crime" means the following crimes, or the equivalent crime in another state:

1. First-degree intentional homicide under s. 940.01.

2. First degree sexual assault under s. 940.225 (1).

3. First degree sexual assault of a child under s. 948.02 (1).

4. Second degree sexual assault of a child under s. 948.02 (2) if the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.

5. Repeated acts of sexual assault of the same child under s. 948.025 if the child had not attained the age of 13, or if the child had attained the age of 13 and had not attained the age of 16 and the person was, at the time of the sexual contact or sexual intercourse, more than 4 years older than the child with whom the person had the sexual contact or sexual intercourse.

6. A substantiated report of neglect, abuse, or misappropriation of property based on information maintained by the Department of Health and Family Services.

(2) (a) An entity shall obtain the information specified under para. (2)(c) for all contractors and prospective contractors who are caregivers specified under para. 1(b)(1) and for all employees and prospective employees. No prospective employee or contractor may perform client care responsibilities without supervision until the entity has received and reviewed this information. An entity shall provide this information to another entity that is a prospective or existing employer or contractor upon request.

(b) The Department of Health and Family Services shall obtain a criminal history search from the records maintained by the Department of Justice with respect to a person specified under para. 1(b)(2). The Department of Health and Family Services shall provide this information to an entity that is a prospective or existing employer or contractor upon request.

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

1. A criminal history search from the records maintained by the Department of Justice.

2. Information that is contained in the registry under s. 146.40 (4g) regarding any findings against the person.

3. Information maintained by the Department of Regulation and Licensing regarding the status of the person's credentials, if applicable.

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

1. Notwithstanding s. 111.335, the Department of Health and Family Services shall refuse to license, certify or register, or continue to license, certify or register any such caregiver to operate an entity.

2. Notwithstanding s. 111.335, an entity shall refuse to employ or contract with or continue to employ or contract with any such caregiver.

3. Notwithstanding the provisions of (1) and (2) above, the Department of Health and Family Services may license a person to operate an entity who otherwise would not be so licensed because of para. 3(a)(1), and an entity may employ or contract with a person who otherwise would not be employed or contracted because of para. 3(a)(2), if the person demonstrates that he or she has been rehabilitated to the Department of Health and Family Services by clear and convincing evidence and in accordance with the procedures established by the Department of Health and Family Services by rule. An entity may continue to employ or contract with a person undergoing rehabilitation review while the rehabilitation review is pending.

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

(5) These requirements shall apply to:

(a) all license applications or renewals submitted to DHFS on or after _____.

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

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

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

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

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

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

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

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I am David Slautterback representing the Wisconsin State Legislative Committee of AARP. We are thankful for this opportunity to have our opinions heard.

Wisconsin State Legislative Committee of AARP has been, and continues to be, a very strong supporter of the legislation introduced by Representative Krusick last year concerning criminal background checks and expansion of the caregiver registry. With some reservations, we are satisfied with the rules you have before you, HFS 12 and HFS 13. We think you should approve them with a few changes.

A problem for us is that DHFS has set no time limits on its collection of data and transmission of those data to the employer. Since the potential employee cannot and should not begin work until the check is completed a significant hardship could be experienced both by the employee and the employer who needs to have the job filled. Since most or all of the data to be retrieved are in computers it should be possible to complete the task in short order. The actual retrieval of the data should be accomplished in minutes and the transfer of the data to the employer should also be done in minutes. Nevertheless, we have suggested an upper limit of 10 days but even given a burdened system and necessary administrative complexities it must be possible to respond more rapidly. We understand that it is difficult to control other states and the federal government from Wisconsin but, at the least, the data from Wisconsin should be transmitted quickly. Our efforts to ascertain why the system at present takes weeks rather than hours or days have not yet met with success.

We think this is a very serious problem. The issue has been central to negotiating an agreement among advocates, providers and others. We hope that your Committee will insist that the rule specify the shortest reasonable time and that the information retrieved be transmitted electronically.

I have seen two printouts of requested data which reveal a weakness in the program for retrieval that results in a printout of data on more than one person. Although it should be relatively easy to improve the program, a glance at the data by the technical person should eliminate this problem.

As you have heard, we have been engaged in conscientious negotiations with others concerned about this legislation and the rules. We have signed on to a consensus that we hope you will find acceptable. Successful negotiation depends on the willingness of partners to give something. Paragraph 2 (a) that leaves the responsibility for the hiring decision with the employer for some crimes not among the 6 serious ones, was a real concern to us. And it still is. For us, at AARP, the question of who bears the liability if a wrong decision is made is of little importance. Our concern is for the person living in an institution with little or no ability to protect her- or himself and their property. We hope that if you accept the whole of our negotiated proposal our concern will be sufficiently counterbalanced. We know that there are many providers who share our concerns and hold patient safety as their highest priority. We know also that for some cost is a higher priority. We expect that our proposal will minimize that risk.

May 10, 1999

To: Interested Legislators

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

Subject: HFS 13 – Mandatory Abuse Reporting Rules

Hospitals and health systems are devoted to the well-being of their patients and do not tolerate abusive staff. They put significant resources into hiring, training, and educating their staff, including pervasive quality monitoring and improvement programs that are intended, in large part, to eliminate negligent or unintentional errors. In every Wisconsin hospital, employment policies and quality improvement programs alike call for the investigation of abuse and neglect.

In this factual context, the mandatory abuse reporting rules in HFS 13 continue to have the potential to be needlessly costly, disruptive, and even counterproductive to patient safety and well-being. Conducting a complete investigation and submitting a report to DHFS on every single allegation of abuse or neglect will serve to unfairly stigmatize and demoralize hospital staff, create a damaging and untrue image of hospitals and other providers, and distract DHFS staff from the truly significant aberrations that rightfully require their attention.

The problems with the proposed permanent rule HFS 13 can be traced to four sources. First, the rule creates a broad and confusing definition of abuse and neglect that should be significantly clarified. Second, the rule contains no definition of "allegation." Third, the rule requires that a full report of every allegation and investigation be reported to DHFS regardless of merit. Fourth, the rule requires that every single allegation of abuse or neglect generate a full investigation.

- **The definition of abuse and neglect should be clarified.** We continue to believe the following definition of misconduct, based on that enunciated by the Wisconsin Supreme Court in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249 (1941), as modified below for its application in the context of health care and the abuse registry system, would be appropriate.

  > "Abuse or neglect" 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

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> 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 abuse.

Please note that this definition does not contain any requirement that the conduct in question be "wilful or wanton," language that significantly broadens the definition and removes the terminology that caused concerns when this definition was applied to nursing homes by DHFS.

The definition of abuse contained in the proposed HFS 13 is very long and complex and raises as many questions as it answers. For example:

1. Occasionally, restraint or other steps must be taken for good clinical reasons that are not part of the "treatment plan," simply because it is not practical to amend the treatment plan before taking these steps. The language exempting actions done as part of the treatment plan may be too narrow. Language exempting any action done for the purpose of providing care and treatment to the patient might be more appropriate.

2. The exclusionary language in par. f., stating that ordinary negligence, isolated instances of good faith errors in judgment, etc. are not abuse, is cross-referenced in only two of the several provisions of this definition. Does this mean that it does not apply where it is not cross-referenced? This exclusionary language should apply across the board, not only to a few isolated provisions.

3. Sub(1)(a)3., referring to "mental or emotional damage to a client," appears to be redundant with sub(1)(a)4, referring to "harm to the mental health of a client." Further, sub(1)(a)(3) continues to raise concerns among providers of psychiatric services, who use confrontation that is likely to trigger the symptoms listed in the provision. It would appear that sub(1)(a)(3) could be deleted, with sub(1)(a)4 requiring investigation and reports of allegations about harm to the mental health of clients.

- **Definition of "allegation."** The key term "allegation" is still not defined anywhere in HFS 13. While it may appear that this term has a general meaning that is easily understood, in practice there is a great deal of confusion about what counts as an allegation that must be investigated. For example, is a rumor an allegation? Is gossip an allegation? Is something overheard in an elevator or a lunchroom an allegation?

We suggest that "allegation" be defined as follows:

> "Allegation" means an accusation made orally or in writing for the purpose of starting an investigation, that an employee or contractor of the entity committed misappropriation of property or neglect or abuse, which a reasonable and disinterested person would consider to be credible.

- **Reporting requirement.** The current language in both the statute and the administrative rule requires that an entity "**shall** report to the department any allegation . . . ." Having such a report on file will be devastating for many caregivers who have done nothing wrong, but who will nonetheless have a file in Madison detailing unfounded allegations.

  Federal law does not require that all allegations of abuse be reported to DHFS. There is no federal requirement on this issue at all except as it applies to nursing homes.

  Rather than invite a deluge of reports that are not required by federal law and have no reason to be reviewed and filed by DHFS, we propose that the statute and the rule be changed so that, except as required by federal law, only allegations that have a reasonable foundation need to be reported to DHFS. We propose that the reporting requirement in HFS 13.05(3) be changed to mandate a complete report only when the entity has reasonable grounds for concluding that the allegation is based on fact.

  For unfounded allegations, the entity could periodically submit a summary report to DHFS listing the allegations that it had investigated that turned out to be unfounded. This report should not contain any caregiver names, but should instead indicate what the substance of the allegation was and the entity's conclusion. Rather than submitting the documentation for unfounded allegations to DHFS, entities could be required to keep it on file for a set period of time, where it would be available to DHFS surveyors or auditors on request.

  We believe these changes are consistent with the current Wisconsin statute on abuse reporting. However, we urge the legislature to consider amending this statute so that it harmonizes with federal law.

- **Investigation requirement.** The current language requires that every allegation shall be reported to the department, and that every report be on the department form, including "whatever information the department requires." The form itself states that "completion of this form is required," and goes on to require a full range of information, including the names of all possible witnesses, a summary of the investigation made, and so forth. The report form appears to require that it be filled out in its entirety for every reported allegation, with the only reqirement that information by included if "applicable" appearing in the section on supporting documents.

Bruce amended

Taken as a whole, this is widely interpreted to mean that every investigation must generate a completed investigation report, requiring in turn a one-sizes-fits-all investigation of every allegation regardless of what might be reasonable or appropriate.

Some flexibility should be introduced into this requirement. Eliminating unfounded allegations from the reporting requirement could be done in a way that also releases the investigation and documentation of unfounded reports from the current format as well. In addition, the reporting form should be revised to make it clear that only relevant information needs to be pursued and reported as part of the investigation.

SAINT JOHN'S

January 27, 1999

Mr. Larry Hartzke
Bureau of Quality Assurance
P.O. Box 309
Madison, Wisconsin 53701

Re: Public hearing on HFS 12.

On September 30, 1999 Saint John's will award a 10-year service pin to one of its best employees. On October 1, 1999 that employee will be fired.

Dear Mr. Hartzke:

Please include this letter with the testimony recently offered at the public hearings on HFS 12, the criminal background check law.

While I strongly support the need for criminal background checks of employees who serve residents of Wisconsin's nursing homes, I am concerned about provisions of the current law which prohibit people convicted of certain offenses from **ever** being employed in a care setting. The fact that on October 1, 1999 the law will be applied retroactively is particularly disturbing and potentially disruptive to the smooth operation of our nursing home facility, to our residents and to the life of one of our best employees.

We have an employee, hired in 1989, who in 1990 was convicted of a crime listed on the "permanent bar" list. This crime was not against an older person. The employee was sentenced to 10 years in prison but the sentence was stayed to one year in jail (Huber Law) and 11 years probation. At the time this employee was convicted Saint John's reviewed the case and evaluated the risk to our residents. We determined that, while the crime was very serious, it was not committed against an older person and that with proper supervision this person could be a productive and valuable employee.

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In order to protect the person's privacy, I will not go into detail other than to say that the terms imposed by the court with regard to probation were extensive and severe. I have a letter from this person's probation officer who says that the employee will be off probation in two years. She states that this person has "never been a problem," and has faithfully fulfilled all the provisions of the court's order.

Despite committing a terrible offense, this person's life has been turned around. For 10 years this person has been a model employee. In fact, if all of our employees were as conscientious and skilled as this one, our residents would be even better served than they are. I wish we could clone this employee and I am concerned that, given today's tight job market, we may not find as good a replacement.

The worth of this employee has been proven over a 10-year period (the average nursing home employee works at one job for less than two years). **Yet ironically, unless the law is changed, on October 1, 1999 this employee will have to be fired!** The employee's life will be thrown into chaos despite the fact that the person has done everything required over the last nine years to pay society's debt. This person's discharge will serve no good purpose for Saint John's, our residents or society in general. This cannot be what the legislature intended when they passed this law.

Please ask the legislature to make appropriate changes to the law to remedy this situation. Allow for the "grandfather" exception for existing employees or provide an opportunity for employees like this to prove they have been rehabilitated.

Very truly yours,

Dennis M. Gralinski
President

State Medical Society of Wisconsin
Working Together, Physicians Can Determine the Path of Medicine

TO: **State Senator Rodney Moen, Chair**
Members, Senate Committee on Health, Utilities, Veterans and Military Affairs

FROM: **M. Colleen Wilson, Legislative Counsel**
Government Relations

RE: **Chapter HFS 12 – Caregiver Background Checks**
(HFS 98-191)

DATE: **April 28, 1999**

The State Medical Society of Wisconsin appreciates the opportunity to offer comments with regard to Chapter HFS 12 – Caregiver Background Checks. The physicians of the State Medical Society support efforts to increase the safety of their patients. They do not want the well-being of their patients jeopardized in an institutional setting.

The Department of Health and Family Services interpretation of the enabling statute presumes that all hospital medical staff bylaws establish a contractual relationship between a hospital and its medical staff. Under certain circumstances, medical staff bylaws can (but do not always) constitute a contract. (*See* Bass v. Ambrosius, 185 Wis. 2d 879 (Wis. Ct. App. 1994) *and* Keane v. St. Francis Hospital, 186 Wis. 2d 637 (Wis. Ct. App. 1994)) The difficulty this poses is that not all bylaws will be considered a contract between the hospital and the medical staff. Thus, absent clarification in the enabling legislation, entities prohibited from contracting, or that do not consider their hospital staff bylaws to be contracts may unknowingly violate this law. The State Medical Society suggests that a definition of contract be drafted that specifically excludes medical staff physicians who are otherwise not contracted with the hospital. These individuals will, however, be the subject of criminal background checks as physicians are asked by the Department of Regulation and Licensing (DRL) if they have ever been convicted of a misdemeanor, a felony or driving while intoxicated (DWI) in Wisconsin or any other state, or if they have any criminal charges or DWI charges pending.

Due to the comprehensive nature of the process used by DRL to assess its credential holders (see attached), the State Medical Society encourages the Department of Health and Family Services to require the institutions performing criminal background checks to rely on the credentialing status of persons licensed by DRL. The stated objectives of the enabling legislation can be accomplished with fewer difficulties than the process created by the proposed permanent rules.

Thank you for the opportunity to offer these comments. We are happy to work with committee members as the rule promulgation process continues.

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April 28, 1999

TO: Senate Health Committee

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

SUBJECT: HFS 12 - Background Check Emergency Rules

Hospitals and health systems are devoted to the well-being of their patients and do not want them exposed to any dangerous people, employees[1] or situations. They put significant resources into ensuring patient safety and well-being, from investments in their physical plant and equipment to intensive staffing patterns. While conducting a background check can provide important information, WHA does not believe that restricting the discretion of hospitals and health systems to decide who they can hire will have any appreciable impact on patient safety in the hospital environment.

Some of the difficulties posed by the current emergency rules are mitigated by the proposal before the Committee. However, we believe that these difficulties are symptoms of underlying problems with the background check statute itself. The past year has taught us many lessons about how background checks and employment mandates play out in the health care world, and the best way to put these lessons into effect is through statutory change.

The widely acknowledged need for statutory change overshadows the current rules. In the four months since the background check went into effect, we have already had one major revision to the crimes list, and we are now contemplating another major revision. The current revision will have a very short effective life, and then another revised version of the rules (in the form of permanent rules) will be adopted. At some point, the statute will probably be amended, requiring in turn another round of rule drafting. All told, we can reasonably expect the current process to result in no less than five major changes to the background check requirement in less than a year. This kind of instability is very disruptive to both hospitals and their employees.

The current draft of the rules represents a large step in the right direction. However, as outlined below, there are still significant legal and operational shortcomings, and extensive further revisions are still needed.

- **Eliminate the 18 point checklist (HFS 12.11(3)(b)) for evaluating whether something that is not a "serious crime" is nonetheless**

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

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

> "in determining whether a crime or delinquency adjudication [of a non-serious crime] is substantially related to the care of a client, the agency or entity shall consider at a minimum the following [eighteen criteria]."

The checklist is not required by the statute, and in fact goes well beyond the scope of the statute by regulating the employment decision for non-serious crimes. The "substantial relationship" concept regulated by this provision is created by Wisconsin's fair employment law statute as an employer's defense to a charge of employment discrimination. Wisconsin law prohibits an employer from discriminating against a person because of their criminal history.[2] However, "it is not employment discrimination because of arrest record" to fire or refuse to hire someone who has a conviction or a pending charge "the circumstances of which *substantially relate* to the circumstances of the particular job . . ."[3] (emphasis added) The concept arises only as an exception from the fair employment laws and is used only as a defense against charges of discrimination.

The background check statute says, in effect, that employers may not hire employees who have a conviction or a pending charge for certain listed "serious crimes." It does not address in any way the hiring decision relating to crimes that are not designated as serious crimes, although it does allow DHFS to specify crimes for which "special precautionary measures" may be appropriate.

The background check statute leaves the employment decision to employer discretion, subject to the fair employment laws, on anyone who has only non-serious crimes on their record. However, HFS 12 attempts to bring that decision within the regulatory scope of DHFS by specifying "at a minimum" eighteen criteria for making that decision. We believe that HFS 12.11(3)(b) should be deleted from the rule. We do not believe that this deletion will create any gaps or cause any compliance problems.

- **Further clarification of what persons or positions are subject to the rule.** The new definitions of "caregiver," "access," and "under the entity's control" go a long way toward resolving the overbreadth of the previous rules. However, additional clarification is needed to focus the extraordinary mandate imposed by this law on the appropriate class of people. We suggest that the following language be adopted to further clarify what contractors are covered by the rule:

> "A person is a contractor or prospective contractor, or is under contract with, an entity only when that person can reasonably be said to be a

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[2] § 111.335(1)(a), Wis. Stats.
[3] § 111.335(1)(b) and (c), Wis. Stats.

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

- **Withdraw the current "policy statement" on the DHFS web site extending the background check requirement to physicians with admitting privileges.** This policy statement extends the background check requirement beyond the language of either the statute or the rules. Medical staff physicians are not "under the entity's control" in any real sense of the phrase, and are not the kind of employee-surrogate contractors intended to be covered by the statute.

  Background checks on all licensed caregivers should be done at the licensing level, not at the employment level. The Department of Regulation and Licensing (DRL) already has ample authority to obtain background information, and arguably has a duty to do so in licensing caregivers, both of which are separate and independent of the background check statute. It makes no sense for DRL to state on the one hand that someone is fully qualified to be a licensed practitioner, and for DHFS to state on the other hand that they cannot practice.

- **The filing requirement needs to be more flexible to allow real-world arrangements.** The current requirement that every entity have on its premises a copy of the background file on every single employee or contractor covered by the rule is unnecessarily rigid and creates unnecessary burdens. The proposed change allowing these records to be maintained by temporary employment agencies and/or schools for their temps or students is a step in the right direction. However, the record-keeping requirement should be broadened further to allow the records to be kept by anyone, so long as the entity has access to the records and can review and copy them at any time. This will allow arrangements to evolve that are efficient and meet the need for access to information.

- **The disclaimer that the Crimes List is not exhaustive should be removed.** The introduction to the crimes list contains (in all capital letters) the statement that "THE LIST IS NOT EXHAUSTIVE." It is not clear what it means. The published list by definition is the complete and only list of "serious crimes" that trigger the regulatory mandates. There are no other crimes that are "serious" for purposes of triggering the mandates. What does it mean to say that the regulatory list is not exhaustive? We raise the because the crimes list does create a regulatory mandate that certain persons be fired. It is disturbing to see language that creates doubt and uncertainty about when employers will be required by law to fire an employee. This statement sends a message that the crimes list cannot be relied upon as definitive and authoritative, a message we believe is unjustified and confusing.

  We do not see what purpose this statement serves, and believe that it should be removed from the rule.

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

of a kind of statute of limitations that requires DHFS review of crimes only for a specified period of time after conviction.

While the permanent bar list is almost down to an appropriate level, there are still too many rehabilitation review crimes. As set forth in the attached table, there are still over 40 crimes that require lifetime DHFS rehabilitation review, including a number of misdemeanors. In addition, there are over 40 additional crimes that require rehabilitation review by DHFS for varying periods of time, depending on the circumstances, including a number of misdemeanors.

The Crimes List should be further shortened based on the following general principles.

1. No misdemeanors.

2. No traffic, property, or other crimes that are not clearly and substantially related to patient care.

3. Only the most serious crimes should require rehabilitation review by DHFS.

UNIVERSITY OF WISCONSIN MILWAUKEE

Occupational Therapy Program
Department of Health Sciences

UWM

April 26, 1999

Senate Committee on Health, Utilities, Veterans and Military Affairs
Joint Committee for Review of Administrative Rules
Wisconsin Legislature
State of Wisconsin
Madison, WI

Dear Committee Members:

I'm Barbara Jacobs from the University of Wisconsin-Milwaukee's Occupational Therapy Program. I've taught and served as Academic Fieldwork Coordinator at UW-M since the 1991-92 academic year. Currently, I place 74 students in each of two fieldwork placements which occur second semester of the senior year after all academic course work has been completed. According to our accrediting agency, the National Board for Certification in Occupational Therapy (NBCOT), students must complete six months of supervised fieldwork before sitting for the certification examination. This fieldwork is usually completed in two different settings for three months each.

My concern as I consider the impact of the caregiver background checks on our students is that this will be the "straw that broke the camel's back" in terms of facilities and clinicians being willing to provide this essential component of our students' education. While providing fieldwork education can be energizing, it can also be draining depending on the student and the current environment in the health care organization. Clinicians are currently concerned with lay-offs and job security. This new requirement for students is just one more disincentive to take students.

I am also concerned about the ability of large institutions (both our university and the hospital conglomerates we depend on for clinical education) to respond in a timely manner to the paperwork involved in implementing the checks for the numbers of students involved. Delaying the start-date of a student's fieldwork placement due to not having the paperwork in order can result in postponing his/her fieldwork completion and his/her ability to sit for the certification examination, which is held only in September and March. This adversely affects the student's ability to enter the job market, which could cost the student $15000 in lost earnings during the 6-month wait and will have an economic ripple effect in all sorts of ways.

While I am very concerned about the welfare of the vulnerable populations this law is intended to protect, I am wondering if it is necessary to apply it to students in the same way that it is applied to employees. Our accreditation standards mandate that students are supervised by a registered occupational therapist with at least one year's clinical experience. In most of our sites, this supervision is supplemented by other health care professionals that are also available to observe student behavior and to answer student questions. Students are evaluated by their supervising clinician using a very complete

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form developed by the American Occupational Therapy Association. Fairly close scrutiny of student behavior is necessary to complete the form accurately.

Our students are also advised, prior to applying to our occupational therapy program, that both NBCOT and the state of Wisconsin regulate the practice of occupational therapy to protect the public from unsafe, illegal and unethical practitioners. We believe that students with questionable backgrounds will self-select out of our program as a result. As occupational therapists, however, we also believe in the value and efficacy of rehabilitation. Many people with questionable backgrounds deserve the opportunity to demonstrate that they have turned their lives and want to give back to society by serving the people with the disabilities they have overcome themselves.

Thank you for your attention and consideration.

Sincerely,

Barbara Jacobs MS, OTR

Barbara Jacobs, MS, OTR
Academic Fieldwork Coordinator
Clinical Assistant Professor

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I am David Slautterback representing the Wisconsin State Legislative Committee of AARP. We are thankful for this opportunity to have our opinions heard.

Wisconsin State Legislative Committee of AARP has been, and continues to be, a very strong supporter of the legislation introduced by Representative Krusick last year concerning criminal background checks and expansion of the caregiver registry. With some reservations, we are satisfied with the rules you have before you, HFS 12 and HFS 13. We think you should approve them with a few changes.

A problem for us is that DHFS has set no time limits on its collection of data and transmission of those data to the employer. Since the potential employee cannot and should not begin work until the check is completed a significant hardship could be experienced both by the employee and the employer who needs to have the job filled. Since most or all of the data to be retrieved are in computers it should be possible to complete the task in short order. The actual retrieval of the data should be accomplished in minutes and the transfer of the data to the employer should also be done in minutes. Nevertheless, we have suggested an upper limit of 10 days but even given a burdened system and necessary administrative complexities it must be possible to respond more rapidly. We understand that it is difficult to control other states and the federal government from Wisconsin but, at the least, the data from Wisconsin should be transmitted quickly. Our efforts to ascertain why the system at present takes weeks rather than hours or days have not yet met with success.

We think this is a very serious problem. The issue has been central to negotiating an agreement among advocates, providers and others. We hope that your Committee will insist that the rule specify the shortest reasonable time and that the information retrieved be transmitted electronically.

I have seen two printouts of requested data which reveal a weakness in the program for retrieval that results in a printout of data on more than one person. Although it should be relatively easy to improve the program, a glance at the data by the technical person should eliminate this problem.

As you have heard, we have been engaged in conscientious negotiations with others concerned about this legislation and the rules. We have signed on to a consensus that we hope you will find acceptable. Successful negotiation depends on the willingness of partners to give something. Paragraph 2 (a) that leaves the responsibility for the hiring decision with the employer for some crimes not among the 6 serious ones, was a real concern to us. And it still is. For us, at AARP, the question of who bears the liability if a wrong decision is made is of little importance. Our concern is for the person living in an institution with little or no ability to protect her- or himself and their property. We hope that if you accept the whole of our negotiated proposal our concern will be sufficiently counterbalanced. We know that there are many providers who share our concerns and hold patient safety as their highest priority. We know also that for some cost is a higher priority. We expect that our proposal will minimize that risk.

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

One East Main Street, Suite 401; P.O. Box 2536; Madison, WI 53701-2536
Telephone: (608) 266-1304
Fax: (608) 266-3830
Email: leg.council@legis.state.wi.us

DATE: March 25, 1999

TO: [redacted]

FROM: Richard Sweet, Senior Staff Attorney

SUBJECT: Caregiver Background Checks

This memorandum is written pursuant to your request for a description of current statutes and administrative rules that relate to caregiver background checks for employes of entities regulated by the Department of Health and Family Services (DHFS) and other specified persons. The major statutes on this subject are ss. 48.685 and 50.065, Stats., which were created by 1997 Wisconsin Act 27 (the 1997-99 Biennial Budget Act). The provisions in ch. 48, Stats., relate to programs for children that are regulated by DHFS and the provisions in ch. 50, Stats., relate to other programs regulated by DHFS.

As described in this memorandum, the provisions of the caregiver background check statutes generally took effect on October 1, 1998 for persons hired on or after that date. There is an additional one-year delay in the background check requirements for persons who were employes as of that date (i.e., the requirements will apply as of October 1, 1999).

Just prior to the October 1, 1998 effective date for new employes and licensees, DHFS promulgated an emergency rule that relates to caregiver background checks. That rule is ch. HFS 12, Wis. Adm. Code. A related rule, ch. HFS 13, which was promulgated at the same time as an emergency rule, relates to reports of misappropriation of property, abuse and neglect of clients. In February 1999, the Joint Committee for Review of Administrative Rules (JCRAR) extended the expiration date for both emergency rules by 30 days. On March 24, JCRAR granted an additional extension of 36 days.

DHFS has held public hearings on the proposed permanent rules. Both proposed permanent rules have been submitted to the Legislature for review prior to promulgation. The rules have been referred to the Assembly Committee on Health and the Senate Committee on Health, Utilities, Veterans and Military Affairs.

The following is a description of the statutes and current emergency rules.

A. DEFINITION OF "ENTITY"

The background check statutes and rules apply to ***entities***, as defined in the statutes. The term "entity" is defined in s. 50.065 (1) (c), Stats., as a facility, organization or service that is regulated, licensed or certified by or registered with the DHFS. This definition includes such facilities and services as nursing homes, hospitals, community-based residential facilities and home health agencies. In addition, "entity" includes a personal care worker agency and a supportive home care service agency, both of which must be defined by DHFS by rule. The term "entity" does not include a person certified as a Medical Assistance provider who is not otherwise regulated, licensed or certified by or registered with DHFS.

The term "entity" in s. 50.065 (1) (c), Stats., also does not include certain programs for children. However, a parallel provision in s. 48.685 (1) (b), Stats., includes programs for children, such as licensed and certified child care, child welfare agencies, foster homes, treatment foster homes, group homes and shelter care facilities. Background check requirements for kinship care are set forth in a separate statute. (See s. 48.57, Stats.)

B. PROHIBITION ON LICENSING OR HIRING CERTAIN PERSONS

Under the statutes, ***DHFS may not license or renew a license*** of a person to operate an entity and ***no entity may hire or contract with*** a person under the entity's control who has or is expected to have access to its clients or permit a person who is not a client to reside at the entity if DHFS or the entity ***knows or should have known any of the following***:

1. That the person has been convicted of a "serious crime," as defined by DHFS by rule. (For day care licensure or certification, this includes an adjudication of delinquency, on or after the person's 12th birthday, for committing a serious crime.)

2. That the person has pending against him or her a charge for a serious crime.

3. That a unit of government or state agency has made a finding that the person has abused or neglected any client or misappropriated the property of any client.

4. That a determination has been made under the child abuse and neglect statutes that the person has abused or neglected a child.

5. That, in the case of a position for which the person must be credentialed by the Department of Regulation and Licensing (DRL), the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client.

Provisions of the statutes that relate to DHFS licensure apply also to county certification of child care and to school boards providing or contracting for child care. Also, if a county or school board denies certification or a contract based on one of the above reasons, it must notify DHFS of this.

The statutes provide that DHFS may license a person to operate an entity and an entity may employ, contract with or permit to reside at the entity a person who has been convicted of

a serious crime if the person demonstrates by clear and convincing evidence and in accordance with procedures established by DHFS by rule that he or she has been ***rehabilitated***. However, by statute, no person who has been convicted of any of the following may be permitted to demonstrate rehabilitation: (1) first-degree intentional homicide; (2) first-degree sexual assault; (3) first-degree sexual assault of a child; (4) second-degree sexual assault of a child if the person was more than four years older than the child; and (5) repeated acts of sexual assault of the same child if the child is under age 13 or if there is more than a four-year age difference between the person and the child who is age 13 to 15. The statutes provide an administrative and judicial appeal procedure for persons who have been found not to be rehabilitated.

For purpose of the above statute, DHFS rules define "access to a client" as meaning: ". . . 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." (See s. HFS 12.03 (1), Wis. Adm. Code.)

For purposes of the above statutes, DHFS has defined the term "serious crime" to include the five statutory crimes listed above and additional crimes included by rule. The rule listing these crimes is Appendix A to ch. HFS 12, Wis. Adm. Code. That appendix divides the listed crimes into crimes that are considered permanent bars and crimes for which the person may demonstrate that he or she has been rehabilitated. (Certain of the crimes for which rehabilitation may generally be demonstrated or for which there is generally no bar are considered permanent bars for foster homes and treatment foster homes.)

C. REQUIRED INFORMATION

The statutes require DHFS and every entity to ***obtain all of the following*** with respect to a person described above (i.e., a licensee, employe, contractor or person residing at the entity who is not a client):

1. A ***criminal history search*** from the records maintained by the Department of Justice.

2. Information that is contained in the ***DHFS abuse registry*** regarding any findings against the person.

3. Information maintained by ***DRL*** regarding the status of the person's ***credentials***, if applicable.

4. Information maintained by DHFS regarding any ***substantiated reports of child abuse or neglect*** against the person.

5. ***Information maintained by DHFS*** regarding denial to the person of a license, continuation of a license, certification or a contract to operate an entity for a reason specified above in Section B. and regarding any denial to the person of employment at, a contract with or permission to reside at an entity for one of those reasons. If this information indicates that such a denial has occurred, the previous four items do not need to be obtained.

The information does not need to be obtained by an entity for any of the following:

1. A person for whom, within the last four years, the required information under items 1, 2., 3. and 5., above, was already obtained, either by another entity or by a temporary employment agency. The entity may obtain the required information from that other entity or temporary employment agency, which is required to provide the information if possible. If it is not able to do so, the entity must obtain the information from the sources above.

2. A person for whom DHFS has already obtained the required information as a licensee and who is also an employe, contractor or resident of the entity.

3. A person whom 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 of a client.

4. A person under 18 years of age whose background information form (as described below) indicates that the person is not ineligible to be employed, contracted with or permitted to reside at the entity for a reason specified above and with respect to whom the entity otherwise has no reason to believe that the person is ineligible.

If the person who is the subject of a criminal history search is not a resident of Wisconsin, or if at any time within the preceding three years the person has not been a resident of Wisconsin, the entity must make a good faith effort to obtain a criminal history search from any state in which the person is a resident or was a resident within the preceding three years.

The statutes provide that, for not more than 60 days, an entity may employ, contract with or permit a person to reside at the entity, pending the receipt of the information. The entity may do so only if the person's background information form indicates that the person is not ineligible to be employed, contracted with or permitted to reside at the entity for a reason specified above in Section B. An entity must provide supervision for such a person.

In addition to obtaining the required information at the time of employment or contracting, the entity is required to obtain the information again ***every four years***. Similarly, in addition to obtaining the information at the time of licensure, DHFS is required to obtain the information again every four years.

The statutes allow DHFS to charge licensees a fee for obtaining the required information. The fee may not exceed the reasonable cost of obtaining the information. No fee may be charged to a nurse's assistant if to do so would be inconsistent with federal law.

D. OTHER PROVISIONS RELATING TO BACKGROUND CHECKS

1. Penalties

An entity that violates the above requirements may be required to forfeit not more than $1,000 and may be subject to other sanctions specified by DHFS by rule. (See s. HFS 12.04, Wis. Adm. Code.)

2. Delayed Effective Date for Current Employes

As noted earlier, the general effective date for the above provisions is October 1, 1998. However, with respect to persons who are employes of entities on that date, the provisions will not apply until October 1, 1999. (See SECTIONS 1664f, 2059f and 9423 (9ptt) of 1997 Wisconsin Act 27.)

3. Crimes Not Defined as a "Serious Crime"

The statutes provide that DHFS may refuse to license a person to operate an entity and an entity may refuse to employ, contract with or permit to reside at the entity a person who has, or is expected to have, access to its clients if the person has been convicted of an offense that DHFS has not defined to be a "serious crime" but that is, in the estimation of DHFS or the entity, ***substantially related*** to the care of a client (for example, an offense plea-bargained down from a relevant, originally charged "serious crime"). Decisions by DHFS to refuse licensure are reviewable under ch. 227, Stats. DHFS rules specify criteria to be used in determining whether a crime is substantially related to the care of a client. (See s. HFS 12.11 (3) (b), Wis. Adm. Code.)

4. Background Information Form

The statutes direct an entity to require certain persons to complete a background information form that is developed and distributed by DHFS. The form must require the person completing it to include his or her date of birth. A background information form will have to be completed by: (a) a person that the entity employs or contracts with, or intends to employ or contract with, if the person has, or is expected to have, access to any client of the entity; and (b) a person who is a resident or prospective resident at the entity, but who is not a client or prospective client of the entity, if the person has, or is expected to have, access to any client. DHFS must also require a person who applies for a license or renewal of a license to operate an entity to complete a background information form.

A person who provides false information on a background information form may be required to forfeit not more than $1,000 and may be subject to other sanctions specified by DHFS by rule. (See s. HFS 12.20 (1) (c), Wis. Adm. Code.)

Feel free to contact me if I can be of further assistance.

RNS:wu;ksm

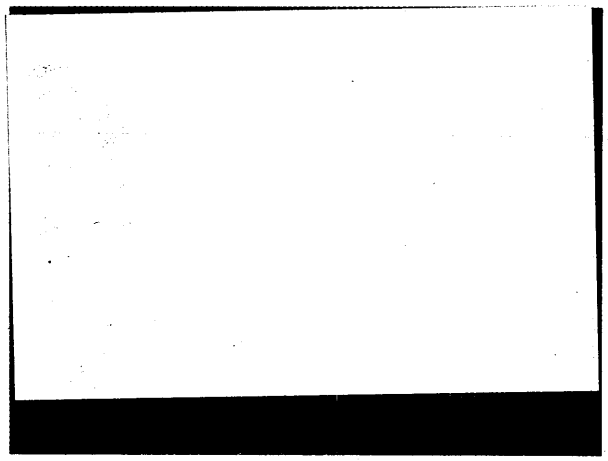
The Questions about Criminal Background Checks

States will give up some sovereignty but gain important tools with a new compact linking federal and state efforts on criminal background checks.

By David Naftzger

Should your child's teacher undergo a criminal background check? What about nurses and doctors, attorneys or even your barber?

While such checks have been used for many years in the military, as well as banking and other industries, the number of professionals subject to this scrutiny is set to skyrocket. In response to several high-profile cases of abuse as well as public concern for possible victims, federal legislation requiring checks on prospective foster parents and nursing home employees has recently been adopted.



These politically popular measures are, on the one hand, a relatively inexpensive and nonintrusive way to improve security in sensitive professions. On the other hand, criminal background checks are, in certain circumstances, arguably an invasion of privacy and a threat to personal liberty. Up until now, state legislators have confronted these issues through state laws. Now legislators must decide whether to enter into a new state-federal partnership, the National Crime Prevention and Privacy Compact.

Until recently, all criminal record searches were conducted using a dual state-federal system. The state agency would search its own records and submit an inquiry to the Federal Bureau of Investigation. The FBI would search a record of federal offenders and duplicate records it maintains of state information.

In 1980, the FBI began the Interstate Identification Index (III), a decentralized system designed to handle interstate and federal-state criminal record searches. Thirty-nine states currently participate in III. Although all states permit virtually unrestricted access to criminal history records for criminal justice purposes, state laws governing access and use for other purposes are diverse. Policies range from essentially open records in a few states to very restrictive rules in others. Laws differ on what constitutes a reportable offense, what disposition information (acquittal, conviction, etc.) is available and who can get the information.

David Naftzger tracks state-federal issues for NCSL.

For this reason, the III system is limited to use for criminal justice purposes. The only exception is when an applicant fingerprint card is identified with a record by the FBI or a state bureau of identification (even if there is a fingerprint match, dissemination rules are fairly restrictive).

To create a national, decentralized criminal record system, the federal government adopted Public Law 105-251 in 1998. This legislation authorized the National Crime Prevention and Privacy Compact, which will take effect upon ratification by two or more states.

The compact:

- ◆Binds the FBI and ratifying states to participate in the civil access program of the III.
- ◆Re-authorizes use by current users of FBI file records.
- ◆Requires participating states to make all unsealed criminal history records available in response to authorized noncriminal justice requests.
- ◆ Bases all civil access to the system on fingerprints to ensure positive identification.
- ◆ Requires that the laws of the receiving states govern release of information. In turn, those states would be required to screen record responses and delete any information that cannot legally be released.
- ◆ Establishes a council of federal and state officials and other members representing user interests to establish operating policies for civil uses of the III system and resolve disputes.

Most strikingly, a state would voluntarily preempt any nonconforming law by adopting the compact. Jurisdiction for disputes would be placed with a federally appointed council of federal and state representatives, and appeals would be made to federal, not state, courts.

Clearly, the compact involves tradeoffs related to state sovereignty, privacy and technical efficiency that state legislators will need to balance. With the public's demand for access to criminal records unlikely to abate, policymakers will need to develop appropriate state-federal solutions.

of a kind of statute of limitations that requires DHFS review of crimes only for a specified period of time after conviction.

There are possibilities there, but must be discussed in person the Crimes left are the very serious ones or related to job duties.

While the permanent bar list is almost down to an appropriate level, there are still too many rehabilitation review crimes. As set forth in the attached table, there are still over 40 crimes that require lifetime DHFS rehabilitation review, including a number of misdemeanors. In addition, there are over 40 additional crimes that require rehabilitation review by DHFS for varying periods of time, depending on the circumstances, including a number of misdemeanors.

The Crimes List should be further shortened based on the following general principles.

1. No misdemeanors. yes
2. No traffic, property, or other crimes that are not clearly and substantially related to patient care. yes
3. Only the most serious crimes should require rehabilitation review by DHFS. no

misdemeanor battery - intentional harm

probability of future harm

sexual assault 16 or older

↳ consensual 16 or 17 year old

misdemeanor theft

misdemeanor retail theft → if property

Wisconsin Association of Homes and Services for the Aging, Inc.
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ISSUE: Caregiver Criminal Background Checks

BACKGROUND: The Legislature last session enacted into law a requirement that an "entity," defined as "a facility, organization or service licensed or certified by or registered with the Department (Department of Health and Family Services) to provide direct care or treatment services to clients," must conduct a criminal background check of all prospective employees beginning October 1, 1998. Similar checks of those employed prior to October 1, 1998 would be required by October 1, 1999 and every four years thereafter. Those checks also would be required of licensees, contractors and persons residing at an entity who are not clients.

Those background checks would consist of: 1) A criminal history search from records maintained by the Wisconsin Department of Justice (DOJ); 2) Information contained in the Department of Health and Family Services (DHFS) abuse registry; 3) Information maintained by the Department of Regulation and Licensing (DRL) on the status of an employee's (or prospective employee) credentials, if applicable; and 4) Information maintained by the DHFS regarding any substantiated reports of child abuse or neglect.

The findings of those background checks would determine the individual's suitability for employment or continued employment. Under the law, no entity may employ or contract with any person under the entity's control who has or is expected to have access to its clients if the entity knows or should have known: 1) That the person has been convicted of a "serious crime"; 2) That the person has pending against him/her a charge for a "serious crime"; 3) That a unit of government or state agency has made a finding that the person has abused or neglected any client or misappropriated the property of any client; 4) That a determination has been made under the child abuse and neglect statutes that the person has abused or neglected a child; or 5) That, in the case of a position for which the person must be credentialed by the DRL, the person's credential is not current or is limited so as to restrict the person from providing adequate care to a client.

The statute also directs the DHFS to create rules to define "serious crimes" that would result in either a permanent employment ban for anyone convicted of such crimes from working in an entity or a permanent employment ban unless the individual convicted of such a crime can demonstrate through clear and convincing evidence that he/she has been rehabilitated.

Finally, the law expands the reporting requirements for allegations of abuse, neglect or misappropriation of client property to any person employed by or under contract with an entity. Under the law, an entity is required to report to the DHFS any allegation of misappropriation of property, neglect or abuse (to be defined by rule) of a client by a person employed by or under contract with the entity if the person is "under the control of the entity." The registry for certified nursing assistants (CNA) would be expanded to include any caregiver covered under this law with a substantiated finding of abuse, neglect or misappropriation of client property. The evidentiary process would be similar to that for CNAs under HSS 129. A substantiated finding of abuse, neglect or misappropriation of client property would place that individual on the caregiver misconduct registry and would result in a permanent employment ban for that individual in any entity.

Administrative Rule Revisions: The DHFS promulgated emergency rules HFS 12 (caregiver background checks) and HFS 13 (reporting of caregiver misconduct) to implement these statutory provisions on October 1, 1998. The emergency rules are to remain in effect until March 1, 1999, when permanent rules are expected to replace them. Three public hearings were held in January (at Wausau, Milwaukee and Madison) on the

emergency rules. The DHFS has requested a 60-day extension of the March 1st emergency rule time-period to enable the Department to issue a written response to all the public hearing comments and to revise the emergency rules based on those public hearing comments into permanent rules. The Joint Committee for the Review of Administrative Rules (JCRAR) has scheduled a February 25th public hearing to consider the Department's request for a 60-day extension for HFS 12 and 13.

In its testimony on HFS 12 and 13, WAHSA expressed a number of concerns with the two emergency rules. They included: 1) The expansiveness of the "serious crimes" list; 2) The broad interpretation of who would be required to undergo criminal background checks; 3) The complexity and time-consuming aspects of the rehabilitation review process; 4) The need to permit grandfathering "good" employees who erred in the past; 5) The over-broadness of the new definition of "abuse;" and 6) The need for clarification of what must be reported and what need not be reported relative to allegations of abuse, neglect and misappropriation. The DHFS has indicated a willingness to revisit each of these issues in the revised emergency rules that will be forwarded to the JCRAR for review at its February 25th public hearing.

In the interim, the Governor's biennial budget bill (1999 Senate Bill 45/Assembly Bill 133) has been introduced by the Legislature. In the budget bill, the Governor proposes narrowing the requirement for criminal background checks to include only those who are under the entity's control and who are "expected to provide to clients of the entity direct care that is more intensive than negligible care in quantity or quality or in amount of time required to provide the care."

WAHSA POSITION: WAHSA respectfully requests the following revisions to the caregiver background checks law:

1) "Serious crimes" should be defined as felony convictions under Chapter 940 (crimes affecting life and bodily security) or Chapter 948 (crimes against children). However, there should be no permanent employment ban crimes; individuals convicted of a "serious crime," including the five permanent ban crimes listed under s.50.066(5), would retain the ability to apply for rehabilitation review. Future employment of those convicted of crimes other than a "serious crime" would be left to employer discretion.

2) Currently, many counties contract with employment agencies for provision of services to COP and Medicaid home- and community-based waiver clients. Those employees are not required to undergo criminal background checks even though they are providing services in the home. The law should be modified to require employment agencies which contract with counties to provide personal care or supportive home care services under the COP and waiver programs to conduct criminal background checks of those who will provide the personal care/supportive home care services.

3) The Department of Regulation and Licensing (DRL) should be required to conduct criminal background checks of all caregivers who are licensed, certified or credentialed by the DRL at the time of license or certification issuance or renewal. For those convicted of a "serious crime" who fail to receive rehabilitation approval, the DRL may refuse to issue or continue to issue their license, certification or credential, or may limit or restrict their license, certification or credential.

4) There should be a presumption of rehabilitation if the date of conviction (or conclusion of prison sentence) is a certain time-period (e.g., 6 years) prior to the date of application to work for an entity. Employers would retain their discretion whether to hire these individuals.

The Wisconsin Association of Homes and Services for the Aging (WAHSA) is a statewide membership organization of not-for-profit corporations principally serving the elderly and disabled. Membership is comprised of 190 religious, fraternal, private and governmental organizations which own, operate and/or sponsor 194 not-for-profit nursing homes, 71 community-based residential facilities, 28 assisted living facilities, 100 independent living facilities, and 446 community service programs which provide programs ranging from Alzheimer's support, child day care, hospice and home care to Meals on Wheels. For more information, please contact the WAHSA staff at (608) 255-7060: John Sauer, Executive Director; Tom Ramsey, director of Government Relations; Brian Schoeneck, Financial Services Director.

The Capital Times April 19, 1999

A healthy change?

Background-check law for caregivers could cost some workers their jobs

A law passed in 1997 by the state Legislature requires background checks of all public and private employees in caregiving facilities, such as hospitals, nursing homes, day care centers and more.

When guidelines on how to handle past offenses were written, half of Wisconsin's criminal statutes — about 400 offenses — were cited. Of that number, 100 offenses triggered permanent banishment from the workplace.

Following significant public outcry about the rules being too austere, a newly drafted set includes 118 crimes. Only 17 of those call for permanent bans of employees, and the rest give discretion to the employer or require the employee to prove to the state that he or she has been rehabilitated.

By Luke Timmerman
The Capital Times

Maybe you got into a bar fight 20 years ago and paid a fine for battery.

Maybe you stole something valuable and got caught when you were a teenager, but have been clean for years.

Or maybe something much more serious happened years ago, such as a second-degree homicide conviction that resulted in prison and probation.

A new state law could cost people their jobs for any of those offenses or much more, if they work in a public or private caregiving facility.

Employee unions, caregiving facilities and legislators have all been critical of the law's broad reach and how it has struck the core of two old moral questions: Who decides when an offender's social debt is paid in full, and how does one balance the protection of society with individual rights?

Those questions are being addressed now. The law, passed in the state's 1997-1999 budget, was vague on those questions. It granted authority to the Department of Health and Family Services to write much of its language, and that's when problems started months ago.

Even though the Legislature listed only a handful of red-flag offenses, the additional rules written by the bureaucracy listed 400 crimes that were grounds for dismissal or could force an employee to prove he or she had been rehabilitated.

The law affects an estimated 300,000 workers statewide, so worker representatives quickly began making noise. It's unclear how many people may have lost jobs already because of the background checks, because all facilities don't have to be in full compliance until Oct. 1.

After a string of legislative public hearings in February, the list of offenses was whittled down to 118. The revised draft, passed by the Assembly Health Committee on Wednesday, narrows the universe of affected employees to those who have access to patients. It also limits how far employers can delve into the past, depending on the severity of the offense.

Also, a person in a caregiving facility may not be employed if currently charged with a crime — which critics argue means the presumption of innocence is out the window.

Nobody is arguing with the intent of the law — protecting vulnerable people from criminals — but many have said the law may be applied in a heavy-hand-

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ed way.

"By almost all accounts, the current law has swung the pendulum too far toward government responsibility and ignores the fact that individuals may have been rehabilitated," said John Sauer, executive director of the Wisconsin Association of Homes and Services for the Aging.

Part of the difficulty is that the original draft of the law's administrative rules covered any employee in a caregiving facility. That would include employees who don't have direct contact with patients, such as custodians, administrative assistants and food service workers.

Union representatives argued that those employees shouldn't be subjected to the same scrutiny as the intended group of employees — such as doctors, nurses, nurses' assistants, and day care providers.

Since last October, the background checks have applied to prospective job applicants. Starting this coming October, the caregiving facilities will need to have performed background checks of all their current employees.

Sauer, whose group represents nonprofit and government nursing homes, said peering into people's backgrounds was already being done for employment screening by 90 percent to 95 percent of nursing homes before the law was passed.

But by casting such a wide net, the law could discourage some qualified people from applying for jobs — which Sauer said would make a tight labor market even tighter.

The unions don't have a problem with that, but don't like the fact it could get some members fired.

"The concept was very good, but the way it translated wasn't," said Jennifer Grondin, policy analyst for AFSCME Council 11, which covers public employees affected by the law.

There are those in the Legislature who agree. Rep. Peggy Krusick, who wrote the law and sits on the Assembly committee reviewing the administrative rules, says recent drafts have been improved.

The biggest problem with the original rules, Krusick said, is that about one-fourth of all the offenses they covered triggered the permanent firing of the employee. The new rules allow the opportunity for many of those employees to show they've been rehabilitated.

"The initial rules were too broad," Krusick said. "But DHFS (Department of Health and Family Services) was very responsive, and the revisions reflect public input."