

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

NOTICE OF PUBLIC HEARING

Caregiver Background Checks

DCF 12, 50, 51, 55, and 56

NOTICE IS HEREBY GIVEN that pursuant to ss. 48.67 (intro.), 48.685 (1) (ag) 1. a., (2) (d), (4), (5) (a), (6) (b) and (c), 49.155 (1d), and 227.11 (2), Stats., the Department of Children and Families proposes to hold a public hearing to consider proposed rules relating to relating to caregiver background checks.

Hearing Information

**February 19, 2016
Friday
1:30 p.m.**

**MADISON
GEF 1 Building, Room H206
201 E. Washington Ave.**

Interested persons are invited to appear at the hearing and will be afforded the opportunity to make an oral presentation of their positions. Persons making oral presentations are requested to submit their facts, views, and suggested rewording in writing.

If you have special needs or circumstances regarding communication or accessibility at a hearing, please call (608) 422-7077 at least 10 days prior to the hearing date. Accommodations such as ASL interpreters, English translators, or materials in audio format will be made available on request to the fullest extent possible.

Analysis Prepared by the Department of Children and Families

Statutory authority: Sections 48.67 (intro.), 48.685 (1) (ag) 1. a., (2) (d), (4), (5) (a), (6) (b) and (c), 49.155 (1d), and 227.11 (2), Stats.

Statutes interpreted: Sections 48.01 (1) (f), 48.60, 48.62, 48.623, 48.65, 48.651, 48.66, 48.67, 48.685, 48.75, 48.88 (2) (am), 48.975, 48.979, 49.155 (1d), and 938.22, Stats.

Related statute or rule: Sections 48.833, 48.837, 48.839, 50.065, 120.13, Stats., and ch. DHS 12.

Explanation of Agency Authority

Section 48.67 (intro.), Stats., provides that the department shall promulgate rules establishing minimum requirements for the issuance of licenses to, and establishing standards for the operation of, child welfare agencies, child care centers, foster homes, group homes, shelter care facilities, and county departments. Those rules shall be designed to protect and promote the health, safety, and welfare of the children in the care of all licensees.

Section 48.685 (1) (ag) 1. a., Stats., directs the department to define “under the control of the entity” by rule.

Section 48.685 (2) (d), Stats., provides that every entity shall maintain or shall contract with another person to maintain the most recent background information obtained on a caregiver. The information shall be made available for inspection by authorized persons, as defined by the department by rule.

Section 48.685 (4), Stats., provides that an entity that violates s. 48.685 (2), (3), or (4m) (b), Stats., may be required to forfeit not more than \$1,000 and may be subject to other sanctions specified by the department by rule.

Section 48.685 (5) (a), Stats., directs the department to establish procedures by rule under which a person may show by clear and convincing evidence that he or she has been rehabilitated.

Section 48.685 (6) (b) 1., Stats., provides that caregivers licensed by the department, persons who are under 18 years of age and who are caregivers for a child care center, nonclient residents of an entity that is licensed by the department, and other persons specified by the department by rule shall send the background information form to the department.

Section 48.685 (6) (b) 2., Stats., provides that caregivers who are licensed or certified by a county department or an agency contracted with under s. 48.651 (2), Stats., nonclient residents of those entities, and other persons specified by the department by rule shall send the background information form to the county department or contracted agency.

Section 48.685 (6) (b) 3., Stats., provides that caregivers who are licensed by a child welfare agency, nonclient residents of those entities, and other persons specified by the department by rule shall send the background information form to the child welfare agency.

Section 48.685 (6) (b) 4., Stats., provides that caregivers who are contracted with by a school board, nonclient residents of those entities, and other persons specified by the department by rule shall send the background information form to the school board.

Section 48.685 (6) (c), Stats., provides 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 the department by rule.

Section 49.155 (1d), Stats., provides that the department shall promulgate rules establishing standards for the certification of child care providers under s. 48.651, Stats.

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

Summary of the Proposed Rule

The proposed rulemaking order will create a Department of Children and Families caregiver background check rule as required under s. 48.685, Stats. In general, s. 48.685, Stats., applies to programs involving the care of children by entities that are regulated by the Department of Children and Families. The department's proposed rule is similar to the existing caregiver background check rule in ch. DHS 12. Chapter DHS 12 is a Department of Health Services rule that currently applies to background checks required under ss. 48.685 and 50.065, Stats. Most of the programs affected by the background checks required under s. 48.685, Stats., were in the Department of Health and Family Services until they were transferred when the Department of Children and Families was created. Chapter DHS 12 applies to background checks under s. 48.685, Stats., until the department creates its own rule.

In general, s. 48.685, Stats., requires a background check as a condition of regulatory approval and employment at, contract with, or nonclient residency at specified entities that care for children, including residential care centers, group homes, foster homes, shelter care facilities, child-placing agencies, licensed child care centers, certified child care providers, and child care programs established or contracted for under s. 120.13 (14), Stats. A background check is also required for an interim caretaker seeking subsidized guardianship payments and any nonclient residents of the interim caretaker.

Entity Contract to Conduct Background Checks and Retain Records

In general, the applicable regulatory agency conducts the background check on the person who has, or is seeking, regulatory approval and any person who is, or is seeking to be, a nonclient resident. The entity conducts the background check on a person who has, or is seeking, employment or contract as a caregiver.

Under the proposed rule, an entity may enter into a contract with any other entity or with a person, temporary employment agency, college, university, vocational or technical college or school to obtain and retain the required background information. The entity must retain a copy of the contract. For searches conducted under contract, the entity must obtain a copy of the completed background information disclosure if it is required under s. 48.685 (6), Stats., and the results of the search. These documents must be retained by the entity for a time period determined by the agency that regulates the entity, so they can be promptly retrieved and reviewed by the agency.

Obtain Armed Forces Information

Section 48.685 (2), Stats., specifies the records that must be searched to conduct the background check. In general, these records include criminal history records, records of final determinations that a person abused or neglected a child, information on the status of applicable professional credentials maintained by the Department of Safety and Professional Services, the registry of findings of misappropriation of property of a client or neglect or abuse of a client under s. 146.40 (4g), Stats., and records of previous denials or revocations due to s. 48.685, Stats. In some cases, a search of a sex offender registry, a search of records of another state, a fingerprint-based search of national criminal history records, or various types of follow-up may be required.

The proposed rule also requires an agency or entity to make every reasonable effort to obtain the discharge status of a person who has served in the armed forces within the previous 3 years, including any reserve component. If the discharge status is other than honorable, the agency or entity shall obtain information on the nature and circumstances of the discharge. The proposed rule requires the agency or entity to document the efforts made to obtain the discharge status of the person.

Bars and Substantially-Related Convictions and Delinquency Adjudications

Specified offenses that are a bar. Under s. 48.685 (4m), Stats., an agency may not grant regulatory approval and an entity may not employ or contract with a caregiver or allow a nonclient to reside at the entity if the results of the background checks show certain criminal charges, convictions, delinquency petitions, delinquency adjudications, or administrative findings specified in s. 48.685 (4m), Stats., and s. DCF 12.02 (24), except in certain circumstances.

The proposed s. DCF 12.02 (24) includes a revised interpretation of the effect of a conviction or delinquency adjudication for the offenses specified in s. 48.685 (5) (bm) 4. and (br) 6. and 7., Stats. Section 48.685 (5) (bm) 4., Stats., applies to eligibility relating to foster care, subsidized guardianship, and adoption home studies. Section 48.685 (5) (br) 6. and 7., Stats., applies to eligibility relating to licensed child care, certified child care, and child care programs established or contracted for under s. 120.13 (14), Stats.

Under the current interpretation of s. 48.685 (5) (bm) 4. and (br) 6. and 7., Stats., a conviction or delinquency adjudication results in a 5-year bar to eligibility with no requirement to demonstrate rehabilitation when the 5-year period is over. Under the revised interpretation, a conviction or delinquency adjudication for these offenses will remain a bar to eligibility after the 5-year period, unless the person demonstrates rehabilitation. The 5-year period is a waiting period before a person may request a rehabilitation review.

When the proposed rule becomes effective, the revised statutory interpretation will apply to the following persons:

- A person seeking regulatory approval to be a caregiver if the regulatory approval is not a continuation or renewal of a regulatory approval the person has on the effective date of the rule.
- A person seeking employment or contract to be a caregiver with an entity if the person is not employed or contracted as a caregiver with that same entity on the effective date of the rule.
- A person seeking nonclient residency at an entity if the person is not a nonclient resident at that entity on the effective date of the rule.

Substantially-related criminal convictions and delinquency adjudications. Under s. 48.685 (5m), Stats., an agency may refuse to grant regulatory approval and an entity may refuse to employ or contract with a person to be a caregiver or to allow a nonclient to reside at the entity if the person was convicted of, or adjudicated delinquent for, a crime that is not a specified “serious crime,” but that is substantially related to the care of, or access to, a client or the activities of a program. The agency determines whether a criminal conviction or delinquency adjudication is substantially related for the person who has or is seeking regulatory approval and for nonclient residents. The entity makes the determination for persons who it employs or contracts with to be a caregiver.

The proposed rule lists factors that an agency or entity is required to consider in its determination of whether a person’s criminal conviction or delinquency adjudication is substantially related to care of, or access to, a client or the activities of a program. The factors are similar to the factors in ch. DHS 12. The proposed rule also requires the agency or entity to document how it reached the determination.

Reporting Requirements

The proposed rule includes a requirement that an entity report to the applicable regulatory agency if a caregiver or nonclient resident at an entity is the subject of specified pending criminal charges, convictions, delinquency petitions and adjudications, and specified administrative findings. The entity is required to report to the agency as soon as the entity knows or should have known of the action. An entity is also required to include in its personnel or operating policies a provision that requires caregivers who are employees or contractors to notify the entity as soon as possible, but no later than the entity's next working day, if a specified action occurs.

Sanctions

The proposed rule provides that if an entity fails to comply with specified requirements, the agency that regulates the entity may impose sanctions. The possible sanctions include denial or revocation of regulatory approval, specific conditions or limitations placed on the regulatory approval, a forfeiture of not more than \$1,000, implementation of a plan for correcting personnel screening practices, and mandatory training at entity expense.

In addition, an agency may deny an application for regulatory approval if an applicant fails to properly complete and submit a background information disclosure.

Rehabilitation Reviews

Section 48.685 (5), Stats., provides that an agency may give regulatory approval and an entity may employ, contract with, or permit to reside at the entity a person who otherwise would not be eligible under s. 48.685 (4m), Stats., if the person can demonstrate to the agency that regulates the entity, by clear and convincing evidence, that he or she has been rehabilitated. Under the proposed rule, a person is not eligible for a rehabilitation review if s. 48.685 (5) (bm) or (br), Stats., does not permit the person with a conviction or delinquency adjudication for that crime to demonstrate rehabilitation or requires a waiting period before the person may request rehabilitation and the waiting period has not ended. In addition, a person is not eligible for a rehabilitation review if within the preceding 12 months, the person was denied rehabilitation approval and the new request is for the same type of regulatory approval, job function, or nonclient resident status with the same level of direct contact with clients or unsupervised access to clients.

The proposed rule provides that an eligible person may submit an application for rehabilitation review to the agency that regulates the affected entity. The person has 90 days after the agency first receives the application to submit all supporting documentation and information requested in the application. The agency appoints a rehabilitation review panel of at least 2 persons to review the information submitted and schedules an opportunity for the person to appear before the panel and answer any questions the panel may have. In determining whether the person has demonstrated that he or she is rehabilitated, the panel considers rehabilitation decision factors that are in the proposed rule. The factors in the proposed rule are similar to the factors in the current caregiver background check rule in ch. DHS 12.

Under the proposed rule, an agency may grant rehabilitation approval only within the scope of its regulatory authority. The review panel shall issue a written decision that includes the type of entity the decision applies to, the types of approval that were requested and are either approved or denied in the decision, and any applicable conditions or limitations on an approval. The review panel may defer a decision for a period of not more than 6 months, unless the person who is the subject of the rehabilitation review agrees to a longer period. If the panel defers the decision, the panel shall send a notice to the person that states the reason for the deferral and the date that the panel will reconvene to review any new information affecting the request. If the panel denies the request, the

decision shall include the reasons for the denial, notice that the person may appeal the denial, and a summary of the appeal process under s. 48.685 (5c), Stats.

An agency that granted a person a rehabilitation approval may immediately withdraw the approval if the agency has knowledge that the person has failed to comply with or abide by any conditions or limitations imposed with the approval or the person knowingly submitted false information or withheld pertinent information that could have or would have affected the review panel's decision to grant the rehabilitation approval.

An agency may accept a rehabilitation approval granted to a person by another agency if the previous rehabilitation approval applies to the same type of entity and the same type of approval. In addition, a certification agency may accept a rehabilitation approval granted to a person by the department if the previous rehabilitation approval applies to the same type of approval in a child care center licensed to care for 4 to 8 children. The agency that accepts a rehabilitation approval granted by another agency shall include any limitations or conditions that were included in the approval if the conditions or limitations imposed by the agency that granted the approval have not been terminated or have not expired.

Delegation under Section 48.979, Stats.

Under s. 48.979 (1), Stats., as created by 2011 Wisconsin 87, a parent who has legal custody of a child, by a power of attorney that is properly executed by all parents who have legal custody of the child, may delegate to an agent, any of his or her powers regarding the care and custody of the child, except the powers specified in s. 48.979 (1) (a), Stats.

An organization that facilitates delegations of care and custody is required to conduct a background check under s. 48.685, Stats., on a proposed agent and any nonclient resident of the agent. If the organization determines that a proposed agent or nonclient resident is ineligible to contract to be an agent or to reside with an agent under s. 48.685 (4m), Stats., the proposed agent or nonclient resident may request a determination of eligibility for a rehabilitation review under s. 48.685 (5), Stats. Under the proposed rule, the department will conduct these rehabilitation reviews. In the proposed rule, the agent is included in the definition of caregiver at s. DCF 12.02 (4) (c). The agent is a contractor of the entity specified in s. DCF 12.02 (14) (k).

Adoption Assistance, Adoption Approval, Subsidized Guardianship, and Foster Homes

The proposed rule also updates cross-references from ch. DHS 12 to ch. DCF 12 and clarifies the procedures for conducting background checks in ch. DCF 50, Facilitating the Adoption of Children with Special Needs; ch. DCF 51, Adoption of Children with Special Needs and Preadoption Training; ch. DCF 55, Subsidized Guardianship; and ch. DCF 56, Foster Home Care for Children.

Summary of Factual Data and Analytical Methodologies

The proposed rule creates a Department of Children and Families version of ch. DHS 12, relating to caregiver background checks.

Summary of Related Federal Requirements

42 USC 671 (20) requires that states provide for background checks of any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child and prohibits payment of foster care maintenance or adoption assistance if the record check indicates certain convictions or other findings. It also requires that states provide for background

checks of any relative guardian before the guardian may receive subsidized guardianship payments on behalf of the child.

Comparison to Rules in Adjacent States

All states currently have background check requirements. No meaningful comparison to rules in adjacent states is possible because the proposed rule focuses on procedural issues that are specific to s. 48.685, Stats.

Effect on Small Business

The proposed rule will affect small businesses covered by s. 48.685, Stats., but the effect will be minimal. The Department's Small Business Regulatory Coordinator is Elaine Pridgen, (608) 422-7077, elaine.pridgen@wisconsin.gov.

Analysis Used to Determine Effect on Small Business or in Preparation of Economic Impact Analysis

The proposed rule is similar to the existing rule on caregiver background checks in ch. DHS 12.

Agency Contact Person

- For licensed child care, Anne Carmody, (608) 422-6023, anne.carmody@wisconsin.gov.
- For certified child care, Jolene Ibeling, (608) 422-6027, jolene.ibeling@wisconsin.gov.
- For foster care, subsidized guardianship, adoption approval, and delegations of care and custody of children under s. 48.979, Stats., Jonelle Brom, (608) 422-6930, jonelle.brom@wisconsin.gov.
- For residential care centers, group homes, shelter facilities, and child-placing agencies, Mary • Morse, (262) 548-8694, mary.morse@wisconsin.gov.
- For rule procedure, Elaine Pridgen, (608) 422-7077, elaine.pridgen@wisconsin.gov.

Place Where Comments are to be Submitted and Deadline for Submission

A copy of the emergency and proposed permanent rules is available at <http://adminrules.wisconsin.gov>. This site allows you to view documents associated with this rule's promulgation, register to receive email notification whenever the Department posts new information about this rulemaking order, and submit comments and view comments by others during the public comment period. You may receive a paper copy of the rules or fiscal estimate by contacting:

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Written comments on the rules received at the above address, email, or through the <http://adminrules.wisconsin.gov> website no later than February 22, 2016, will be given the same consideration as testimony presented at the hearing.