



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

NOTICE OF PUBLIC HEARING

Review of a Determination of Child Abuse or Neglect

Chapter DCF 40

NOTICE IS HEREBY GIVEN that pursuant to ss. 48.981 (3) (c) 5m. and 227.11 (2) (a), Stats., the Department of Children and Families proposes to hold a public hearing to consider emergency and proposed permanent rules relating to review of a determination of child abuse or neglect.

Hearing Information

**January 27, 2015
Tuesday
2:00 p.m.**

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

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) 267-9403 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.

Explanation of Agency Authority

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

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

Summary of the Rule

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

Review of an Initial Determination

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

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

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

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

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

The review of the initial determination shall be held within 45 days after the person's request for review. The person may request one rescheduling of the review date or time, and the agency

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

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

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

Final Determination

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

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

Division of Hearings and Appeals Contested Case Hearing

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

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

s. 48.13, Stats., based on the alleged abuse or neglect. DHA shall issue a final decision within 60 days after the close of the hearing.

The proposed rules provide that a person may request that the division of hearings and appeals expedite his or her appeal if any of the following apply:

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

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

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

Summary of Factual Data and Analytical Methodologies

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

The framework for the rules is based on the appellate opinion *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005) and the district court opinions *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001); *Dupuy v. McDonald*, 2003 Westlaw 2155791 (N.D. Ill. July 10, 2003); and *Dupuy v. Samuels*, 2005 Westlaw 1498468 (N.D. Ill. June 10, 2005). The 7th Circuit is a federal court with appellate jurisdiction over courts in Illinois, Wisconsin, and Indiana.

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

Summary of Related Federal Requirements

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

Comparison to Rules in Adjacent States

Illinois

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

Minnesota

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

Iowa

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

Michigan

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

Effect on Small Business

The proposed rule may have an effect on small businesses as defined in s. 227.114 (1), Stats., in the future, but currently does not.

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

Section 48.981(3) (cm), Stats., allows the department to contract with a licensed child welfare agency to fulfill the department’s duties on the review of an initial determination under s. 48.981 (3) (c) 5m., Stats. The Bureau of Milwaukee Child Welfare has been administering appeals of child abuse or neglect determinations itself and has no plans to contract with a licensed child welfare agency for duties under s. 48.981 (3) (c) 5m., Stats., upon implementation of this rule. Section 48.981 (3) (cm), Stats., does not allow counties to contract out its duties under s. 48.981 (3) (c) 5m., Stats.

Agency Contact Person

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

Place Where Comments are to be Submitted and Deadline for Submission

A copy of the 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:

Elaine Pridgen
Department of Children and Families
201 E. Washington Avenue
Madison, WI 53707
(608) 267-9403
dcfpublichearing@wisconsin.gov

Written comments on the rules received at the above address, email, or through the <http://adminrules.wisconsin.gov> website no later than January 28, 2015, will be given the same consideration as testimony presented at the hearing.

Eloise Anderson
Secretary or designee

12/15/14
Date