

110TH CONGRESS }  
2nd Session }

COMMITTEE PRINT

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BUILDING ON SUCCESS:  
LESSONS LEARNED FROM THE FEDERAL  
BACKGROUND CHECK PILOT PROGRAM FOR LONG-  
TERM CARE WORKERS

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PRESENTED BY THE

SPECIAL COMMITTEE ON AGING  
UNITED STATES SENATE

ONE HUNDRED AND TENTH CONGRESS

July 31, 2008



Prepared by the Majority Staff

This document has been printed for informational purposes. It does not represent either findings or recommendations formally adopted by the Committee.

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## PREFACE

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It is with pride and urgency that I release this Senate Special Committee on Aging print describing the success of a pilot program to conduct background checks on long-term care workers. Over three years and in seven states, this pilot program prevented more than 9,500 applicants with a history of substantiated abuse or a violent criminal record from working with and preying upon frail elders and individuals with disabilities.

The states who participated in the pilot are all planning to continue with the background check programs they have put in place, and build upon the success of the technological infrastructure they have created.

The federal government needs to do the same, as the current system of state-based background checks is haphazard, inconsistent, and full of gaping holes. We should not allow the safety of our loved ones to depend on the state in which they live. Just think about how many more vulnerable older Americans could be protected if we expanded these programs to create a nationwide system of background checks.

I call on my colleagues to pass S. 1577, the Patient Safety and Abuse Prevention Act. Eleven years ago today, the first version of this bill was introduced in the U.S. Senate. Since then, multiple versions have been introduced in both the Senate and the House. The policy has been improved and tested, and with this report, the results are undeniable. The time to pass this legislation is past due. Thank you, on behalf of aging Americans, for considering the material in this report.

HERB KOHL, *Chairman.*

## Executive Summary

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As our population ages, elder abuse<sup>1</sup> is becoming a growing priority for policymakers. Studies vary, but conservative estimates are that elder abuse currently affects hundreds of thousands of seniors each year.<sup>2</sup> And although national surveys often exclude institutional settings such as nursing homes and adult day care centers, criminologists believe ample evidence exists to suggest that abuse in institutions is “extensive and alarming.”<sup>3</sup>

Background checks<sup>4</sup> for job applicants have long been used as an important tool to help reduce the rates of abuse among vulnerable populations. For example, the National Child Protection Act enacted during the 1990s allows states to conduct background checks and suitability reviews of employees or volunteers of entities providing services to children, the elderly and disabled persons. At the state level, many states routinely require individuals seeking to work with children to undergo background checks as part of the pre-employment process. In 2002, a Government Accountability Office (GAO) report requested by members of the Senate Special Committee on Aging (Committee) recommended that individuals applying to work in long-term care settings also undergo background checks because the elderly, like children, are a highly vulnerable population.<sup>5</sup>

Nevertheless, there is still no federal law that requires long-term care providers to perform systematic, comprehensive background checks on employees who have direct patient access to vulnerable seniors. According to a 2006 study prepared for the Department of Health and Human Services, only a handful of states now require an FBI criminal history check for long-term care employees.<sup>6</sup>

In 2003, Congress authorized a pilot program under the Medicare Prescription Drug, Improvement and Modernization Act (MMA) to conduct background checks on workers in long-term care settings.<sup>7</sup> This pilot program afforded states an opportunity to expand their existing background check programs in order to screen

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<sup>1</sup>The term “elder abuse” includes any criminal, physical, or emotional harm or other unethical action that negatively affects the physical, financial, or general well-being of an elderly person  
<sup>2</sup>Colello, Kirsten. “Background on Elder Abuse Legislation and Issues.” *Congressional Research Service*. 25 January 2007.

<sup>3</sup>Payne, Brian and Gainey, Randy. “The Criminal Justice Response to Elder Abuse in Nursing Homes: A Routine Activities Perspective.” *Western Criminology Review*. 7(3). 67–81 (2006).

<sup>4</sup>In this report, the term “background check” refers to comprehensive pre-employment screening of long-term care workers using a combination of state-based registries, state-based criminal history checks (name-based, fingerprint-based, or both), and FBI criminal history checks (fingerprint-based).

<sup>5</sup>U.S. Government Accountability Office. “Nursing Homes: More Can Be Done to Protect Residents from Abuse.” GAO-02-312. March 2002.

<sup>6</sup>The Lewin Group. “Ensuring a Qualified Long-Term Care Workforce” Prepared for the Office of Disability, Aging and Long-Term Care Policy, Contract #HHS-100-03-0027

<sup>7</sup>P.L. 108-173, the Medicare Prescription Drug, Improvement and Modernization Act, Section 307.

a wide range of long-term care workers working in a variety of settings, including the home, and to incorporate FBI criminal history checks. In addition, pilot programs were charged with identifying “efficient, effective, and economical procedures” for conducting comprehensive background checks in long-term care settings. The Centers for Medicare and Medicaid Services (CMS) administered this pilot program between 2005 and 2007, allocating a total of \$16.4 million over three years to fund background check pilot programs in seven states: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin.<sup>8</sup>

This Committee print analyzes state assessment reports from the each of the seven state pilot programs and describes the principal lessons learned by state policymakers interested in furthering the gains made to implement more effective, efficient, and economical background check programs. In particular, this paper assesses (1) the success of comprehensive background check programs in identifying and barring people with criminal records from working in long-term care settings, (2) the improved efficiency of integrated background check programs, and (3) the cost-saving potential of investing in improved background check technology.

The analysis finds that the MMA pilot program was successful in achieving its objectives. First and foremost, older Americans receiving long-term care services in these states are at lower risk of abuse: more than 9,500 applicants with a history of substantiated abuse or a serious criminal background have been barred from working in positions involving direct patient access. Second, better-integrated databases and electronic fingerprinting procedures have helped reduce background check processing time from several months to a few days. Third, investments in information technology (IT), such as a “rap back”<sup>9</sup> system, helped some states reduce ongoing costs associated with conducting criminal history checks. Finally, all of the pilot states chose to continue their background check programs for long-term care workers at the end of the pilot period in September 2007.

Overall, the Committee concludes that the pilot program has been a success and recommends that similar background check programs be replicated in other states to reduce the risk of elder abuse in long-term care settings.

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<sup>8</sup>The MMA also included money for three states—Alaska, Michigan and Wisconsin—to conduct pilot programs in abuse prevention training for frontline direct care workers.

<sup>9</sup>A rap back system is one in which any new crimes that an individual commits after an initial background check are flagged in the state’s database and reported back to the employer. Rap back systems can therefore avoid the cost of having to re-fingerprint individuals each time they change jobs.

Figure 1: Selected Major Findings

State	Effectiveness			Efficiency				Sustainability
	Number of applications screened	Number of applicants disqualified	Percent of applicants disqualified	Number of databases used	Electronic fingerprint system	Online access system for providers	Rap back system	Continued background check program after pilot
Alaska	24,204	477	2.0%	8	X	X	X	X
Idaho	21,446	645	3.0%	7	X	X		X
Illinois	6,315	197	3.1%*	6	X	X	X	X
Michigan	115,651	6932	6.0%	7	X	X	X	X
Nevada	27,875	349	1.3%*	5	X			X
New Mexico	13,145	269	2.0%*	6		X		X
Wisconsin	14,748	640	4.3%	6	X	X		X
<b>Total</b>	<b>223,384</b>	<b>9,509</b>	<b>4.3%</b>	<b>6 (mean)</b>	<b>Most</b>	<b>Most</b>	<b>Some</b>	<b>ALL</b>

\* Illinois, Nevada, and New Mexico did not report the number of applicants disqualified by registry background checks, so the true percent of applicants disqualified by all background checks is greater than the percent reported.

Source: State Reports (Appendix D)

## I. BACKGROUND

### A. ELDER ABUSE

#### THE GROWING PROBLEM OF ELDER ABUSE

Elder abuse in the United States has been identified as a serious issue, with the act of abuse itself taking many forms. Elder abuse can take the form of physical abuse (battery, assault and rape), neglect (withholding or failure to provide adequate food, shelter and health care), and financial exploitation (theft, predatory lending and other illegal misuse or taking of funds, property or assets).

As discussed in the executive summary, the magnitude of elder abuse today is significant, and experts believe that without additional interventions to prevent and build awareness of elder abuse, mistreatment and exploitation of frail elders will increase due to the rapid growth of the elderly population in the U.S. According to a report by the National Research Council, “the frequency of occurrence of elder mistreatment will undoubtedly increase over the next several decades as the population ages.”<sup>10</sup> Between 2000 and 2004, the number of elder abuse cases substantiated by state adult protective services increased by 15.6 percent.<sup>11</sup>

It is also a troubling fact that today, most elder abuse goes unnoticed, because it is not reported. It is believed that for every case of elder abuse that is reported, four are not.<sup>12</sup>

#### ELDER ABUSE IMPOSES A LARGE BURDEN ON SOCIETY

Elder abuse imposes a large economic burden on society, but measuring the direct and indirect costs of abuse to victims and society is difficult.

In 2005, the estimated direct costs to victims of crime over the age of 65, regardless of their mental or physical capacity for self-care, totaled \$1.3 billion, according to the Department of Justice’s Criminal and Victimization Survey.<sup>13</sup> Direct costs in this survey include victims’ self-report of the economic value of property loss from theft, immediate medical expenses, and other personal economic losses incurred by crime victims incurred up to six months after the crime was committed.

Directs costs are only part of the true economic burden of elder abuse. Indirect costs to victims (sometimes known as non-economic, or pain and suffering) are also significant, but are more difficult to quantify. The cost of elder abuse is also borne by federal and state governments, which pay for treating and assisting victims of abuse through Medicare, Medicaid and other health and social services programs. In addition, the costs of identifying and prosecuting the

<sup>10</sup>Bonnie, Richard J. and Robert B. Wallace, eds., National Research Council of the National Academies, *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America*, National Academy Press, Washington, DC 2003. p. 1

<sup>11</sup>National Center on Elder Abuse: Abuse of Adults Aged 60+ 2004 Survey of Adult Protective Services <http://www.ncea.aoa.gov/NCEARoot/Main—Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf>

<sup>12</sup>National Center on Elder Abuse: Abuse of Adults Aged 60+ 2004 Survey of Adult Protective Services <http://www.ncea.aoa.gov/NCEARoot/Main—Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf>

<sup>13</sup>Bureau of Justice Statistics. “Total economic loss to victims of crime, 2005.” *Criminal Victimization in the United States*, 2005. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv0582.pdf>. (The Department of Justice’s Criminal and Victimization Survey includes crimes of assault, rape, and theft, but neglect is not)

perpetrators of elder abuse in the criminal justice system are paid by federal, state, and local governments (see Figure 1).

**Figure 2: Estimated Costs of Elder Abuse**

	Direct Costs to Victims	Indirect Costs to Victims	Indirect Costs to Government
<i>Types of Costs</i>	- Direct cash or property losses, - Immediate medical costs and lost salary	- Long-term medical and psychological problems - Pain and suffering	- Medicare and Medicaid costs - Criminal justice costs - Other federal and state programs
<i>Estimated cost</i>	>\$1.3 billion a year	Unknown	Unknown

*Source: Bureau of Justice Statistics*

## ELDER ABUSE AND NEGLECT IN LONG-TERM CARE SETTINGS

About 5.5 million, or about 16 percent, of adults aged 65 and older in the U.S. receive long-term care services. Of those receiving long-term care, the majority (70 percent, or 3.8 million) live in the community; the remaining 30 percent (1.7 million) live in institutional long-term care settings.<sup>14</sup> The number of older and disabled adults in need of long-term care services is expected to grow significantly in the next several decades. The term “long-term care settings” in this report refers to both institutional settings—such as nursing homes, assisted living facilities, long-term care hospitals and hospice care providers—as well as non-institutional providers, which include home health agencies and personal care providers.

Although elder abuse can take place in many settings, those receiving long-term care are particularly at risk of abuse. Many long-term care recipients suffer from cognitive decline or mental disorders and may not be able to communicate their needs to family members, friends, and caregivers. Those in need of long-term care often must rely on the availability and good will of others to assist them with basic personal care needs such as eating, toileting, bathing and dressing.

In 2006, State Long-Term Care Ombudsman Programs reported over 14,000 complaints of abuse, gross neglect and exploitation in nursing homes, and over 5,000 similar complaints in other residential care facilities.<sup>15</sup> Ombudsman programs, administered by the Administration on Aging, were initially designed as a strategy to control abuse and neglect in nursing homes. The programs use paid employees and unpaid volunteers to receive and handle suspected allegations of nursing home abuse. In other research findings, two studies from the late 1990s found that between 81 and 93 percent of nurses and nurse’s aides had either seen or heard about cases of elder abuse in long-term care facilities.<sup>16, 17</sup>

A 2001 Congressional report prepared by the House Committee on Government Reform concluded that 5,283 nursing homes, or one out of every three nursing homes, were cited for at least one abuse violation between 1999 and 2001, with over 9,000 abuse violations cited during that timeframe.<sup>18</sup> To date, however, there has never been a national study of the prevalence of abuse in nursing homes.<sup>19</sup>

A recent analysis of Medicaid Fraud Control Unit cases of elder abuse provides insight into the scope and severity of elder abuse in long-term care settings. Of the 801 cases of nursing home abuse

<sup>14</sup> Congressional Research Service, “Long-Term Care: Consumers, Providers, Payers, and Programs”, by Carol O’Shaughnessy, Julie Stone, Laura B. Shrestha, and Thomas Gabe, March 15, 2007.

<sup>15</sup> AOA “National Ombudsman Reporting System Data Tables.” Available at <<http://www.aoa.gov/prof/aoaprogr/elder—rights/LTCombudsman/National—and—State—Data/2006nors/A-5A-B%20comp%20Ver-Disp.xls>>

<sup>16</sup> Crumb, Deborah and Kenneth Jennings. “Incidents of Patient Abuse in Health Care Facilities are Becoming More and More Commonplace.” *Dispute Resolution Journal*. 1998:37–43 (1998).

<sup>17</sup> Mercer, Susan, Patricia Heacock, and Cornelia Beck. “Nurse’s Aides in Nursing Homes.” *Journal of Gerontological Social Work*. 21:95–113 (1996).

<sup>18</sup> U.S. Congress, House Committee on Government Reform, Special Investigations Division, Minority Staff, *Abuse of Residents Is a Major Problem in U.S. Nursing Homes*, prepared for Rep. Henry A. Waxman, July 30, 2001.

<sup>19</sup> Colello, Kirsten. “Background on Elder Abuse Legislation and Issues.” *Congressional Research Service*. 25 January 2007.

analyzed, about two-thirds were due to physical abuse.<sup>20</sup> Figure 3 provides the distribution of types of elder abuse offenses.

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<sup>20</sup> Payne, Brian and Randy Gainey. "The Criminal Justice Response to Elder Abuse in Nursing Homes: A Routine Activities Perspective." *Western Criminology Review*. 7(3), 67–81 (2006).

**Figure 3: Types of Elder Abuse and Neglect in Nursing Homes from Medicaid Fraud Control Unit Cases, 1997-2002**

<b>Offense Type</b>	<b>%</b>
Physical.....	67.7%
Sexual.....	9.7%
Duty-related <sup>21</sup> .....	9.7%
Neglect.....	6.7%
Drug Theft.....	1.9%
Emotional Abuse.....	1.6%
Financial Abuse.....	1.2%
Unclear.....	1.4%

*N=801*

*Source: Payne, Brian and Gainey, Randy. "The Criminal Justice Response to Elder Abuse in Nursing Homes: A Routine Activities Perspective." Western Criminology Review, 7(3), 67-81 (2006).*

<sup>21</sup> Duty-related abuse is defined as failure to report abuse, unintentional oversight of job responsibilities, or knowing violating a workplace rule that results in patient harm

In non-institutional settings, elder abuse is also prevalent. A recent investigative report by the *Wall Street Journal* focused on growing reports of cases of abuse and neglect by home health aides.<sup>22</sup> For example, the article notes that local prosecutors in one part of California have noted that “in tiny Lake County, California [population <66,000 in 2006], 80% of the 74 prosecutions of elder abuse in the past year involved home health aides.”<sup>23</sup> Numerous other news accounts in states across the country show that workers are easily able to avoid detection under current background check procedures. One elder justice reform advocate in Florida, Wed Bledsoe, head of A Perfect Cause, a national group advocating for tougher laws to keep criminals from working in nursing homes, commented in 2006 that “there are huge gaps in the system, and what you’re talking about is a gap you drive a truck through.”<sup>24</sup> And in Missouri, a woman convicted of pushing an elderly woman out of a vehicle in a carjacking was allowed to work in nursing homes—because her conviction record in Kansas was not caught by the limited check of Missouri-only criminal history records.<sup>25</sup>

Currently, 86% of people with long-term care needs live in community settings,<sup>26</sup> but most efforts at preventing elder abuse have been focused on institutional settings, such as skilled nursing facilities. Home-based care is expected to grow more rapidly than nursing home care in the coming decade, so addressing elder abuse in home-based care settings is becoming a growing concern.<sup>27</sup>

## B. BACKGROUND CHECKS

### BACKGROUND CHECKS HAVE A POTENTIAL TO REDUCE ELDER ABUSE

Criminal justice research shows that people who commit crime once are more likely to commit crime again. The most recent national-level recidivism study found that about two-thirds of ex-offenders return to the criminal justice system within three years of their release.<sup>28</sup> Because of high recidivism rates, individuals with histories of abuse pose a higher-than-normal risk to vulnerable populations, such as frail elders in need of long-term care services.

Background checks are an established, effective tool for identifying individuals with histories of abuse as documented in a state registry, and criminal offenders as identified through state and federal criminal history checks. Recent research suggests that such checks may be particularly important in long-term care settings because many cases of elder abuse are due to serial abusers. One study found that 75.4 percent of abusers were classified as serial or pathological, while only 24.6 percent of abusers were classified

<sup>22</sup> Shishkin, Philip. “Cases of Abuse by Home Aides Draw Scrutiny.” *The Wall Street Journal*. 15 July 2008. D1

<sup>23</sup> *Ibid.*

<sup>24</sup> Gulliver, David. “Nurse with a History Easily Hired: Gaps in the Law Allowed Him to Get Jobs Despite Probes.” *Sarasota Herald-Tribune*, 9 July, 2006. A1.

<sup>25</sup> Hollingsworth, Heather. “Missouri Case Points to Background Check Weaknesses,” *Associated Press*, 7 September, 2006.

<sup>26</sup> 2005 National Health Interview Survey

<sup>27</sup> Goldberg, Lee. “Everything You Wanted to Know About Long Term Care. . . But Were Afraid to Ask.” Presentation to the National Academy of Social Insurance. July 22, 2008.

<sup>28</sup> Nuñez-Neto, Blas. “Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism.” *Congressional Research Service*. 17 December 2007.

as “stressed-out” by their work environment.<sup>29</sup> The study authors conclude by recommending background checks as an important policy to prevent elder abuse.

Evaluations of background check programs are scarce, but a 2006 study on the use of background checks for the long-term care workforce<sup>30</sup> funded by the Department of Health and Human Services (HHS) determined that:

- a correlation exists between criminal history and incidents of abuse;
- the use of criminal background checks during the hiring process does not limit the pool of potential job applicants; and
- the long-term care industry supports the practice of conducting background checks on potential employees in order to reduce the likelihood of hiring someone who has potential to harm residents.

Yet other federal studies suggest that the use of comprehensive checks in the long-term care sector is too inconsistent and inadequate to protect residents of these facilities.<sup>31</sup> Some state-based research supports this: in 2005, the Michigan Attorney General published a report concluding that 10 percent of employees who were then providing services to frail elders had criminal backgrounds.<sup>32</sup> Such gaps in the background check system for employees of long-term care settings prevent background checks from achieving their full potential of reducing the risk of elder abuse in these settings.

#### SCREENING OF LONG-TERM CARE WORKFORCE INVOLVES MULTIPLE TYPES OF CHECKS

Three different types of databases are typically used to conduct background checks. *Registry checks* cross-list an individual’s name with public databases, such as the National Sex Offender Registry, or with a list of workers found to have a record of substantiated abuse in a particular field, such as those maintained in State Certified Nurse Aide registries. *State name-based and fingerprint criminal checks* are searches of state police records using a person’s name and other identifying information, or their fingerprint. *Federal criminal history checks* are conducted by the FBI through its all-state biometric repository, the Integrated Automated Fingerprint Identification System (IAFIS), which uses fingerprints to identify whether an individual has been arrested or convicted.

Because no one database is complete, a comprehensive background check using many different databases promises to be most effective. State-based registries only cover one state, while FBI records may not include a listing of all convictions if a state has not yet reported them to the federal government.

<sup>29</sup> Payne, Brian and Randy Gainey. “The Criminal Justice Response to Elder Abuse in Nursing Homes: A Routine Activities Perspective.” *Western Criminology Review*. 7(3), 67–81 (2006).

<sup>30</sup> U.S. Department of Health and Human Services (The Lewin Group), *Ensuring a Qualified Long-Term Care Workforce: From Pre-Employment Screens to On-the-Job Monitoring*, May 2006; <http://aspe.hhs.gov/daltcp/reports/2006/LTCWqales.htm>

<sup>31</sup> GAO. “Nursing Homes: More Can Be Done to Protect Residents from Abuse.” GAO–02–312. March 2002.

<sup>32</sup> Office of the Attorney General (Michigan), *Attorney General Investigation Uncovers Hundreds of Criminals Working in Adult Residential Care Facilities*, June 2005; <http://www.michigan.gov/ag/0,1607,7-164-34739-34811-119213-,00.html>

Currently, long-term care providers are required to conduct registry checks on all Certified Nurse Aides (CNAs), but few conduct both state and federal criminal history checks on all employees who have direct access to patients.

Various ideas have been proposed over the years to better integrate background check databases. One proposal would create a master database that integrates state CNA registries. However, a national CNA registry would not cover individuals applying to work in most long-term care settings, such as home health agencies, personal care providers and hospices. By comparison, building an infrastructure to connect the numerous databases and registries at the state and federal level may be more effective.

In addition, recent technological improvements are helping to streamline background check processes. For example, *livescan fingerprint technology*, which records an electronic copy of a fingerprint, is less prone to error and is faster to process than paper-based inked fingerprints. Another technological innovation is the *rap back system*, which ensures that any new disqualifying crimes an individual commits after an initial background clearance are flagged in a state's database and can be reported back to the employer. The FBI is now working to create a federal rap back capability as part of the agency's "Next Generation Identification" (NGI) System initiative.<sup>33</sup>

Sill, absent without federal requirements or funding, few states have moved to incorporate these efficiency-improving system changes. Instead, many states continue to use slower, less accurate paper-based systems that can result in long processing times for providers. In turn, slow processing times increase the risk of abuse by allowing employees with disqualifying crimes to work for several months before background check results are completed. In turn, this contributes to a practice of "job-hopping," in which workers switch jobs frequently, before their criminal history checks can be processed. In one instance, a Certified Nurse Aide with a disqualifying criminal record in Nevada worked for 15 different providers from 1993 through 1996, changing jobs every 90 days to stay ahead of his background check report.<sup>34</sup>

### C. CONGRESSIONAL ACTION

The Senate Special Committee on Aging has a long history of examining issues of elder abuse and exploring the specific potential of background checks for long-term care employees to address the issue of abuse in long-term care settings. Figure 4 outlines selected hearings that the Committee has held on these issues. In 1965, the Committee held a seven-part field hearing on abuse and neglect in the nation's nursing homes, and since then the committee has held nearly thirty hearings on elder abuse and related topics. Most recently, in July 2007, the Committee scheduled a hearing entitled, "Abuse of Our Elders and How We Can Stop It," which convened leading experts to discuss the challenges of preventing elder abuse and report on the state's experiences with the background check

<sup>33</sup>U.S. Department of Justice. "The Attorney General's Report on Criminal History Background Checks." June 2006.

<sup>34</sup>Nevada State Report. Appendix D.

pilot program. At this listening session, comprehensive background checks were cited by all witnesses as a critical measure to protect seniors in long-term care settings.<sup>35</sup>

**Figure 4: Selected Hearings on Elder Abuse in the Senate Special Committee on Aging**

- Conditions and Problems in the Nation’s Nursing Homes (7 part field hearing, February and August 1965)
- Older Americans Fighting the Fear of Crime, September 22, 1981
- Crime Against the Elderly, Los Angeles, CA, July 6, 1983
- Crimes Against the Elderly: Let’s Fight Back, Las Vegas, NV, August 21–22, 1990
- Crimes Committed Against the Elderly, Lafayette, LA, August 6, 1991
- Elder Abuse and Violence Against Midlife and Older Women, May 4, 1994
- Crooks Caring for Seniors: The Case for Criminal Background Checks, September 14, 1998
- Saving Our Seniors: Preventing Elder Abuse, Neglect and Exploitation, June 14, 2001
- Safeguarding Our Seniors: Protecting The Elderly From Physical & Sexual Abuse in Nursing Homes, March 4, 2002
- Shattering the Silence: Confronting the Perils of Family Elder Abuse, October 20, 2003
- Abuse of Our Elders: How We Can Stop It, July 18, 2007

One of the first major congressional actions taken to combat elder abuse was the creation of the Long-Term Care Ombudsman Program (LTCOP) in order to investigate and resolve complaints in nursing homes and other residential care settings. This program was initially created in 1972 as a Public Health Service demonstration project in five states. As a result of the pilot program’s success, the LTCOP was expanded to all states and included as an amendment to the Older Americans Act (OAA) in 1978.<sup>36</sup> In 1992, the program became incorporated into a new Title VII of the OAA that authorized elder rights protection activities and required the Administration on Aging (AoA) to create a permanent National Ombudsman Resource Center. The majority of federal funding for ombudsman activities comes from Title VII and Title III of the OAA. Ombudsman programs also receive some state and local support. In FY 2006, the most recent year for which data are available, the LTCOP received \$46.6 million in federal funding and \$31.2 million from state and local sources, for a total of \$77.8 million.<sup>37</sup>

Other federal funding for services aimed at preventing elder abuse include the Social Services Block Grant (SSBG) program authorized by Title XX of the Social Security Act, and some programs of the Violence Against Women Act. In FY 2005, the most recent year for which data are available, states spent \$169 million on Adult Protective Services (APS) programs, supported by funding

<sup>35</sup> Senate Special Committee on Aging. “Abuse of Our Elders: How We Can Stop It.” *Government Printing Office*. S. Hrg. 110–308. Serial No. 110–12. 18 July 2007.

<sup>36</sup> P.L. 95–478

<sup>37</sup> Colello, Kirsten J. “Older Americans Act: Long-Term Care Ombudsman Program.” *Congressional Research Service*. April 17, 2008.

through SSBG. In FY2008, Congress appropriated \$4.2 million for the Violence Against Women Act. This funding supports programs and services that address violence against older women, such as training for law enforcement, prosecutors, victims' assistants and others. Within the Department of Justice, the "Elder Justice and Nursing Home Initiative" currently receives about \$1 million annually.<sup>38</sup>

Although Congress has implemented several laws aimed at addressing child abuse<sup>39</sup>,<sup>40</sup> and domestic violence,<sup>41</sup> somewhat less attention has been paid to combating elder abuse at the federal level.<sup>42</sup> The Patient Safety and Abuse Prevention Act, which would require background checks for long-term care workers, was first proposed by Senator Kohl in 1997 and is still pending approval. Similarly, the Elder Justice Act, which would do much to improve the detection, investigation and treatment of elders who fall victim to abuse, has followed a parallel course of being considered by several Congresses. Figure 5 lists legislation that has been introduced in the 105th through the 110th Congresses that includes provisions to prevent elder abuse by requiring background checks for long-term care workers.

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<sup>38</sup> Marie-Therese Connolly, (accepted for publication) Where Elder Abuse and the Justice System Collide: Police Power, Parens Patrie and Twelve Recommendations, *Journal of Elder Abuse & Neglect*, 22 (1/2).

<sup>39</sup> See, for example, The Child Abuse Prevention and Treatment Act of 1974 (CAPTA P.L. 93-247) or the Adam Walsh Child Protection Safety Act

<sup>40</sup> Stoltzfus, Emily. "Child Welfare: Federal Policy Changes Enacted in the 109th Congress." *Congressional Research Service*. November 2007.

<sup>41</sup> See the Violence Against Women's Act (VAWA) of 1994

<sup>42</sup> Colello, Kirsten J. "Background on Elder Abuse Legislation and Issues." *Congressional Research Service*. January 25, 2007.

**Figure 5: Legislation That Would Require Background Checks for Long-Term Care Workers, 105th through 110th Congresses**

<b>Congress</b>	<b>Bill Name</b>	<b>Bill Lead Sponsor</b>	<b>Legislative Activity</b>
105 <sup>th</sup>	Patient Abuse Prevention Act (S.1122)	Senator Herb Kohl	The bill was not taken up by committee
	Long-Term Care Patient Protection Act of 1998 (S. 2570)	Senator Herb Kohl	The bill was not taken up by committee
	Elder Care Safety Act of 1997 (H.R. 2953)	Representative Joseph Kennedy	The bill was not taken up by committee
	Elderly and Disabled Protection Act of 1998 (H.R. 4804)	Representative Jerry Weller	The bill was not taken up by committee
106 <sup>th</sup>	Patient Abuse Prevention Act (S. 1445/ H.R. 2627)	Senator Herb Kohl; Representative Fortney Pete Stark	The bill was not taken up by committee
	Elderly Protection Act (H.R. 1984)	Representative Joseph Crowley	The bill was not taken up by committee
	Nursing Home Criminal Background Check Act of 2000 (H.R. 4293)	Representative Chris Cannon	The bill was not taken up by committee
	Home Health Integrity Preservation Act (S. 255)	Senator Charles Grassley	The bill was not taken up by committee
	Senior Care Safety Act of 2000 (S. 3066)	Senator John Ashcroft	The bill was not taken up by committee
107 <sup>th</sup>	Patient Abuse Prevention Act (S. 3091/ H.R. 3933)	Senator Herb Kohl; Representative Brad Carson	The bill was not taken up by committee.
	Senior Safety Protection Act of 2002 (H.R. 5565)	Representative Mike Thompson	The bill was not taken up by committee.
	Elder Justice Act of 2002 (S.2933)	Senator John Breaux	The bill was not taken up by committee.
108 <sup>th</sup>	Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (H.R. 1)	Representative Dennis Hastert	The bill became Public Law 108-173 on 12/8/2003.
	Patient Abuse Prevention Act (S. 958)	Senator Herb Kohl	The bill was not taken up by committee.

<b>Congress</b>	<b>Bill Name</b>	<b>Bill Lead Sponsor</b>	<b>Legislative Activity</b>
108 <sup>th</sup>	Elder Justice Act (S. 333)	Senator John Breaux	The bill was ordered favorably reported by the Senate Finance Committee with an amendment in the nature of a substitute, but was never taken up on the Senate floor. Provisions that would establish national criminal background checks for long-term care employees were removed in the version of the bill reported by the Committee.
	Senior Safety Protection Act of 2003 (H.R. 208)	Representative Mike Thompson	The bill was not taken up by committee.
109 <sup>th</sup>	Senior Safety and Dignity Act of 2006 (H.R. 6161)	Representative Ginny Brown-Waite	The bill was not taken up by committee.
	Elder Justice Act (H.R. 4993)	Representative Peter King	The bill was not taken up by committee.
	Elder Justice Act (S. 2010)	Senator Orrin Hatch	The bill was ordered favorably reported by the Senate Finance Committee with an amendment in the nature of a substitute, but was never taken up on the Senate floor. Provisions that would establish national criminal background checks for long-term care employees were deleted in the version of the bill reported by the Committee.
110 <sup>th</sup>	Patient Safety and Abuse Prevention Act of 2007 (S. 1577/ H.R. 3078)	Senator Herb Kohl; Representative Tim Mahoney	S. 1577 was referred to the Senate Finance Committee; H.R. 3078 was referred to the following committees: Ways and Means, Energy and Commerce, Judiciary.
	Senior Safety and Dignity Act of 2007 (H.R. 1476)	Representative Ginny Brown-Waite	The bill was referred to the following committees: Ways and Means and Energy and Commerce.

Source: Congressional Research Service

## II. THE BACKGROUND CHECK PILOT PROGRAM

### A. PROGRAM OVERVIEW

The Medicare Prescription Drug, Improvement and Modernization Act of 2003, which created Medicare Part D, included Section 307, “Pilot Program for National and State Background Checks on Direct Patient Access Employees of Long-term Care Settings or Providers” (hereinafter referred to as the pilot program). This program was charged with identifying “efficient, effective, and economical procedures” for conducting background checks in order to establish the framework for a national program of background checks for employees of long-term care settings. CMS administered the pilot program in consultation with the Department of Justice between January 2005 and September 2007.

In 2004, the Centers for Medicare and Medicaid Services (CMS) issued a request for proposals for up to ten states to participate in pilot program to enhance background checks for workers in long-term care settings. CMS awarded grants to seven states: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin. Michigan has established a state-wide program using pilot funds; the other states limited their program to certain counties.

At the end of the pilot program all states submitted final assessment reports. Information in this report comes from these final assessment reports as well as from discussions with state program officers conducted by committee staff from March 2007 to July 2008.

### B. PILOT PROGRAM REQUIREMENTS

Under the terms of the pilot program, states had flexibility to create background check programs that worked best for them while meeting certain basic requirements.

The primary requirement was for long-term care settings and providers to conduct background checks for job applicants who would have direct contact with patients. These providers include “any individual (other than a volunteer) that has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such a facility or provider.”<sup>43</sup> If an employee with direct access to patients was found to have disqualifying information, long-term care settings were prohibited from knowingly employing that person.

As part of the background check process, applicants were required to be screened through state and federal fingerprint databases in addition to name-based registries. A written statement by the applicant disclosing any disqualifying information and authorizing the facility to conduct a national and state criminal record check as well as a set of fingerprints were also required of all applicants.

Finally, states were directed to have procedures to permit applicants to appeal or dispute the accuracy of the background check results and to prevent individuals from using the results of the background check for purposes other than employment. Provisions were also put in place to give long-term care settings and providers im-

<sup>43</sup> PL 108–173 § 703 (g)(4)

munity from any action brought by an applicant who was denied employment based on the results of background check information.

States were given flexibility to modify the parameters of the program to suit their needs. For example, disqualifying crimes were defined somewhat differently from state to state. (See Appendix B for a matrix of disqualifying crimes by state). Some states, such as Michigan, include time-limited bans for certain disqualifying felonies based on the point when parole or probation has been completed, while other states, such as Wisconsin, have lifetime bans only.<sup>44</sup>

### C. STATE PROGRAM OVERVIEW

Total federal spending provided to the seven states for the background check pilot program was \$16.4 million over three fiscal years, from 2005–2007.<sup>45</sup> Federal funding for the seven states for establishing background check programs over this three-year period ranged from \$1.5 million in Wisconsin to \$3.5 million in Michigan<sup>46</sup>, as described in Figure 5. Funding depended on the specific proposals of the states and also the scope of their project.

Each state used the pilot program funding differently depending on varying needs and program designs. Some states, such as New Mexico and Idaho, used the funding primarily to improve and expand preexisting background check programs. Others, such as Illinois and Wisconsin, used the funding to completely redesign their background check programs in select counties (ten in Illinois and four in Wisconsin). Michigan, the state receiving the largest amount of funding, established a comprehensive state-wide program.

The pilot program funding was primarily intended to build capacity for comprehensive background checks in states. Additional state funding and fees from background check applications largely supported the ongoing cost of processing background checks. However, the pilot program's initial investment in improved infrastructure is expected to substantially reduce the costs of sustaining the program.

Figure 6 provides an overview of funding and program design for all participating states.

<sup>44</sup> See Appendix B for a matrix of disqualifying crimes by state.

<sup>45</sup> This does not include funding for three states' abuse prevention pilot programs.

<sup>46</sup> Three states received additional funding to set up abuse prevention training programs under the pilot.

Figure 6: Overview of Background Check Pilot Program by State

State	Funding	Scope	Number of Participating Providers	Background Check Databases Used*
Alaska	\$3.4 million	State-wide	886	Alaska Public Safety Information Network, Alaska Court System/Court View and Name Index, Alaska Juvenile Offender Management Information System, Centralized Registry, Certified Nurse Aide Registry, NSOR, OIG, FBI
Idaho	\$2.7 million	State-wide	549	Idaho Transportation Department Driving Records, Adult Protection Registry, Child Protection Registry, Certified Nurse Aide Registry, NSOR, OIG, FBI
Illinois	\$3.0 million <sup>†</sup>	Ten Counties	180	Illinois Department of Corrections Inmate Database, Illinois Sex Offenders Registration, Certified Nurse Aide Registry, NSOR, OIG, FBI
Michigan	\$3.5 million	State-wide	4355	State Automated Fingerprint Identification System, Michigan Offender Tracking Information System, Michigan Internet Criminal History Access Tool, Public Sex Offender Registry, Certified Nurse Aide Registry, OIG, FBI
Nevada	\$1.5 million	State-wide	693	Nevada Department of Public Safety Central Repository, Certified Nurse Aide Registry, NSOR, OIG, FBI
New Mexico	\$1.7 million	State-wide	350	New Mexico Central Repository for Criminal History, New Mexico Employee Abuse Registry, Certified Nurse Aide Registry, NSOR, OIG, FBI
Wisconsin	\$1.5 million	Four Counties	210	Wisconsin State Criminal History Database, Wisconsin Department of Health and Family Services Background Check Database, Caregiver Misconduct Registry, Certified Nurse Aide Registry (including registries from other states), OIG, FBI

NSOR: National Sex Offender Registry

OIG: Office of Inspector General List of Excluded Individuals and Entities

FBI: Federal Bureau of Investigation Integrated Automated Fingerprint Identification System (IAFIS)

\* As part of the pilot program, all states were required to conduct FBI criminal history checks. Current federal law also requires screening with Certified Nurse Aide Registries and the Office of Inspector General List of Excluded Individuals and Entities. For a glossary of background check databases, see Appendix A

<sup>†</sup> Illinois only spent \$1.3 million of grant funds awarded

Source: State Reports (Appendix D) and State Presentations from CMS Background Check Pilot State Annual Conference, June 12-13, 2007

### III. PILOT PROGRAM RESULTS

*"It's working. We're catching them."*<sup>47</sup>

-Mel Richardson, program manager of Alaska's Background Check Unit

*"The applicants that have been excluded from employment are not the types of people Michigan could ever allow to work with our most vulnerable citizens. We have prevented hardened criminals that otherwise would have access to our vulnerable population from employment."*<sup>48</sup>

-Orlene Christie, Director of the Legislative and Statutory Compliance Office at the Michigan Department of Community Health

*"This pilot may have been just a project for some but we in Illinois have tried to absorb it into our social consciousness and truly realize the importance that the results of this pilot may play on individual lives. Most of the health care employers selected to participate in the pilot rallied around this effort with an exceptional enthusiasm. . . . The value of the pilot program is indisputable."*

-Jonna Veach, Project Director of the Illinois Background Check Program

#### A. COMPREHENSIVE BACKGROUND CHECKS ARE EFFECTIVE

##### OVER 9,500 PRIOR CRIMINALS WERE BARRED FROM WORKING IN LONG-TERM CARE FACILITIES

In all states, the pilot program proved successful in preventing thousands of persons with a record of substantiated abuse or a serious criminal record from working in long-term care settings. During the program pilot period, over 220,000 individuals who applied for jobs in long-term care settings were screened. Of these, 9,509 applicants (4.3 percent) were barred for disqualifying crimes. The number of applicants barred from employment due to background checks as part of the pilot program are shown in Figure 7.

The total number of applicants screened and the number of applicants barred varied greatly among states, primarily because of the difference in the geographical scope of the programs. Michigan, a large state that conducted comprehensive state-wide screening was able to screen significantly more applicants than smaller states who conducted their programs in a few counties.

In many states, registry checks were the first method used for screening job applicants. As a result, the majority of applications disqualified due to background check findings were excluded because of registry checks (67 percent). Some states, however, did not report the number of applicants disqualified by registry checks, and Idaho and Alaska reported fewer applicants excluded by registry checks compared to the number of applicants excluded by state and federal criminal background checks.

Overall, state criminal background checks and federal FBI checks were responsible for identifying a total of 3,128 applicants with a disqualifying criminal background who had not been identi-

<sup>47</sup> Alaska's presentation at the CMS Background Check Pilot State Annual Conference, June 12-13, 2007, Marriot Baltimore/Washington Int'l Airport, Baltimore, Maryland

<sup>48</sup> Written Testimony submitted at the U.S. Senate Special Committee on Aging hearing: The Nursing Home Reform Act Turns Twenty: What Has Been Accomplished, and What Challenges Remain?, May 2007

fied through the registry checks. While some applicants were excluded by both state and federal background checks, most applicants excluded by state and federal background checks were only excluded by one type of check (60 percent).

Of all the states, the Michigan pilot program not only had the most number of people screened, but it also had the highest percentage of individuals identified for disqualifying crimes. Of the 115,000 applicants screened, nearly 7,000 (6 percent) were barred from employment. This success was due in large part to the state's use of an integrated system which included a large number of other databases and allowed it to easily identify individuals with disqualifying criminal records.

Figure 7: Number of Applicants Disqualified by Background Checks

	Alaska	Idaho	Illinois	Michigan	Nevada	New Mexico	Wisconsin	Total
(1) Data collection period	4/06-9/07	10/05-9/07	10/06-9/07	4/06-9/07	1/06-9/07	4/06-9/07	02/06-9/07	
(2) Total applicants screened	24,204	21,446	6,315	115,651	27,875	13,145	14,748	223,384
(3) Excluded by registry checks and screening procedures	78	34	N/A*	5,936 <sup>†</sup>	N/A*	N/A*	333	6,381
(4) Excluded by state criminal history check only	362	N/A <sup>‡</sup>	85	499	0	20	283	1,249
(5) Excluded by FBI fingerprint check only	13	N/A <sup>‡</sup>	33	225	217	103	24	615
(6) Excluded by both state and FBI checks	24	N/A <sup>‡</sup>	79	272	132	146	N/A <sup>§</sup>	653
(7) Total excluded by name and fingerprint checks (state and FBI combined)	399	611	197	996	349	269	307	3,128
(8) Total excluded by ALL checks (registries, state, and FBI criminal history checks)	477	645	197	6932	349	269	640	9,509
(9) Percent of applicants excluded by all checks	2.0%	3.0%	3.1%	6.0%	1.3%	2.0%	4.3%	4.3%

(1) Data collection period differs by state due to variation in pilot start dates and data reporting systems

(7) Exclusions for fingerprint checks do not include the number of individuals who withdrew their application at the fingerprint stage (the deterrent effect). Idaho, for example, notes in its state report that 240 individuals withdrew their application after completing the fingerprint portion of the background check.

\* Registry checks were conducted in Illinois, Nevada, and New Mexico, but the number of applicants excluded by registry checks was not reported in these states

<sup>†</sup> Total number of applications that were excluded by registry checks in Michigan may include applicants who were excluded by multiple registries

<sup>‡</sup> Idaho did not report the distribution of exclusions by type of check.

<sup>§</sup> Because WI providers ended the background check after the name-based state search when disqualifying information was discovered, no applicants are disqualified by both a State fingerprint hit and FBI fingerprint check (#6).

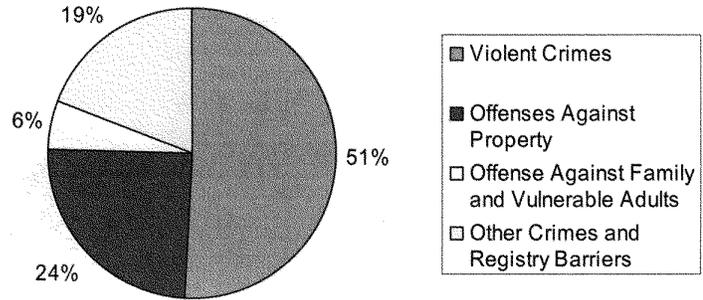
Source: State Reports (Appendix D)

Although the specific disqualifying crimes differed from state to state, data from Alaska suggests that the majority of background check exclusions were for violent crimes, such as assault, rape and murder (Figure 8).<sup>49</sup> About 6 percent of applicants screened in Alaska had a previous conviction for a crime against a family member or a vulnerable adult, such as an elderly person.

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<sup>49</sup>These crimes that direct harm individuals are classified legally as “offenses against the person.”

**Figure 8: Category of Disqualifying Crimes Identified Through Background Checks, Alaska, 4/06-9/07**



Source: Alaska State Report (Appendix D)

Note: Data on disqualifying crimes were collected between April 2006 and September 2007

## FBI FINGERPRINT CHECKS PLAYED AN IMPORTANT ROLE

Under the pilot program, states were required to conduct FBI criminal history checks in addition to state police and state registry-based background checks. By adding FBI checks, states were able to identify a large number of applicants with disqualifying crimes who were missed by state checks. Among those states that reported the number of applicants barred by FBI checks exclusively, federal criminal history records were responsible for 6.5 percent of all exclusions and 19.7 percent of the criminal history exclusions (see Figure 7).

Data from Alaska demonstrate that FBI checks are important for eliminating violent felons. Seventy-five percent of FBI exclusions in the Alaska pilot were due to murder, assault, rape and other violent crimes, compared to about 50 percent of background check bans in all seven pilot programs that were excluded for those crimes.<sup>50</sup>

The importance of federal checks in other states varied. In Wisconsin, for example, the state identified most of the excluded applicants through state registry and name-based criminal history checks, while Nevada identified most through an FBI criminal history check.

## EMPLOYERS WERE GENERALLY SATISFIED WITH BACKGROUND CHECK PROGRAMS

Participating long-term care providers in many states reported high rates of satisfaction with the more effective and efficient background check procedures established as a result of the pilot. In Idaho, a survey of providers found that 86 percent felt that the background check requirement was successful and 73 percent of providers would choose to continue to use the background check system, even if the checks were optional with a fee (see Figure 9).

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<sup>50</sup> Alaska State Report. Violent crimes are classified as “offenses against the person”

**Figure 9: Satisfaction Survey of Participating Idaho Long-term Care Providers**

	Yes	No
<i>Was the background check requirement successful in screening potential workers?</i>	86%	15%
<i>Was the quality of employees hired increased due to the background check requirements?</i>	63%	37%
<i>If funding was available, should the background check requirement continue?</i>	88%	12%
<i>If funding was not available, should the background check continue?</i>	61%	39%
<i>If the background check was optional with a fee, would the facility or provider continue to use it as a resource?</i>	73%	27%

\*Survey of 204 providers and facilities, response rate = 65%  
Source: Idaho state report (Appendix D)

B. INTEGRATED BACKGROUND CHECK PROGRAMS ARE EFFICIENT  
PROCESSING TIME WAS CUT SIGNIFICANTLY

Many states were able to substantially reduce the time required to complete the background check process. For example, Illinois reported the time to complete background checks was reduced from as much as two months to as few as two days (see Figure 10).

Idaho and Illinois reduced their background check processing times to a few days by using an internet-based background check system accessible to authorized providers. In addition, digital livescan fingerprint technology allowed for faster processing of fingerprint checks.

By reducing processing times for background checks, states virtually eliminated the risk that applicants with serious criminal histories could go undetected by moving from one employer to another. The Nevada state report notes, "In 2006, we identified six individuals operating in a similar pattern [of job hopping], but as processing times improved, we saw fewer incidents of this practice. In 2007, we observed no such cases."<sup>51</sup>

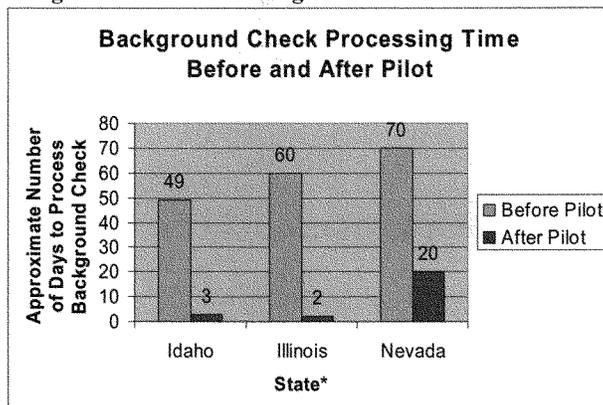
Several states also noted that a significant number of applicants withdrew their applications prior to a fingerprint check. In Michigan, for example, 17.9 percent of applicants withdrew their applications prior to fingerprinting. While data do not exist on the reasons for these withdrawals, some state officials believe that the faster and more accurate fingerprint checks may act as a deterrent for individuals with a criminal history.<sup>52</sup> However, no adverse impact on the number of individuals applying for jobs in the long-term care sector was reported in the final state reports for the pilot program.

Reducing the time for completing background checks did allow states to screen more workers in long-term care settings. In Idaho, for example, the number of applications screened nearly doubled from 15,000 to 28,000 applications after a web-based system was implemented.

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<sup>51</sup>Nevada State Report, p. 10. Appendix D.

<sup>52</sup>See for example Nevada State Report, Appendix D

**Figure 10: Background Check Processing Time Before and After Pilot Program**

\* Only states that reported estimates for background check processing time in their final reports are included above, but all states reported some reduction in processing time as a result of the pilot.

Source: State Reports (Appendix D)

STATES DEVELOPED INNOVATIVE MODELS TO INTEGRATE EXISTING DATABASES

Pilot states succeeded in establishing comprehensive background check programs that were able incorporate and coordinate various registry checks (e.g., state Certified Nurse Aide registries and registries established for sex offenders and child care workers), as well as federally-required checks against the HHS Office of Inspector General’s provider exclusion list, and criminal history checks at the state and federal level. All states used their grant funds to establish more coordinated linkages and working relationships between different agencies charged with administering various registries and databases.

Some states also created an online access point for providers and officials. In Michigan, for example, state officials contracted with researchers at Michigan State University to create a single database that was efficient for providers and allowed researchers and state officials to clearly understand at what point an individual was excluded, whether it be at the registry check level, or at the level of a state or FBI criminal history check. The information collected allows the state to examine the effectiveness of a registry check or fingerprint check.

APPEALS PROCESSES ALLOWED FOR ADEQUATE PROTECTIONS

All states instituted processes to allow workers to appeal results of a background check. These processes varied in scope by state. Some states only allowed individuals to appeal if they could demonstrate there was an error in the background check finding, while other states allowed individuals to appeal the definition of a disqualifying crime on a case-by-case basis. Although a small percentage of people who were barred from employment based on a disqualifying crime appealed the decision, a large percentage of those who did appeal were granted an exemption. Data from the three states submitting appeals data are summarized in Figure 11.

Figure 11: Excluded Applicants, Appeals Requested, and Appeals Approved

State*	Excluded Applicants	Appeals Requested	Appeals Approved
Alaska .....	477	42	31
Illinois .....	197	159	142
New Mexico .....	269	87	57

Note: Only states that reported appeals data are included in the above table.  
Source: State Reports (Appendix D)

C. INVESTMENTS IN BACKGROUND CHECK SYSTEMS ARE ECONOMICAL

“RAP BACK” TECHNOLOGIES CAN REDUCE COST IN THE LONG-TERM

Many pilot states used information technology to reduce the costs of fingerprint checks. Illinois, Alaska, and Michigan instituted rap back programs, in which any new crimes that an individual commits after an initial background check are flagged in the state’s database and reported back to the database and the employer. As a result, these states can avoid the cost of re-fingerprinting for the individuals each time they change jobs. All three states that used a rap back program noted the cost-saving potential and other bene-

fits of a rap back system at a state level, but the full cost savings were limited because these states were not able to implement a rap back system to help reduce costs for the FBI criminal history check.

States were also able to reduce costs by obtaining fingerprints using digital technology. Often referred to as “livescan,” digital fingerprinting reduces costs over time because these scans are significantly more accurate than inked fingerprints on cards, which are prone to error and misinterpretation. In addition, fingerprint scans can be transmitted electronically and read using automated technology, eliminating human error and reducing the need for additional staff. In order to efficiently distribute livescan equipment, some states established mobile units and online reservation systems for an applicant to schedule a fingerprint check.

#### COMPREHENSIVE PROGRAMS CREATE EFFICIENCIES

As the programs expanded, they were able to achieve additional cost savings. In particular, states found that as they expanded their programs, they were able to negotiate better deals with vendors. Wisconsin, for example, reported that their actual cost for background check processing (\$297,533) was less than half of the projected cost (\$634,132). Such savings signal that similar economies of scale may be achievable in some other states.

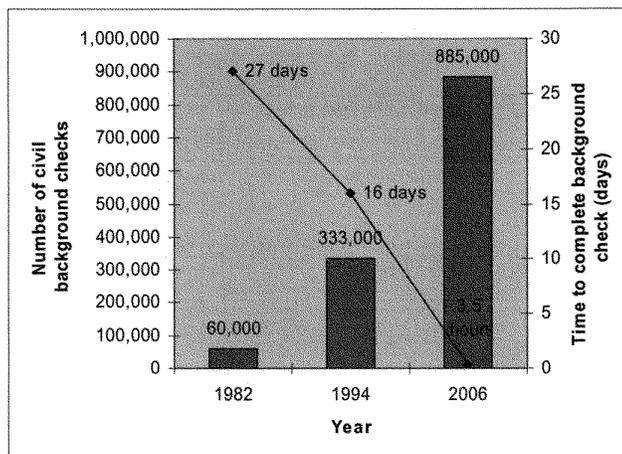
Some states were able to apply the improvements in their screening programs for long-term care workers to other existing background check programs. Alaska, for example, uses its newly improved state criminal history database (APSIN) to screen many employees who work with children.

A welcome cost saving that occurred during the pilot program was a reduction in the fees charged for federal FBI criminal history checks and a reduction in processing time. In June 2008, the FBI formally announced in a regulation that it was reducing the fees for civil fingerprint checks due in part to increased demand.<sup>53</sup> Figure 12, shows historical trends in fingerprint submissions and processing times, suggesting that improvements in technology and economies of scale may continue to drive further fee reductions and shorten processing time if additional states expand and improve their background check systems for workers.

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<sup>53</sup>“FBI Criminal Justice Information Services Division User Fees.” *Federal Register*. 73(119) June 19, 2008

**Figure 12: Number of FBI background checks submitted and processing time, 1982-2006**



Source: "FBI Criminal Justice Information Services Division User Fees." *Federal Register*. 73(119)

## STATES CONTINUING BACKGROUND CHECK PROGRAMS

All states have continued their comprehensive background check programs after the completion of the pilot in September 2007. Many states have expanded their programs by (1) requiring additional categories of workers to have mandatory background checks (e.g., workers who have “direct access” to a resident/beneficiary’s property, financial records and/or treatment information), (2) requiring workers that have direct access to other vulnerable populations (e.g., children) to undergo the same type of background check as those who have access to older people, and/or (3) increasing the types of settings that are required to have background checks done on their employees before they are hired (e.g., general acute-care hospitals).

All of the states concluded that including fingerprint-based background checks was a vital part of the overall criminal background check process. Prior to participating in the pilot, Illinois and Wisconsin did not have widely used fingerprint-based background checks in place. They used the pilot funds to compare their existing name-based background checks with fingerprint-based background checks. The remaining states (Alaska, Idaho, Michigan, Nevada and New Mexico) already had fingerprint-based background checks in place. New Mexico used the pilot funds to improve the quality of their ink-based fingerprint cards by providing training and technical assistance. Alaska, Idaho and Nevada used pilot funds to test the feasibility of converting from ink-based fingerprint cards to livescan (electronic) fingerprinting. Michigan already had livescan fingerprinting in place. They used the pilot funds to enhance their integrated online background check system.

Several of the states (Alaska, Illinois and Michigan) planned to expand their fingerprint-based background check by implementing a “rap back” process. The rap back process will enable state law enforcement to notify the state agency requesting the information as to whether or not the applicant has been convicted of any subsequent criminal activity after the initial background check was conducted. Rap back processes save time and money because the fingerprints are kept on file and do not have to be retaken and resubmitted each time a person applies for a new job.

Overall, the program was successful in helping states build the infrastructure they need to conduct comprehensive, coordinated and cost-effective background checks for long-term care employees. As a result, these programs are helping to create a safer workforce for frail elders and individuals with disabilities.

## D. STATE PILOT PROGRAM SUMMARIES

## ALASKA

**Alaska CMS Background Check Pilot Program for Long-Term Care Workers****Grant award: \$3,400,000****Abuse prevention training program award: \$1,500,000****Administering State Agency: Department of Health and Social Services**

Alaska’s background check program was already in the process of being restructured when they received a grant from CMS. As the largest state in the country, Alaska’s extreme geography and ex-

pansive rural regions led to large, decentralized jurisdictions that often overlapped. Faced with these unique challenges, Alaska looked to the pilot program to help streamline their existing background check program for long-term care workers.

In addition to the scope of workers and facilities required by the Pilot to be included as part of the background check program, Alaska's statute required background checks for any individual or entity that was required by statute or regulation to be licensed or certified by the department or that is eligible to receive payments, in whole or in part, from the department to provide for the health, safety and welfare of persons who are served by the programs administered by the departments. This included individual service providers, such as public home care providers, providers of home and community-based waiver services and case managers coordinating community mental health services.<sup>54</sup>

Two key goals of Alaska's pilot program were to 1) create a single administrative Background Check Unit within the Department of Health and Social Services (DHSS) to oversee all aspects of the background check program and 2) adopt uniform definitions and descriptions of disqualifying crimes or findings of substantiated abuse applicable to all licensed and certified health and long-term care programs under the authority of the DHSS. The first element, reorganizing the DHSS, was necessary because the system had 19 different licensing and certification programs that were being administered under 12 different statutes and 15 different sets of regulations. The second element, adopting uniform definitions, was meant to provide consistency in the way individuals were evaluated during the background check process.

The first step of Alaska's background check process consisted of checking registries and court records from Alaska as well as from those states the individual has lived in during the past 10 years. The registries searched include: Alaska Public Safety Information Network (APSIN); Alaska Court System/Court View and Name Index; Juvenile Offender Management Information System; Centralized Registry (i.e. Employee Misconduct Registry); Certified Nurses Aide Registry; National Sex Offender Registry; Office of the Inspector General List of Excluded Individuals and Entities; FBI fingerprint check; and any other records/registries DHSS deems are applicable. After this information was reviewed, a fitness determination was made. If no disqualifying information was found, a provisional authorization that the applicant can work was posted on the Background Check Unit website. The information was pro-

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<sup>54</sup> Background checks are performed on 1) all administrators or operators; 2) individual service providers; 3) employees, independent contractors, unsupervised volunteers, officers, directors, partners, members, or principals of the business organization that owns an entity or a board member if that individual has: regular contact with recipients of services; access to personal or financial records maintained by the entity or provider regarding recipients of services; or control over or impact on the financial well-being of recipients of services, unless the only recipient whose financial well-being is affected is a relative of the individual who has authorized that individual to make financial decisions for that relative; recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or recipient for whom a court has authorized that individual to make financial decisions; 4) individuals who reside in a part of an entity, including a residence if services are provided in the residence, if the individual remains, or intends to remain, in the entity for 45 days or more, in total, in a 12-month period; or 5) any other individual who is present in the entity and would have regular contact with recipients of services.

tected so that only the entity hiring the individual has access to this information.

The second step involved the submission of fingerprints for state and FBI criminal history review. If no disqualifying results were found, the provisional authorization was replaced with final authorization, and a final determination letter is sent to the individual, the employer, and the department or agency having oversight of the entity.

Finally, the individual's name was then flagged in the Alaska Public Safety Information Network. This is commonly known as a "rap back" process which means that DHSS would be notified on a real-time basis if there were any new or subsequent criminal activity that was considered a disqualifying crime and required that the individual be removed from working with vulnerable persons in health and long-term care settings.

#### RESULTS

During the pilot phase, Alaska followed their original program development plan. The state processed 24,304 applications for background checks and identified 477 individuals with barring conditions including 283 for violent crimes, 136 for offenses against property, and 31 for offenses against family and vulnerable adults.

#### POST-PILOT

After the pilot ended in September 2007, Alaska's Background Check Unit continued to improve the accessibility and availability of fingerprinting services for rural residents by installing 24 livescan (electronic) fingerprinting machines in 23 rural Office of Children's Services locations. This is in line with Alaska's goal to expand the background check to include individuals working directly with children served by state-licensed foster care and childcare. The state has also begun to expand background checks to all staff serving vulnerable populations in programs that are required by statute or regulation to be licensed or certified by DHSS or who are eligible to receive payments, in whole or in part, from the department. After the Pilot ended, Alaska picked up the cost of continuing to operate the Background Check Unit through a combination of state funds and fees collected by the program.

#### IDAHO

**Idaho CMS Background Check Pilot Program for Long-Term Care Workers**  
**Grant award: \$2,072,026**  
**Administering State Agency: Idaho Department of Health and Welfare**

Prior to participating in the CMS Background Check Pilot Program, Idaho conducted background checks for people who worked with children and vulnerable adults in facilities such as foster care and adoption, child care, developmental disabilities, psychosocial rehabilitation, and mental health clinics. They had a paper-based background check process in place that involved mailing applications and fingerprint cards to the Idaho State Police for processing. Applicants had to wait approximately six to eight weeks to receive background check clearance. To address inefficiencies with this process, Idaho used the pilot funds to implement a web-based ap-

plication system that allowed fingerprints to be collected and transmitted electronically. A more efficient way of processing applications was necessary since the pilot required Idaho to expand its list of facilities requiring employee background checks to include nursing facilities, assisted living or residential care facilities, intermediate care facilities for persons with mental retardation, home health, hospice, and hospitals with swing beds.<sup>55</sup> Providers, employees, and contractors with access to vulnerable individuals in these types of long-term care settings were required under the pilot to have background checks.<sup>56</sup>

Idaho's new web-based background check system allowed for: 1) online application submission; 2) online fingerprint scheduling; 3) real-time status check of application, and; 4) email notifications informing applicants and employers of the status of each application as it goes through the process. Applicants began the process by completing an online application that required them to disclose any crimes or other relevant information in their background. Next they had to schedule a fingerprint appointment in one of several livescan (electronic) fingerprint offices throughout the State.<sup>57</sup> Then the applicant either printed out the application, signed it and had it notarized, and brought it to their fingerprint appointment; or submitted the application electronically and had their signature notarized when they were fingerprinted. By submitting the application, the individuals authorized the Criminal History Unit to complete the background check, obtain necessary information, and release it in accordance with the applicable laws. If no disqualifying offenses were disclosed in the notarized application, the individuals were granted a provisional work period if he or she is fingerprinted within 21 days, and then another provisional work period until the background check was completed.

During the fingerprint appointment, the Criminal History Unit completed the required registry checks against the following registries: Idaho Child Protection Registry, Idaho Adult Protection Registry, National Sex Offender Registry, Office of Inspector General List of Excluded Individuals and Entities, Nurse Aide Registry, and Idaho Department of Motor Vehicles Driving Records. Next, the applicant's fingerprints were transmitted to the Idaho State Police who conducted a comparison against State crime records. The Idaho State Police then forwarded the fingerprints electronically to the FBI for comparison against national criminal records. If no criminal record or registry information was found, the Criminal History Unit was notified and they changed the individual's status in the database to "clear." If a criminal history was found, the Idaho Criminal History Unit reviewed the information and made a determination based on State's list of disqualifying crimes.<sup>58</sup> Applicants and employers could check on the status of the application at any point during this process by logging on to a secure website. Applicants and employers were notified via email

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<sup>55</sup> Volunteers in these settings were excluded from background check requirements.

<sup>56</sup> Although the pilot included personal care attendants as part of the required entities, Idaho already had existing regulations requiring personal care attendants to have a background check therefore they were not included in the pilot project.

<sup>57</sup> A small percentage of applicants, who live in remote towns or cities, had a law enforcement officer roll and submit a fingerprint card.

<sup>58</sup> Idaho's list of disqualifying crimes is included in Appendix B

when the background check was complete and/or if any disqualifying offenses were found. Idaho does not have a “rap back” process in place where new or subsequent criminal activity is automatically sent to the Criminal History Unit.

#### RESULTS

Between October 2005 and March 2007, Idaho screened 20,117 applications of which 648 (3 percent) were denied access or not allowed to work with vulnerable persons in long-term care settings. 408 individuals were denied access due to information found during a criminal record or other record search and an additional 240 withdrew their applications after they disclosed a disqualifying offense or other incident would have likely resulted in a denial.

#### POST-PILOT

At the end of the pilot, Idaho’s Division of Medicaid surveyed the directors of the participating long-term care settings to find out whether they thought the background checks should continue after the Pilot ended. The response was overwhelmingly positive. Based on the combination of successful screening results, and positive feedback from the provider community, Idaho’s Division of Medicaid modified their regulations to continue requiring background checks for: home health agencies, skilled nursing homes, residential assisted living facilities, and intermediate care facilities for the mentally retarded. Hospice agencies and hospitals with swing beds were not included in the modified regulations and did not continue requiring background checks for job applicants. During the Pilot, grant funds were used to cover the cost of the background checks. Post-pilot, the fee for the background checks will be paid for by either the applicant or the provider.

#### ILLINOIS

##### **Illinois CMS Background Check Pilot Program for Long-Term Care Workers**

**Grant award: \$3,000,000**

**Administering State Agency: Illinois Department of Public Health (IDPH)**

Prior to participating in the Background Check Pilot Program, Illinois relied primarily on name-based background checks for direct health care workers. Fingerprint background checks were performed only if name-based checks revealed multiple common names, a waiver request was made for disqualifying convictions, or the applicant challenged the results. Recognizing name-based background checks were not as effective or efficient as fingerprint-based checks, Illinois used the pilot funds primarily to test the feasibility of implementing a fingerprint based background check process in their state.<sup>59</sup> To institute a fingerprint-based system, and automate

<sup>59</sup>The scope of the Pilot in Illinois originally included the entire state and all the requested provider types but due to the high cost of background checks, the scope of the Pilot was negotiated down to include only 10 counties (i.e., Boone, Carroll, Jo Daviess, Lake, Lee, McHenry, Ogle, Stephenson, Whiteside, and Winnebago) in the northern part of the state and only five of the mandated provider types (i.e., skilled nursing facilities/nursing facilities; intermediate care facilities for persons with mental retardation, home health agencies, long-term care hospitals/hospitals with swing beds and home-and-community-based service facilities over eight beds). The smaller scope allowed grant funds to be used to subsidize the cost of the fingerprint background checks. The reduced scope retained a true representation of the geographic, social

all the background check processes, Illinois amended the state's Health Care Workers Background Check Act.

Illinois developed a background check process for the Pilot that included several steps. First, an applicant seeking a position in a long-term care facility where he or she may have access to a resident; the resident's living quarters; or the resident's financial, medical or personal records, was asked to fill out a disclosure and authorization form. The employer logged into the Illinois Department of Public Health (IDPH) online Web portal to the Health Care Worker Registry (HCWR)<sup>60</sup> to check for any disqualifying offenses or substantiated findings. If no offenses or substantiated findings were found, the employer checked the following registries through links provided in the Web application: Office of Inspector General List of Excluded Individuals and Entities; Illinois Sex Offenders Registration, Illinois Department of Corrections Sex Registrant, Inmate Search and Wanted Fugitives; and National Sex Offender Public Registry. If no matches were found, the applicant was sent to a livescan vendor to have his or her fingerprints electronically scanned. After the applicant's fingerprints were scanned, the livescan vendor sent a data file to IDPH who then sent it to the Illinois State Police (ISP). The ISP conducted a state-based criminal history records search and forwarded the file to the FBI for a national search. The results of the background check were sent to IDPH electronically and matched to the applicant's social security number and transaction control number (provided by the livescan vendor). If no criminal record was found, the applicant's name was moved to the status of "Direct Access Worker" and an automatically generated email was sent to the employer with notification that the applicant was eligible to work. If any criminal record was found, the IDPH reviewed the information and made a determination as to whether there was a disqualifying conviction. As soon as the determination was entered into the web application an automatically generated email was sent to the employer stating whether the conviction was disqualifying. The applicant was mailed a copy of the rap sheet along with a waiver application (if applicable) when the conviction was disqualifying. If the applicant was convicted of any subsequent criminal activity after the background check has been completed, the ISP automatically notified the IDPH as part of their "rap back" process.<sup>61</sup> As soon as a determination is made by the IDPH on the conviction, an email was automatically generated and sent to the employer.

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and economic structure of the entire state. Illinois consists of an extraordinary amount of border counties where workers can live in one state and work in another. Eight of the ten counties bordered another state. The scope captured enough rural area to be characteristic of the plain states. Illinois has one of the most concentrated metropolitan areas in the United States; therefore, one of the counties included in the pilot was a highly populated urban area.

<sup>60</sup> Illinois received additional grant funds from CMS to develop a web-based application system to coordinate their background checks, the IDPH Online Health Care Worker Registry (HCWR).

<sup>61</sup> A "rap back" system involves maintaining the fingerprints of individuals who have been cleared in a law enforcement database, allowing detection of any subsequent disqualifying crimes that these individuals may commit. When this occurs, the database notifies the department that requested the background check as part of their oversight for a particular industry (e.g., Illinois' Department of Public Health), which in turn notifies the employer of their employee's relevant arrest or conviction.

## RESULTS

Illinois was late entering the pilot study because of difficulties faced early on (i.e., having to reduce the scope of the pilot). However, between October 2006 and September 2007, 6,315 background check applications were submitted to IDPH for screening of which 3.1 percent (1,924) were either disqualified based on prior offenses, substantiated findings, or criminal histories or were withdrawn by the applicants themselves.

## POST-PILOT

Illinois is currently in the process of implementing a fingerprint-based background check process statewide, using all the automation features introduced during the pilot. Fingerprint background checks are now required for unlicensed direct care workers for multiple health care settings and unlicensed workers who have (or may have) contact with residents, residents' living quarters, or residents' personal, financial, and medical records in many long-term care settings.<sup>62</sup> Furthermore, since health care providers are now required to initiate fingerprint background checks through the Department of Public Health's (IDPH) web application, IDPH can legally store the fingerprints and use the rap back to notify IDPH of any future convictions that are associated with those fingerprints.

## MICHIGAN

**Michigan CMS Background Check Pilot Program for Long-Term Care Workers**

**Grant award: \$3,500,000**

**Abuse prevention training program award: \$1,500,000**

**Administering State Agency: Michigan Department of Community Health**

Michigan used the funds from the CMS Background Check Pilot program to enhance the comprehensive background check program they already had in place. The major improvement they made was to develop, in partnership with Michigan State University, an on-line application that provides health and human service agencies with a systematic process of conducting the background checks. In addition to receiving funds to supplement and expand their background check program, they were one of three states awarded an additional \$1.5 million to create and deliver a comprehensive adult abuse and neglect prevention-training program for employees and managers of long-term care settings.

Prior to the pilot, Michigan performed background checks on a limited number of employees in nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities. They relied primarily on name-based background checks with fingerprint background checks required only for employees residing in Michigan for less than three years. Using pilot funds, Michigan expanded the scope of facilities covered to also include hospices, hospitals with swing bed long-term care units, assisted living facilities

<sup>62</sup> Long-term care settings currently required to screen applicants in Illinois include assisted living and shared housing establishments; community living facilities; children's respite homes; freestanding emergency centers; full hospices; home health agencies; hospitals; life care facilities; long-term care settings; post-surgical recovery care facilities; and sub-acute care facilities.

that are classified in Michigan as “homes for aged,” psychiatric hospitals, and intermediate care facilities for the mentally retarded. They performed background checks on all prospective long-term care employees who will have direct access to patients with plans to check current employees in the future.

Michigan’s background check program had three stages. First, the provider entered the applicant’s personal information into the online system where it was screened against five integrated registries: Office of Inspector General List of Excluded Individuals and Entities, Michigan Nurse Aide Registry, Michigan Public Sex Offender Registry, Offender Tracking and Information System, and Internet Criminal Access Tool. Second, if no convictions for a relevant crime were found, the applicant was required to complete a digital fingerprint scan which was submitted to the Michigan State Police and then to the FBI. Third, if a match was found, a notice was sent to either the Department of Community Health or the Department of Human Services where the department staff examined the applicant’s criminal history to see if it was exclusionary.<sup>63</sup>

During the pilot, Michigan developed new functionality to integrate a rap back process that would allow the Michigan State Police to legally store the fingerprints and provide either the Michigan Department of Community Health or Department of Human Services with notifications of any future convictions that are associated with those fingerprints. One limitation of Michigan’s background check system was a limited appeal process if an applicant was deemed inappropriate to work in a facility due to their criminal background. Appeals were only granted to applicants if their criminal record was found to be inaccurate, or if the record should have been expunged from the record.

#### RESULTS

Because Michigan had such a comprehensive background check system already in place, between March 2006 and September 2007 they were able to process 103,251 background check applications for those applying to work in long-term care settings. During that 18 month period, they excluded 6,932 applicants (6.0 percent) from working with vulnerable older persons because of prior offenses, substantiated findings, or criminal histories.

In 2006, Michigan enacted a law that not only expanded the scope of facilities that were required to perform background checks on potential employees, but also expanded the types of workers required to have background checks. In addition to “direct care” workers (people who provide personal, hands-on care to residents/beneficiaries), workers who had “direct access” to a resident/beneficiary’s property, financial records, and/or treatment information also had to undergo a background check.<sup>64</sup> The law also required Michigan’s Department of Community Health to cover the cost of background checks for long-term care workers with no charge to the applicant or the facility. Approximately one-quarter of the total costs were to be reimbursed through a Medicaid match. State officials have reported substantive cost-savings as a result of the

<sup>63</sup> Michigan’s list of disqualifying crimes can be found in Appendix B.

<sup>64</sup> Private duty long-term care workers were not included.

Michigan program, including one-year crime prevention savings of \$37 million.

#### POST-PILOT

One important component of Michigan's background check program that continues to evolve is the online application. A second component which Michigan continues to work on is the appeals process for applicants that have been denied employment because of their past criminal activity. The Michigan Workforce Background Check system is being modified to incorporate and track the appeals process so that people with minor infractions can have the opportunity to demonstrate that they have been rehabilitated. Michigan has requested and received approval from HHS to bill Medicaid for the cost of FBI checks as an allowable administrative cost.

#### NEVADA

##### **Nevada Criminal Background Check Pilot Program for Long-Term Care Workers**

**Grant award: \$1,891,018**

**Administering State Agency: Nevada State Health Division**

Nevada has been conducting fingerprint-based state and national criminal background checks for certain long-term care settings since 1997. As one of the fastest growing states in America, many of Nevada's residents have lived and worked in other states, making a national fingerprint background check critical for long-term care workers. Before the Pilot, the majority of fingerprints were collected manually using ink-based cards. These cards first had to be scanned by the Nevada Department of Public Safety for the state-based check, and then mailed to the FBI for the national check. This process took 90 to 120 days and often required re-fingerprinting due to the poor quality of the ink-based cards. Realizing the need to also check applicants against the FBI registry, Nevada used the majority of their Pilot funds to improve their existing background check program by installing livescan (electronic) fingerprinting machines across the state. By increasing the number of locations from which applicants' prints could be submitted electronically, they were able to significantly reduce the processing time of fingerprint background checks.

As part of the Pilot, Nevada expanded the scope of workers who were required to have a criminal background check.<sup>65</sup> It now includes all prospective long-term care employees who will have direct access to patients and independent contractors working in intermediate care facilities, skilled nursing facilities, residential care facilities, and agencies that provide personal care services and/or nursing care in the home. Persons applying for a license to operate intermediate care facilities, skilled nursing facilities, and residential facilities for groups must also undergo a criminal background check.

Under Nevada statute, providers were required to submit the employee's fingerprints to the Department of Public Safety, which

<sup>65</sup>The facility must do a criminal history background check when the employee is first hired and at least every five years that the person remains employed there.

conducted the background check search and notifies the provider and the Bureau of Licensure and Certification of the results.<sup>66</sup> Although Nevada does not conduct name-based criminal checks (except in the rare instance where an individual's fingerprints cannot be taken) they do check applicants against the National Sex Offender Registry, the Central Repository for Nevada Records of Criminal History, and the Certified Nurses Aide Registry. The fingerprint check serves as a back-up and the long-term care agencies are required to keep a copy of the fingerprints submitted to the Central Repository for Nevada Records of Criminal History for future inspections by the Health Division.

#### RESULTS

At the end of the pilot, Nevada had installed 37 new livescan fingerprinting sites across the state thus drastically reducing the average time it took to perform a background check from about 80 days to less than 20 days. In addition to providing more timely results to employers, shorter turn-around times also allowed Nevada to better identify previously missed "job-hoppers" who had criminal histories but were rarely caught. Between January 2006 and September 2007, Nevada excluded 349 people (1 percent) who applied for health care positions because they had criminal backgrounds or disqualifying offenses. Although this percentage seems low, it may reflect effective screening of applicants by employers before they submitted fingerprints, or it may be that increased awareness of the background check program now acts as a deterrent for people with criminal histories.

#### POST-PILOT

After the pilot, Nevada has continued to expand the background check program and has assumed portions of the cost of fingerprint-based criminal history background checks for prospective long-term care employees.

#### NEW MEXICO

##### **New Mexico CMS Background Check Pilot Program for Long-Term Care Workers**

**Grant award: \$1,100,000**

**Administering State Agency: New Mexico Department of Health**

Since 1999, New Mexico's Caregivers Criminal Screening Act has required health care facilities to perform nationwide and statewide criminal background checks on persons whose employment or contractual service with a care provider include direct care or routine and unsupervised physical or financial access to any care recipient<sup>67</sup> served by that provider.<sup>68</sup> The Act requires over 20 different

<sup>66</sup>Prior to the pilot, the Department of Public Safety only notified the Bureau of Licensure and Certification if an applicant had a criminal background or a disqualifying offense. To streamline and track the background check process, the Department of Public Safety now shares the results of all background checks with the Bureau of Licensure and Certification.

<sup>67</sup>Care recipient is defined as any person under the care of a provider who has a physical or mental illness, injury or disability or who suffers from any cognitive impairment that restricts or limits the person's activities.

<sup>68</sup>The Caregivers Criminal History Screening Act stipulates that care providers can only conditionally employ a caregiver pending completion of the criminal history screening.

types of long-term care settings to screen direct care employees.<sup>69</sup> However for the purposes of the pilot, New Mexico only reported data on the care provider types specifically identified in the CMS Background Check Pilot Program requirements (i.e., skilled nursing facilities/nursing facilities; long-term care hospitals/hospitals with swing beds; intermediate care facilities for persons with mental retardation; home health agencies; home-and-community-based service group homes over eight beds; and personal care agencies).

Due to a limited information technology (IT) infrastructure, New Mexico's Department of Health can not utilize livescan (electronic) fingerprinting. Instead, they use inked fingerprint cards to collect fingerprints. Although fingerprint cards are prone to low-quality fingerprinting, and their use can cause significant delays in processing, New Mexico did not use the pilot funds to upgrade their IT infrastructure to utilize electronic fingerprinting. Instead, they used the \$1.1 million they received from the Pilot to improve the efficiency of the existing background check process by: 1) providing for training and technical assistance for individuals who process fingerprints throughout the state; 2) developing an integrated web-based application allowing agencies and providers to access criminal history information as well as check on the training status of applicants; 3) establishing methods to monitor provider compliance; 4) replacing outdated scanning equipment and software; and 5) conducting research for statutory and regulatory reforms for system improvements.

New Mexico's criminal history screening had three stages: 1) application submission and processing, 2) employment fitness determination, and 3) administrative reconsideration (if needed).

During the first stage, application submission and processing, the applicant's personal information was entered into an online system and screened against three integrated registries: Nurse Aide Registry, New Mexico Employee Abuse Registry, and Caregivers Criminal History Screening Program (CCHSP) database. Simultaneously, their fingerprints were scanned and electronically sent to the New Mexico Department of Public Safety for a statewide criminal history search and to the FBI for a nationwide criminal history search. If the fingerprints come back without a match (no criminal history found), the CCHSP database is updated and the care provider facility is sent a letter stating that the applicant's background check is clear. If a match is found either through the registry screening or the fingerprint search, the application is sent to the CCHSP for further review.

The second stage of New Mexico's criminal background check, employment fitness determination, occurred only if the direct care worker is found to have a criminal history. The CCHSP legal assistants review the rap sheets and determine if there is any part of that individual's criminal history that would disqualify them from employment in accordance with the Caregivers Criminal History Screening Act and Rule. If there is an item in their criminal history that meets the threshold determined by the CCSHP dis-

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<sup>69</sup> See Appendix D for list of long-term care settings in New Mexico's Background Check Pilot Program Final Report.

qualification list<sup>70</sup> then a disqualification letter is sent to the direct care worker and the care provider facility. If the item does not meet the threshold, it was updated in the CCHSP database and processed for clearance.

The third stage of the criminal background check, administrative reconsideration, is the appeals process. If an applicant is sent a disqualification letter by the CCHSP, they can request that their employment fitness determination be reconsidered. The applicant is required to submit all supporting documents and may be requested to provide additional material if the reconsideration committee deems it necessary.

#### RESULTS

Between April 2005 and June 2007, New Mexico processed 13,145 applications and excluded 649 health care applicants (2 percent) because they had criminal backgrounds which included disqualifying crimes. One of the major successes of the pilot was identified as the substantial improvement in compliance by care provider agencies. New Mexico found that using resources to train, assist, and inform in the beginning of the background check process is a better use of resources than trying to fix problems as they arise during the process. New Mexico's background check process is budget-neutral to the state. The state paid for the background checks by charging the long-term care providers an application fee.

#### POST-PILOT

After the pilot ended, New Mexico continued the background check program for the long-term care settings identified in the pilot as well as the facilities identified in the 1999 Caregivers Criminal Screening Act. In addition, New Mexico began screening general acute care hospitals. Post-Pilot, New Mexico also expanded the types of caregivers to include students who participate in clinical practicum trainings in both long-term care and general acute care (and meet the caregiver definition) as well as a select number of volunteers.

New Mexico has plans to improve the current IT system to allow providers to submit applications electronically now that the New Mexico Department of Public Safety has the capability to accept and match electronic fingerprints in their state repository. This process will allow CCHSP to end its current labor intensive process and reduce processing time.

#### WISCONSIN

##### **Wisconsin CMS Background Check Pilot Program for Long-Term Care Workers**

**Grant award: \$1,500,000**

**Abuse prevention training program award<sup>71</sup>: \$1,500,000**

**Administering State Agency: Department of Health and Family Services**

<sup>70</sup>New Mexico's list of disqualifying crimes is included in their final report which can be found in Appendix D.

<sup>71</sup>Michigan, Alaska, and Wisconsin were awarded additional funds to create a deliver a comprehensive adult abuse and neglect prevention-training program for employees and managers of long-term care settings.

Prior to participating in the CMS Background Check Pilot Program, Wisconsin lacked an automated system that utilized fingerprint-based background checks for long-term care employees. They used the pilot funds to test the feasibility of establishing a more comprehensive approach to screening applicants for jobs in the state's long-term care sector. Specifically, they enhanced their existing name-based criminal background check system by adding a fingerprint-based background check program.

Beginning in February 2006, Wisconsin received \$1.5 million to cover fingerprint-based background checks in four counties: Dane, Kenosha, La Crosse, and Shawano. These four counties were chosen to represent specific populations, communities, and trends that exist within Wisconsin—rural and urban settings, rapid and slow growth populations, border counties with high interstate movement, and a variety of commuting patterns.

The Pilot required providers to have background checks for prospective employees in long-term care settings, including skilled nursing facilities; nursing facilities; intermediate care facilities for persons with mental retardation; home health agencies; long-term care hospitals; hospitals with swing beds; hospice providers; personal care agencies approved by the Medicaid program; and community-based residential facilities with at least nine beds. The state trained these providers in procedures for conducting coordinated registry checks and criminal history checks, using both the state's name-based system and state and federal fingerprint-based checks. Records were searched in the following registries: Office of the Inspector General List of Excluded Individuals and Entities, Wisconsin Nurse Aide Registry, and Nurse Aide Registries in other states if the applicant had lived in another state. If the applicant had a finding in any of the above registries, he or she was denied employment and the background check ended. If the applicant passed the registry review, fingerprint scans were sent to the Wisconsin Department of Justice which simultaneously searched the state fingerprint database and forwarded the prints to the FBI for a federal fingerprint search and the Department of Health and Family Services for an Integrated Background Check Information System Check.

Wisconsin employers have long been accustomed to requesting and receiving full criminal history information on applicants—including the actual “rap sheets” that are maintained by law enforcement agencies, since Wisconsin is an open-record state, which means that criminal records are accessible to the public. Because of this, Wisconsin employers are more accustomed to making “fitness determinations” about crimes that are not automatically disqualifying under state and federal law, but which the provider may or may not deem sufficiently serious to exclude an applicant.<sup>72</sup> State officials also believe that employers are sufficiently well-informed to use background check information appropriately for making decisions about an individuals' suitability for employment.

State officials indicated that they did not have concerns about long-term care providers receiving applicants' criminal information directly and making fitness determinations. State officials argue

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<sup>72</sup> Wisconsin's list of disqualifying crimes is included in Appendix B.

that there are minimal confidentiality risks in allowing providers to receive sensitive criminal history information on individuals as long as they observe proper security procedures for handling and storing this information. The Wisconsin Department of Justice conducts periodic audits to review security procedures used by providers.

#### RESULTS

Overall, Wisconsin's pilot program screened 14,748 applicants and disqualified 640 applicants based on a disqualifying criminal history finding (4.3 percent). Most long-term care workers who were disqualified due to their background check results were disqualified before the fingerprint background check. The staged pilot process allowed employers to stop the process as soon as any disqualifying information was found. Many employers indicated that they will continue the up-front free registry searches post-pilot.

Wisconsin officials reported that the overall results of the pilot verify the effectiveness of Caregiver Law requirements. Wisconsin's process is straightforward. The state's Offenses List is relatively short and the conditions apply to everyone the same way—all the crimes result in lifetime bans unless the person completes a Rehabilitation Review. Anomalies are handled on a case-by-case basis. This is a more effective process than establishing different time lines for different offenses. No records need to be kept at the state level regarding where individuals are employed and the state agency does not need to keep copies of fingerprints or background check results.<sup>73</sup>

Many of the participating employers indicated they appreciated acquiring criminal history information through the FBI fingerprint-based background check, which eliminated the need to track down out-of-state results for caregivers who have lived outside of Wisconsin. They also said that overall the pilot provided a measure of increased assurance for long-term care employers that their employees did not have a history of committing abuse, neglect, or stealing client property. The state's automated system developed during the pilot, decreased turnaround time for fingerprint-based background checks to between 24 and 48 hours for those submitted electronically.

#### POST-PILOT

Wisconsin has required background checks for caregivers working in regulated healthcare and daycare settings since 1998 and supports a requirement for all caregivers nationwide to undergo a thorough background check. After the pilot, they have continued their background check program.

#### ABUSE PREVENTION TRAINING PROGRAM

Wisconsin was one of three states to receive additional funding to develop and provide innovative abuse and neglect prevention

<sup>73</sup>The Wisconsin Pilot program did not attempt to assess the value of a "rap back" system, in which fingerprint records are retained in a state-administered database so that individuals who have been checked and cleared once do not have to be re-fingerprinted each time they change jobs.

training for Wisconsin's direct caregivers. Wisconsin's experience with the Abuse and Neglect Prevention pilot project demonstrated a critical need for direct caregivers, especially those who are non-credentialed, to receive training that offers the behavioral and interpersonal skills to respond positively in potentially abusive situations. Wisconsin's efforts to provide meaningful training to direct caregivers and their supervisors and managers received an extremely positive response. The response was so great, and the need for training resources was so clear, that the Department identified additional funding to continue training through 2008.

# APPENDIX

**Appendix A: Glossary of Background Check Databases**  
Selected Federal Background Check Databases

Name	Description	Source
FBI Integrated Automated Fingerprint Identification System (IAFIS)	IAFIS is a national database that links fingerprint records to a criminal history system maintained by the Criminal Justice Information Services (CJIS) Division of the Federal Bureau of Investigation (FBI). Fifty-five million subjects are included in the IAFIS Criminal Master File, which is compiled from voluntary submissions from federal, state and local law enforcement agencies. As an electronic database, it is available 365 days a year and agencies can receive responses within 24 hours for civil fingerprint submissions. For background checks in civil cases, however, a small fee is charged.	<a href="http://www.fbi.gov/hq/cjis/iafis.htm">http://www.fbi.gov/hq/cjis/iafis.htm</a>
National Crime Information Center (NCIC)	NCIC is a national database of criminal record history information, current fugitives, stolen property and other criminal justice information. The data in NCIC is provided by the FBI, authorized courts and Federal, state and local law enforcement agencies. NCIC is normally only available to law enforcement agencies, and outside requests must be made through a law enforcement agency that has access to NCIC.	<a href="http://www.fas.org/irp/agency/dof/bi/is/ncic.htm">http://www.fas.org/irp/agency/dof/bi/is/ncic.htm</a>
National Sex Offender Registry (NSOR)	The Dru Sjodin National Sex Offender Public Registry (NSOR) is a national online registry coordinated by the Department of Justice that compiles results from state-based public sex offender registries. This database includes all 50 states, the District of Columbia, Guam and Puerto Rico, but the specific criteria for searching and the criteria for qualifying crimes varies by state. As an online public database, instant searching is available free of charge.	<a href="http://www.nsopt.gov/">http://www.nsopt.gov/</a>
Office of Inspector General (OIG) exclusion list	The OIG exclusion list is a federal list of individuals who have been convicted for prior patient abuse, program-related fraud, licensing board actions and default on Health Education Assistance Loans. Section 1128 and 1156 of the Social Security Act mandate that individuals on the OIG list can not be hired by federally-funded health care programs. The database is available online and searchable by the general public for free.	<a href="http://www.oig.hhs.gov/frand/exclusion/aboutexclusions.html">http://www.oig.hhs.gov/frand/exclusion/aboutexclusions.html</a>

## Selected State-based Registries

Name	Description	Source
Alaska Centralized Registry (employee misconduct registry)	The Centralized Registry, also called the Employee Misconduct Registry, is an Alaska-wide registry of persons who have been investigated and found guilty by a state investigator for abuse, neglect and/or exploitation. For a set fee, the Alaska Background Check Program will search APSIN, JOMIS, the Employee Misconduct Registry and other databases at once.	<a href="http://www.hss.state.ak.us/dph/CL/bgc/heck/FAQ.htm">http://www.hss.state.ak.us/dph/CL/bgc/heck/FAQ.htm</a>
Alaska Juvenile Offender Management Information System (JOMIS)	JOMIS is the primary database for juvenile offense history records in the state of Alaska. JOMIS is separate from the Alaska database of adult criminal records, but for a set fee, the Alaska Background Check Program will search APSIN, JOMIS, the Employee Misconduct Registry and other databases at once.	<a href="http://www.hss.state.ak.us/dph/CL/bgc/heck/FAQ.htm">http://www.hss.state.ak.us/dph/CL/bgc/heck/FAQ.htm</a>
Alaska Public Safety Network (APSIN)	APSIN is an integrated criminal justice information system for the state of Alaska. In addition to serving as a repository for Alaska criminal histories, Alaska Department of Motor Vehicle Records and other information, APSIN also provides access to federal law enforcement resources, such as NCIC (National Crime Information Center), NLETS (National Law enforcement Telecommunications System), III (Interstate Identification Index) and others. APSIN is primarily designed for local law enforcement agencies, but it can also be used for background checks and other non-criminal justice uses as part of the Alaska Background Check Program.	<a href="http://www.dps.state.ak.us/Statewide/ap sin/whatisaps in.aspx">http://www.dps.state.ak.us/Statewide/ap sin/whatisaps in.aspx</a>
Idaho Bureau of Criminal Identification (BCI)	BCI is a repository of Idaho's criminal records, fingerprints and crime statistics and provides access to these data through an electronic database, the Idaho Public Safety and Security System, known as ILETs. BCI primarily serves the criminal justice community, but it also serves the general public. Background checks through the Bureau of Criminal Identification are supported by fees.	<a href="http://www.idsp.state.id.us/identification/">http://www.idsp.state.id.us/identification/</a>
Idaho transportation department driving records	Idaho transportation department driving records include a history of motor vehicle violations, license suspensions and other details about an individual's driving history. Driving record information can be accessed online by individuals or businesses for a small fee.	<a href="http://www.dmv.org/idaho/driving-records.php">http://www.dmv.org/idaho/driving-records.php</a>

<b>Name</b>	<b>Description</b>	<b>Source</b>
Illinois Database of Current Inmates	The Illinois Department of Corrections maintains a list of inmates that are currently incarcerated or on parole. This database is searchable for free online by name, date of birth or Illinois Department of Correction (IDOC) number.	<a href="http://www.idoc.state.il.us/subsections/search/default.asp">http://www.idoc.state.il.us/subsections/search/default.asp</a>
Michigan Internet Criminal History Access Tool (ICHAT)	ICHAT is an online database that includes public criminal records in the state of Michigan. Felonies and serious misdemeanors punishable by over 93 days are included in the database, but suppressed records and warrant information are not included publicly. Anyone can request a search through ICHAT, but a fee is charged for each public search.	<a href="http://apps.michigan.gov/ichat/home.aspx">http://apps.michigan.gov/ichat/home.aspx</a>
Michigan Offender Tracking Information System (OTIS)	OTIS is an online database of offenders who are or have been under the jurisdiction or supervision of the Michigan Department of Corrections within the last three years from the date of search. The database allows individuals to search by name, age, race, marks/ tattoos and/or MDOC number. The general public can access this database for free online.	<a href="http://www.state.mi.us/mdoc/asp/otis2.html">http://www.state.mi.us/mdoc/asp/otis2.html</a>
New Mexico Central Repository for Criminal History	The New Mexico State Central Repository for Criminal History maintains a database of information on persons arrested felony, DWI and misdemeanor offenses punishable by six months or more imprisonment. These data are linked with fingerprint records taken at the time of arrest. This information is available in non-criminal cases for a small fee.	<a href="http://www.dps.nm.org/law/enforcement/records.php">http://www.dps.nm.org/law/enforcement/records.php</a>
New Mexico Employee Abuse Registry	The Employee abuse registry is a state-mandated listing of employees with substantiated registry-referred abuse, neglect or exploitation. This registry became effective in 2006 and allows an opportunity for individuals with records of substantiated abuse to have an opportunity for a hearing before being included on the registry.	<a href="http://dhi.health.state.nm.us/eilibrary/NewsItems/EAR_Rule.pdf">http://dhi.health.state.nm.us/eilibrary/NewsItems/EAR_Rule.pdf</a>

<b>Name</b>	<b>Description</b>	<b>Source</b>
Certified Nurse Aide Registry	Nurse aide registries are state-based databases of all individuals who are registered to work as a nurse aide in that state and all individuals who have been prohibited from employment due to prior substantiated findings of abuse, neglect or misappropriation of property. Federal regulations (42 CFR § 483.156) require that each state and the District of Columbia maintain a nurse aide registry, and long-term care settings are required to check their state nurse aide registry and the registries of other states that are believed to have any information before hiring new nurse aides. Searching online nurse aide registries is free, but there is currently no national database which requires states to check other nurse registries at once.	<a href="http://www.oig.hhs.gov/oei/reports/oei-07-04-00140.pdf">http://www.oig.hhs.gov/oei/reports/oei-07-04-00140.pdf</a>

## Appendix B: Disqualifying Crimes Matrix

<u>Lifetime Ban</u>	<u>ALASKA</u>	<u>NEW MEXICO</u>	<u>NEVADA</u>
	<p>Attempt to commit a crime if the crime attempted is murder in the first degree, unclassified felony other than murder in the first degree, class A, B, or C felony and is a barrier crime, class A or class B misdemeanor and is a barrier crime; solicitation to commit a crime if the crime solicited is murder in the first degree, unclassified felony other than murder in the first degree, a class A, B, or C felony and is a barrier crime; Conspiracy to commit a crime if the object of the conspiracy is murder in the first degree, a crime punishable as an unclassified felony other than murder in the first degree, or a crime punishable as a class A or B felony; Murder in the first or second degree; manslaughter; criminally negligent homicide; assault in the first, second, and third degrees; stalking in the first degree; kidnapping; crime involving domestic violence in the first degree; sexual assault in the first, second, third, or fourth degree; sexual assault of a minor in the first, second, third, or fourth degree; incest; online enticement of a minor; unlawful exploitation of a minor; indecent exposure in the first or second degree; robbery in the first or second degree; extortion; arson in the first and second degree; endangering the welfare of a child in the first degree if a Class B or C Felony or a Class A misdemeanor; endangering the welfare of a vulnerable adult in the first or second degrees; failure to register as a sex offender or child kidnapper in the first or second degrees; indecent viewing or photography if a Class C Felony or Class A Misdemeanor; distribution of child pornography if a Class A or B Felony; Possession of child pornography; electronic distribution of indecent material to a minor; promoting prostitution in the first, second, and third degrees if a Class A or B Felony and the person who was induced or cause to engage in prostitution was under 16 or 17 years of age at the time of the offense.</p>	<p>Homicide, trafficking, or trafficking in controlled substances; kidnapping, false imprisonment, aggravated assault or aggravated battery; rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure, or other related felony sexual offenses; crimes involving adult abuse, neglect, or financial exploitation; involving child abuse or neglect; involving robbery, larceny, burglary, fraud, forgery, embezzlement, credit card fraud, or receiving stolen property; an attempt, solicitation, or conspiracy involving any of the felonies in this subsection.</p>	<p>Murder, voluntary manslaughter, mayhem; assault with intent to kill or to commit sexual assault or mayhem; sexual assault, statutory sexual seduction, incest, lewdness, indecent exposure or any other sexually related crime; Abuse or neglect of a child or contributory delinquency; A violation of any provision of NRS 200.50955 or 200.5099, two statutes addressing elder abuse and neglect.</p>

<p><b><u>10 Years From the Date of Conviction*</u></b></p>	<p><b><u>ALASKA</u></b></p>	<p><b><u>NEW MEXICO</u></b></p>	<p><b><u>NEVADA</u></b></p>
	<p>Stalking in the first degree; theft in the first degree; issuing a bad check (if class B Felony); issuing a bad check if a Class B Felony; fraudulent use of an access device if a Class B Felony; burglary in the first degree; criminal mischief in the first and second degrees; forgery in the first degree; offering a false instrument for recording in the first degree; scheme to defraud; defrauding creditors if a Class B Felony; terroristic threatening in the first degree; manufacture or delivery of an imitation controlled substance in the first, second or third degrees; misconduct involving weapons in the first or second degrees; criminal possession of an explosive if a Class A or B Felony; promoting prostitution in the first degree if the person who was induced or cause to engage in prostitution was 18 years of age or older at the time of the offense; delivery of an imitation controlled substance to a minor; fraudulent or criminal insurance act if a Class B Felony; operating a vehicle, aircraft, or watercraft while intoxicated; refusal to submit to chemical tests.</p>		<p>Any violation of any federal or state law regulating the possession, distribution or use of any controlled substance or any dangerous drug as defined in chapter 454 of NRS; Any offense involving fraud, theft, embezzlement, burglary, robbery, fraudulent conversion or misappropriation of property; Any other felony involving the use of a firearm or other deadly weapon.</p>
<p><b><u>5 Years From the State of Conviction</u></b></p>	<p>Theft in the third degree; criminal trespass in the first degree; criminally negligent burning; criminal mischief in the fourth degree; forgery in the third degree; deceptive business practices if a Class A misdemeanor; criminal nonsupport if a Class A misdemeanor; violating protective order; interfering with a report of a crime involving domestic violence; criminal possession of explosives if a Class A misdemeanor.</p>		
<p><b><u>1 Year From the Date of Conviction</u></b></p>	<p>Criminal mischief in the fifth degree; unlawful contact in the first or second degrees; harassment</p>		

<u>Lifetime Ban</u>	<u>ILLINOIS</u>	<u>MICHIGAN**</u>
	<p>Solicitation of Murder; Class; Solicitation of Murder for Hire; First Degree Murder; Intentional Homicide of an Unborn Child; Second Degree Murder; Voluntary Manslaughter of an Unborn Child; Involuntary Manslaughter and Reckless Homicide; Concealment of Homicidal Death; Involuntary Manslaughter and Reckless Homicide of an Unborn Child; Drug Induced Homicide; Kidnapping; Aggravated Kidnapping; Indecent Solicitation of a Child; Sexual Exploitation of a Child; Exploitation of a Child; Child Pornography; Aggravated Domestic Battery; Aggravated Battery; Heinous Battery; Aggravated Battery With a Firearm; Aggravated Battery With a Machine Gun, et al.; Aggravated Battery of a Child; Aggravated Battery of an Unborn Child; Aggravated Battery of a Senior Citizen; Drug Induced Infliction of Great Bodily Harm; Criminal Sexual Assault ; Aggravated Criminal Sexual Assault; Predatory Criminal Sexual Assault of a Child; Criminal Sexual Abuse; Aggravated Criminal Sexual Assault; Abuse/Gross Neglect of a LTC Facility Resident; Criminal Neglect of an Elderly/Disabled Person; Financial Exploitation of an Elderly/Disabled Person; Armed robbery; Aggravated Vehicular Hijacking; Aggravated Robbery.</p>	<p>Felonies related to manufacture, distribution, prescription or dispensing of a controlled substance after August 21, 1996; Felony or misdemeanor patient abuse; Felony health care fraud; Ever found not guilty by reason of insanity; Ever had a finding of abuse, neglect, or misappropriation of property in a nursing facility (not-criminal findings).</p>
<p><u>10 Years from the Date of Conviction*</u></p>		<p>Misdemeanors involving the use or threat of violence; Misdemeanors involving the use of a firearm or dangerous weapon; Misdemeanors involving abuse of vulnerable adults, eg. Misdemeanor elder abuse; Misdemeanor criminal sexual conduct (4th degree); Misdemeanor involving cruelty or torture; Misdemeanor involving abuse or neglect).</p>

<b>5 Years from the Date of Conviction</b>	<b>ILLINOIS</b>	<b>MICHIGAN**</b>
<p>Forcible Detention; Battery of an Unborn Child; Tampering with Food, Drugs or Cosmetics; Aggravated Stalking; Home Invasion; Ritual Mutilation; Ritual Abuse of a Child; Financial Identity Theft; Aggravated Financial Identity Theft; Forgery; Robbery; Vehicular Hijacking; Burglary; Residential Burglary; Arson; Aggravated Arson; Residential Arson; Unlawful Use of a Weapon by a Felon; Aggravated Discharge of a Firearm; Aggravated Discharge of a Machine Gun; Unlawful Discharge of a Firearm; Projectiles; Armed Violence; Permitting sexual abuse of a child; Cannabis Trafficking; Delivery to Person Under 18; Calculated Criminal Cannabis Conspiracy; Manufacture of Controlled/Counterfeit Substance Controlled Substance Analog; Controlled Substance Trafficking; Look-alike Substances; Calculated Criminal Drug Conspiracy; Element of the Offense; Delivery to a Person Under 18/Violations at School, Public Housing, Public Park; Employing Person Under 18 to Deliver Substance; Aggravated Unlawful Use of a Weapon; Unlawful Sale or Delivery of Firearms on the Premises of any School; Theft; Unlawful Use of a Weapon if a Felony; Manufacture, Delivery, or Possession With Intent to Deliver/Manufacture if a Felony; Delivery of Cannabis on School Grounds if a Felony; Endangering the Life or Health of a Child if a Felony; Offense of Retail Theft; Domestic Battery; Unlawful Restraint; Aggravated Unlawful Restraint; Child Abduction; Aiding and Abetting Child Abduction; Reckless Discharge of a Firearm; Receiving Stolen Credit Cards or Debit Cards; Receiving a Credit or Debit Card with Intent to Use, Sell, or Transfer; Selling or Buying a Credit Card; Using a Credit or Debit Card With the Intent to Defraud; Altering an Electronic Transmission With the Intent to Defraud; Criminal Jurisprudence Act; Wrongs to Children Act; Aggravated Assault.</p>	<p>Misdemeanor involving cruelty if committed by an individual under the age of 16; Misdemeanor home invasion, e.g. misdemeanor breaking and entering; Misdemeanor embezzlement; Misdemeanor negligent homicide; Most misdemeanor theft offenses; Retail fraud (shoplifting) in the 2nd degree; Certain misdemeanor controlled substance offenses; Most misdemeanors involving fraud.</p>	<p>Misdemeanor assaults; Retail fraud (shoplifting) in the 3rd degree; Most misdemeanors involving creation, delivery, possession or use of a controlled substance.</p>
<p><b>1 Year from the Date of Conviction</b></p>	<p>Unlawful Use of a Weapon if a Misdemeanor; Manufacture, Delivery, or Possession With Intent to Deliver/Manufacture if a misdemeanor; Delivery of Cannabis on School Grounds if a misdemeanor; Endangering the Life or Health of a Child if a misdemeanor; Aggravated Assault if a misdemeanor; Criminal Trespass to Residence; Pretending to be a Nurse; Assault; Battery; Theft or mislaid property.</p>	

**Lifetime Ban**

**IDAHO**

Abuse, neglect, or exploitation of a vulnerable adult. Aggravated, first-degree and second-degree arson, Crimes against nature, Forcible sexual penetration by use of a foreign object, Incest, Injury to a child, felony or misdemeanor; Kidnapping, Lewd conduct with a minor, Mayhem, Murder in any degree, voluntary manslaughter, assault, or battery with intent to commit a serious felony, Poisoning, Possession of sexually exploitative material, Rape, Robbery, Felony stalking, Sale or barter of a child, Sexual abuse or exploitation of a child, Video voyeurism, Enticing of children, Inducing individuals under eighteen (18) years of age into prostitution or patronizing a prostitute, Any felony punishable by death or life imprisonment; Attempt, conspiracy, or accessory after the fact.

**WISCONSIN**

First degree intentional homicide; 1st degree reckless homicide; Felony murder; 2nd degree intentional homicide; Assisting suicide; Battery (felony); Sexual exploitation by therapist, duty to report; 1st, 2nd, or 3rd degree sexual assault; Abuse of vulnerable adults (misdemeanor or felony); Abuse of residents of a penal facility; Abuse or neglect of patients & residents (misdemeanor or felony); 1st or 2nd degree sexual assault of a child; Repeated acts of sexual assault of same child; Physical abuse of a child – intentional causation of bodily harm; Sexual exploitation of a child; Causing a child to view or listen to sexual activity; Incest with a child; Child enticement; Soliciting a child for prostitution; Exposing child to harmful material or harmful descriptions or narrations; Possession of child pornography; Child sex offender working with children; Neglect of a child – resulting in death (felony); Abduction of another's child; constructive custody; Finding by a governmental agency of neglect or abuse of a client, or of misappropriation of a client's property; Finding by a governmental agency of child abuse or neglect.

	<u>IDAHO</u>	<u>WISCONSIN</u>
<u>10 Years from the Date of Conviction*</u>		
<u>5 Years from the Date of Conviction</u>	Aggravated assault, Aggravated battery, Arson in the third degree, Burglary, A felony involving a controlled substance; Felony theft, Forgery of and fraudulent use of a financial transaction card, Forgery and counterfeiting, Grand theft, Insurance fraud, Public assistance fraud, Attempt, conspiracy, accessory after the fact, or aiding and abetting.	
<u>1 Year from the Date of Conviction</u>		

NOTES

\*For Nevada and Illinois, the time limit is 7 years.

\*\*In addition to the time-limited bans from the point of conviction, Michigan also imposes time-limited bans for certain crimes following completion of parole or probation.

Disqualifying crimes that trigger a 15-year ban on employment in long-term care facilities following completion of parole or probation are:

- Felonies involving the use or threat of violence, e.g. felonious assault; Felonies that result in, or were intended to result in, death or serious injury, e.g. assault with intent to do great bodily injury (including 1<sup>st</sup> degree murder, assault, assault against a family member or family independence agency employee, assault and battery, opposing someone performing duty); Felonies involving cruelty or torture; Felonies involving abuse of vulnerable adults, e.g. elder abuse; Felonies criminal sexual conduct (1<sup>st</sup>, 2<sup>nd</sup>, or 3<sup>rd</sup> degree); involving abuse or neglect, e.g. child abuse; involving the use of a firearm or dangerous weapon, e.g. armed robbery; involving the diversion or adulteration of medication, e.g. forging drug prescriptions.

Disqualifying crimes that trigger a 10-year ban after completion of parole or probation include:

- Other felonies not subject to the 15-year ban (see bullet above) or felonies listed in the matrix, which trigger either permanent or time-limited bans from the point of conviction. Felonies include larceny from a person, stealing the firearm from another person; larceny of money goods or chattel; bank note; bond; promissory note; due bill; bill of exchange; larceny from a motor vehicle; breaking and entering a coin-operated telephone; 1<sup>st</sup> degree retail fraud.

## Appendix C: Section 307 of the MMA

MMA of 2003

SEC. 307. <<NOTE: 42 USC 1395aa note.>> PILOT PROGRAM FOR NATIONAL AND STATE BACKGROUND CHECKS ON DIRECT PATIENT ACCESS EMPLOYEES OF LONG-TERM CARE SETTINGS OR PROVIDERS.

- (a) Authority To Conduct Program.--The Secretary, in consultation with the Attorney General, shall establish a pilot program to identify efficient, effective, and economical procedures for long term care facilities or providers to conduct background checks on prospective direct patient access employees.
- (b) Requirements.--
  - (1) In general.--Under the pilot program, a long-term care facility or provider in a participating State, prior to employing a direct patient access employee that is first hired on or after the commencement date of the pilot program in the State, shall conduct a background check on the employee in accordance with such procedures as the participating State shall establish.
  - (2) Procedures.--
    - (A) In general.--The procedures established by a participating State under paragraph (1) should be designed to--
      - (i) give a prospective direct access patient employee notice that the long-term care facility or provider is required to perform background checks with respect to new employees;
      - (ii) require, as a condition of employment, that the employee--
        - (I) provide a written statement disclosing any disqualifying information;
        - (II) provide a statement signed by the employee authorizing the facility to request national and State criminal history background checks;
        - (III) provide the facility with a rolled set of the employee's fingerprints; and
        - (IV) provide any other identification information the participating State may require;
      - (iii) require the facility or provider to check any available registries that would be likely to contain disqualifying information about a prospective employee of a long-term care facility or provider; and
      - (iv) permit the facility or provider to obtain State and national criminal history background checks on the prospective employee through a 10-fingerprint check that utilizes State criminal records and the Integrated Automated Fingerprint Identification System of the Federal Bureau of Investigation.
    - (B) Elimination of unnecessary checks.--The procedures established by participating State under paragraph
      - (1) shall permit a long-term care facility or provider to terminate the background check at any stage at which the facility or provider obtains disqualifying information regarding a prospective direct patient access employee.

## (3) Prohibition on hiring of abusive workers.--

(A) In general.--A long-term care facility or provider may not knowingly employ any direct patient access employee who has any disqualifying information.

## (B) Provisional employment.--

(i) In general.--Under the pilot program, a participating State may permit a long-term care facility or provider to provide for a provisional period employment for a direct patient access employee pending completion of a background check, subject to such supervision during the employee's provisional period of employment as the participating State determines appropriate.

(ii) Special consideration for certain facilities and providers.--In determining what constitutes appropriate supervision of a provisional employee, a participating State shall take into account cost or other burdens that would be imposed on small rural long-term care settings or providers, as well as the nature of care delivered by such facilities or providers that are home health agencies or providers of hospice care.

## (4) Use of information; immunity from liability.--

(A) Use of information.--A participating State shall ensure that a long-term care facility or provider that obtains information about a direct patient access employee pursuant to a background check uses such information only for the purpose of determining the suitability of the employee for employment.

(B) Immunity from liability.--A participating State shall ensure that a long-term care facility or provider that, in denying employment for an individual selected for hire as a direct patient access employee (including during any period of provisional employment), reasonably relies upon information obtained through a background check of the individual, shall not be liable in any action brought by the individual based on the employment determination resulting from the information.

(5) Agreements with employment agencies.--A participating State may establish procedures for facilitating the conduct of background checks on prospective direct patient access employees that are hired by a long-term care facility or provider through an employment agency (including a temporary employment agency).

(6) Penalties.--A participating State may impose such penalties as the State determines appropriate to enforce the requirements of the pilot program conducted in that State.

## (c) Participating States.--

(1) In general.--The &lt;&lt;NOTE: Contracts.&gt;&gt; Secretary shall enter into agreements with not more than 10 States to conduct the pilot program under this section in such States.

(2) Requirements for states.--An agreement entered into under paragraph (1) shall require that a participating State--

(A) be responsible for monitoring compliance with the requirements of the pilot program;

(B) have procedures by which a provisional employee or an employee may appeal or dispute the accuracy of the information obtained in a background check performed under the pilot program; and

(C) agree to—

- (i) review the results of any State or national criminal history background checks conducted regarding a prospective direct patient access employee to determine whether the employee has any conviction for a relevant crime;
  - (ii) immediately report to the entity that requested the criminal history background checks the results of such review; and
  - (iii) in the case of an employee with a conviction for a relevant crime that is subject to reporting under section 1128E of the Social Security Act (42 U.S.C. 1320a-7e), report the existence of such conviction to the database established under that section.
- (3) Application and selection criteria.--
- (A) Application.--A State seeking to participate in the pilot program established under this section, shall submit an application to the Secretary containing such information and at such time as the Secretary may specify.
  - (B) Selection criteria.--
    - (i) In general.--In selecting States to participate in the pilot program, the Secretary shall establish criteria to ensure--
      - (I) geographic diversity;
      - (II) the inclusion of a variety of long-term care settings or providers;
      - (III) the evaluation of a variety of payment mechanisms for covering the costs of conducting the background checks required under the pilot program; and
      - (IV) the evaluation of a variety of penalties (monetary and otherwise) used by participating States to enforce the requirements of the pilot program in such States.
    - (ii) Additional criteria.--The Secretary shall, to the greatest extent practicable, select States to participate in the pilot program in accordance with the following:
      - (I) At least one participating State should permit long-term care settings or providers to provide for a provisional period of employment pending completion of a background check and at least one such State should not permit such a period of employment.
      - (II) At least one participating State should establish procedures under which employment agencies (including temporary employment agencies) may contact the State directly to conduct background checks on prospective direct patient access employees.
      - (III) At least one participating State should include patient abuse prevention training (including behavior training and interventions) for managers and employees of long-term care settings and providers as part of the pilot program conducted in that State.
    - (iii) Inclusion of states with existing programs.--Nothing in this section shall be construed as prohibiting any State which, as of the date of the enactment of this Act, has procedures for conducting background checks on behalf of any entity described in subsection (g)(5) from being selected to participate in the pilot program conducted under this section.
- (d) Payments.--Of the amounts made available under subsection (f) to conduct the pilot

program under this section, the Secretary shall--

- (1) make payments to participating States for the costs of conducting the pilot program in such States; and
- (2) reserve up to 4 percent of such amounts to conduct the evaluation required under subsection (e).

- (e) <<NOTE: Grants. Contracts.>> Evaluation.--The Secretary, in consultation with the Attorney General, shall conduct by grant, contract, or interagency agreement an evaluation of the pilot program conducted under this section. Such evaluation shall--
- (1) review the various procedures implemented by participating States for long-term care facilities or providers to conduct background checks of direct patient access employees and identify the most efficient, effective, and economical procedures for conducting such background checks;
  - (2) assess the costs of conducting such background checks (including start-up and administrative costs);
  - (3) consider the benefits and problems associated with requiring employees or facilities or providers to pay the costs of conducting such background checks;
  - (4) consider whether the costs of conducting such background checks should be allocated between the Medicare and Medicaid programs and if so, identify an equitable methodology for doing so;
  - (5) determine the extent to which conducting such background checks leads to any unintended consequences, including a reduction in the available workforce for such facilities or providers;
  - (6) review forms used by participating States in order to develop, in consultation with the Attorney General, a model form for such background checks;
  - (7) determine the effectiveness of background checks conducted by employment agencies; and
  - (8) recommend appropriate procedures and payment mechanisms for implementing a national criminal background check program for such facilities and providers.
- (f) Funding.--Out of any funds in the Treasury not otherwise appropriated, there are appropriated to the Secretary to carry out the pilot program under this section for the period of fiscal years 2004 through 2007, \$25,000,000.
- (g) Definitions.--In this section:
- (1) Conviction for a relevant crime.--The term "conviction for a relevant crime" means any Federal or State criminal conviction for--
    - (A) any offense described in section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7); and
    - (B) such other types of offenses as a participating State may specify for purposes of conducting the pilot program in such State.
  - (2) Disqualifying information.--The term "disqualifying information" means a conviction for a relevant crime or a finding of patient or resident abuse.
  - (3) Finding of patient or resident abuse.--The term "finding of patient or resident abuse" means any substantiated finding by a State agency under section 1819(g)(1)(C) or 1919(g)(1)(C) of the Social Security Act (42 U.S.C. 1395i-3(g)(1)(C), 1396r(g)(1)(C)) or a Federal agency that a direct patient access employee has committed--

- (A) an act of patient or resident abuse or neglect or a misappropriation of patient or resident property; or
  - (B) such other types of acts as a participating State may specify for purposes of conducting the pilot program in such State.
- (4) Direct patient access employee.--The term "direct patient access employee" means any individual (other than a volunteer) that has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider, as determined by a participating State for purposes of conducting the pilot program in such State.
- (5) Long-term care facility or provider.--
- (A) In general.--The term "long-term care facility or provider" means the following facilities or providers which receive payment for services under title XVIII or XIX of the Social Security Act:
    - (i) A skilled nursing facility (as defined in section 1819(a) of the Social Security Act) (42 U.S.C. 1395i-3(a)).
    - (ii) A nursing facility (as defined in section 1919(a) in such Act) (42 U.S.C. 1396r(a)).
    - (iii) A home health agency.
    - (iv) A provider of hospice care (as defined in section 1861(dd)(1) of such Act) (42 U.S.C. 1395x(dd)(1)).
    - (v) A long-term care hospital (as described in section 1886(d)(1)(B)(iv) of such Act) (42 U.S.C. 1395ww(d)(1)(B)(iv)).
    - (vi) A provider of personal care services.
    - (vii) A residential care provider that arranges for, or directly provides, long-term care services.
    - (viii) An intermediate care facility for the mentally retarded (as defined in section 1905(d) of such Act) (42 U.S.C. 1396d(d)).
  - (B) Additional facilities or providers.--During the first year in which a pilot program under this section is conducted in a participating State, the State may expand the list of facilities or providers under subparagraph (A) (on a phased-in basis or otherwise) to include such other facilities or providers of long-term care services under such titles as the participating State determines appropriate.
  - (C) Exceptions.--Such term does not include--
    - (i) any facility or entity that provides, or is a provider of, services described in subparagraph (A) that are exclusively provided to an individual pursuant to a self-directed arrangement that meets such requirements as the participating State may establish in accordance with guidance from the Secretary; or
    - (ii) any such arrangement that is obtained by a patient or resident functioning as an employer.
- (6) Participating state.--The term "participating State" means a State with an agreement under subsection (c)(1).

APPENDIX D - State Prepared Reports Submitted to CMS

ALASKA'S BACKGROUND CHECK PILOT PROGRAM  
FINAL REPORT

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State of Alaska  
Department of Health and Social Services  
Division of Public Health  
Certification & Licensing Section

CMS Pilot ID No. 11-P-93-40/0

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The statements contained in this report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare & Medicaid Services. The awardee assumes responsibility for the accuracy and completeness of the information contained in this report.

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### EXECUTIVE SUMMARY

Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003 directed the Secretary of Health and Human Services, in consultation with the Attorney General, to establish a pilot program to identify efficient, effective, and economical procedures to conduct background checks on prospective long-term care direct patient access employees.

This report summarizes the Background Check Pilot Program conducted by the State of Alaska from March 31, 2006 through September 30, 2007. The Pilot Program gave Alaska the opportunity to create a Background Check program not only to evaluate the effectiveness of such a program on long-term care facilities and to support the safety and welfare of all those receiving long term care services, but also to provide a centralized service for all programs subject to certification and licensing authority of the Department of Health and Social Services. Upon implementation of Alaska Statute 47.05.300-.390 in March, 2006, 860 licensed and certified Long Term Care entities and individual service providers became subject to Criminal History and Centralized Registry requirements. Data contained in this report relates to these facilities and the over 24,000 background check applications processed by the Background Check Unit during the pilot for individuals providing services in long-term care settings.

The main outcomes of the Alaska Background Check Program pilot are:

- Implementation of a more effective fingerprint-based criminal history records investigation and fitness determination program.
- Consistent implementation and application of criminal history and centralized registry standards across all Long-Term Care programs licensed or certified by the Department.
- Improved monitoring and enforcement of criminal history and centralized registry standards across all Long-Term Care programs licensed or certified by the Department.
- Implementation of a unique “flag” process that alerts the Background Check Unit of activity in the state criminal history repository of persons who are approved for and in Long-Term Care programs.
- Improved overall safety and security of vulnerable individuals in state licensed and certified Long-Term Care facilities and programs, and;
- Creation of a Background Check Unit that will continue to serve as the central program to process fingerprint-based criminal history checks for all entities and individuals who are required to become licensed or certified or who are eligible to receive payments from the Department. In addition to Long-Term Care programs, incorporating programs such as Child Care and Foster Homes and Group Homes into the Background Check Unit, creates a comprehensive program encompassing all individuals who provide care to Alaska’s vulnerable populations.

The CMS Background Check Pilot Program grant funds allowed Alaska to accelerate the implementation and consolidation of an effective and efficient finger-print based criminal history records investigation and fitness determination program. With the strong desire to improve the safety and security of individuals in out-of-home care settings, the State has been able to overcome obstacles and road blocks to reach pilot program goals and continues to improve and to explore further opportunities for consolidation and collaboration with other state agencies.

## INTRODUCTION

The Constitution of the State of Alaska, Article VII § 4-5, requires the legislature to provide for the public welfare and promote and protect the public health. The legislature has enacted statutes directing and authorizing the Alaska Department of Health and Social Services (DHSS), as an executive branch agency under Alaska Statutes (AS) 18.05.010 and 47.05.010 (Appendix A), to administer legislative appropriations and take appropriate action to facilitate services and protections for vulnerable children and adults in long-term care (LTC) programs.

To protect vulnerable individuals, DHSS requires facilities and programs to comply with LTC certification and licensing laws and regulations. These requirements mandate background checks and fitness determinations for those seeking employment with a LTC community or group living agency. These authorities were scattered throughout the statutes and administrative codes and contained provisions that were inconsistent and sometimes contradictory to one another.

On March 10, 2003, former Governor Murkowski directing a reorganization of the DHSS published Executive Order 108. The organizational restructuring placed many of the state's licensing and certification programs under DHSS. On July 1, 2004, a new Certification and Licensing Section was established in the DHSS, under the Division of Public Health (DPH). Section management immediately identified the need to standardize and consolidate the DHSS background investigative process.

Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003 directs the Secretary of Health and Human Services, in consultation with the Attorney General, to establish a pilot program to identify efficient, effective, and economical procedures to conduct background checks on prospective long-term care direct patient access employees. The Centers for Medicare and Medicaid Services (CMS) selected seven states to participate in the Background Check Pilot Program (Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin).

The State of Alaska was awarded \$3,400,000 in grant funds to implement the CMS Background Check Pilot Program on December 17, 2004. Since the grant ran concurrent with the State's restructuring, the grant award provided DHSS the ability to initiate a comprehensive overhaul to standardize LTC statutes and regulations for background check requirements across all state programs. Grant funding supported efforts to implement a more effective finger-print based criminal history records investigation and fitness determination program for LTC programs. In addition, the grant provided the opportunity for DHSS to lay the foundation for a program that will continue to serve as the central base to process fingerprint-based criminal history checks for all entities and individuals required by DHSS.

## PROGRAM DISCUSSION

Authorizing Legislation: Two key elements of Alaska's grant application stated that Alaska would create a single administrative unit to oversee all aspects of the background check program across divisional and program boundaries within DHSS and adopt uniform definitions and descriptions of disqualifying information applicable to all licensed and certified programs under the authority of DHSS. These two key elements fell in line with the restructuring of DHSS. On March 10, 2003, DHSS was given a directive to begin placing licensing and certification functions into one program under Division of Public Health and to create common statutes and regulations for those programs. While DHSS recognized it had sufficient statutory authority to regulate programs in Alaska, there were 19 different licensing and certification programs being administered under 12 different statutes and 15 different sets of regulations. Often, the requirements contained provisions that were inconsistent and sometimes contradictory.

To fulfill the elements of Executive Order 108, in support of the State's reorganization, and of the grant award, a new Certification & Licensing section was established in DHSS, Division of Public Health on July 1, 2004. As part of this section, the Background Check Unit (BCU) was created to serve as the central program for processing finger-print based criminal history checks. The BCU would become the Department's "clearing house" for all state required background checks.

A legislative initiative was begun to reframe and rewrite the health and welfare facility and program licensing laws and regulations. DHSS worked to consolidate licensing statutes and establish broad authority to adopt regulations to administer and oversee specific health and welfare facilities and programs. At the same time, a major effort was made to statutorily require fingerprint-based criminal history checks for entities and individuals required to be licensed or certified by DHSS or who were eligible to receive payments, in whole or in part, to provide for the health, safety, and welfare of persons who are served by the programs administered by DHSS.

On June 24, 2005, Senate Bill 125 was passed. This Bill enacted Alaska Statute 47.05.300-.390 relating to criminal history requirements and became effective March 1, 2006. On this date, all LTC facilities began processing fingerprint-based criminal history check applications through the BCU.

While Alaska succeeded in creating a statutory requirement for fingerprint-based criminal histories, it caused some challenges during this portion of the pilot program. The Alaska Statute is broad, does not create uniform definitions and only states general descriptions of disqualifying information, but did require DHSS to adopt regulations setting forth the uniform definitions and standards of barrier crimes and conditions in regulation.

Work on the new regulations was on-going, but background checks were simultaneously being conducted by the BCU staff who did not have a common set of regulations to review an individual's history against to make a fitness determination. BCU staff were charged with upholding the new statute and ensuring its consistent application and implementation.

At the same time, staff was faced with making a fitness determination on an individual's background check application that required reviewing 15 different sets of regulations. With so many different regulations involved, making initial fitness determinations were sometimes delayed.

The omnibus set of background check regulations (Appendix B) were adopted and became effective on February 9, 2007. This allowed all background check applications to be reviewed against the same barrier crime and condition requirements and ensured more consistent and uniform fitness determinations on individuals in contact with Alaska's vulnerable populations. This in turn enhanced overall background check determinations.

While the implementation of the regulations was to ensure a centralized, consistent implementation of the barrier crime and condition standards, the initial implementation did cause yet another challenge for the BCU. Prior to implementation of the BCU, Alaska did not have a database to monitor those who worked in LTC facilities or whether those employees had background checks. Even with a central database, it was impossible to know exactly how many individuals associated with LTC facilities were without a fingerprint-based criminal history checks; prior to the regulation's effective date, only employees new to a LTC facility were required to have a fingerprint-based criminal history check conducted by the BCU. Only those individuals who processed through the BCU were entered into the database. The new regulations not only required those individuals new to a LTC facility, but also any currently employed individual meeting certain criteria. Those currently employed individuals who did not have a fingerprint-based criminal history check or who had a fingerprint-based criminal history check dating back six years or more from the date of the implementation of the regulations, were required to have a background check. The regulations only allowed 60 days for those individuals to request a fingerprint-based check. With over 850 entities, the BCU was inundated with background check applications receiving as many as 4,000 in one day. This caused yet another delay in fitness determinations for employees.

While the BCU focused on LTC staff for the processing of fingerprint-based criminal history checks, programmatic delays relating to the adoption and implementation of regulations were created by the state attempting to encompass all licensed and certified entities under the one set of regulations. Although this was a major challenge for the BCU staff, it ultimately has had a positive outcome overall. Alaska's Background Check Program continues beyond the pilot with the framework and foundation having been laid ensuring a smoother future transition for state programs, service providers and entities coming into the BCU.

State Agency and Stakeholder Collaboration: Primary partnerships and collaboration involved state stakeholders to include the Department of Health and Social Services' Divisions of Public Health (DPH); Senior and Disabilities Services (DSDS); and Behavioral Health (DBH). These divisions are responsible for providing oversight to the LTC populations, ensuring that all background check requirements are met. Prior to the pilot these divisions were already working collaboratively to unify and standardize overall department regulations; thus, partnering was somewhat smoother for the BCU. The BCU also engaged the Department of Public Safety (DPS), of which already had a long standing partnership with DHSS.

During the first six months of the pilot program, it was clear a crucial obstacle to overcome was consolidating all LTC programs in order to implement the background check requirements consistently. BCU staff worked diligently to educate state oversight staff while at the same time providing education, direction and support to LTC consumers and providers. Early responses from the majority of those affected by the new processes were somewhat negative and support for the new policies and procedures were fraught with anxiety and some resistance.

Statewide meetings occurred through face to face gatherings, newsletters and teleconferences; not only with state staff, LTC providers and entities but also with associations affiliated with those services. Gradually, the BCU garnered participation from over 850 LTC entities, from the largest facility of over 300 beds and more than 400 employees, to a small Alaskan village provider with only 10 beds and less than 15 staff.

One of the state's most active associations, Alaska State Hospital and Nursing Home Association (ASHNA), was instrumental in forming an alliance with the state by ensuring open communication existed between their organization and the BCU throughout the pilot implementation. This partnership continues to enhance program policies and procedures. Eventually, mutual efforts and activities began to acquire and earn support for the implementation of the program through the operation of the BCU.

Negotiations were also initiated with other agencies upon which the pilot program had dependencies, such as DPS. DPS recognized the mandates of the background check process, including the timeline requirements, and actively worked to assure the necessary support for the Alaska Public Safety Information Network (APSIN) access and fingerprint handling were in place. Alaska Courts prepared a list of court events to be considered as part of the background review activity. The Alaska Board of Nursing agreed to expand the Nurse Aide Abuse Registry to include the other care giver types stipulated in the background check program.

As the pilot program concludes, work continues internally with our Department stakeholders that provide oversight to required entities. We have started negotiations with two additional divisions Office of Children Services (OCS) and Division of Public Assistance (DPA) for inclusion of their programs in the background check process which will add approximately 2,700 new entities by the end of the year. Earlier partnership with OCS, establishing an agreement in where they provide sites throughout rural Alaska for the mutual use of live scan equipment with LTC entities, have paved the way for a smooth transition into the BCU processes.

In addition to ongoing collaborative efforts, a "frequently asked questions" (FAQ) component was made available on the BCU website for providers and entities to further enhance understanding of the requirements and provide an opportunity for informational updates. Meetings continue with oversight agencies to ensure consistent compliance with these requirements and to discuss any issues or concerns, as applicable. Initial steps have been taken for the creation of the task force, comprised of state staff, service providers and consumers to review and improve the web based resources and tools.

Throughout the background check implementation process, the successes far outweighed the trials. Trusting relationships have been established with those providing the most vital care for the most vulnerable populations. Not only have those directly involved with the pilot been educated regarding the valuable resources available to ensure safety and well being of our LTC populace but the families have been assured procedures are now in place that will enhance the protection and welfare of their loved ones.

Description of state background check program:

Covered Providers and Employees: Alaska Statute 47.05.300-.390 apply to any individual or entity that is required by statute or regulation to be licensed or certified by the department or that is eligible to receive payments, in whole or in part, from the department to provide for the health, safety, and welfare of persons who are served by the programs administered by the department. Individual service providers, including public home care providers, providers of home and community-based waiver services, and case managers to coordinate community mental health services are also subject to this statute.

Alaska Administrative Code (7 AAC 10.900-.990) defines those who are subject to a fingerprint-based criminal history check, to include:

- an administrator or operator;
- an individual service provider;
- an employee, an independent contractor, an unsupervised volunteer, an officer, director, partner, member, or principal of the business organization that owns an entity or a board member if that individual has;
  - regular contact with recipients of services;
  - access to personal or financial records maintained by the entity or provider regarding recipients of services; or
  - control over or impact on the financial well-being of recipients of services, unless the only recipient whose financial well-being is affected is a
    - relative of the individual who has authorized that individual to make financial decisions for that relative;
    - recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or
    - recipient for whom a court has authorized that individual to make financial decisions;
- an individual who resides in a part of an entity, including a residence if services are provided in the residence, if the individual remains, or intends to remain, in the entity for 45 days or more, in total, in a 12-month period; or
- any other individual who is present in the entity and would have regular contact with recipients of services.
  - A criminal history check under 7 AAC 10.900 – 7 AAC 10.990 is not required for a recipient of services, unless that individual is also associated with the entity or individual service provider and provides services to other recipients.

While the framework of the BCU and the statutes and regulations apply to a variety of individuals and entity types, the unit focused on LTC programs and individuals associated with those entities. The pilot program involved over 850 facilities and over 24,000 background check applications.

Background Check Fees: In the early stages of the pilot program, the fee for processing a background check was \$59 per new application. This fee consists of a \$35 Alaska Department of Public Safety fingerprint processing fee and a \$24 Federal Bureau of Investigation fingerprint processing fee. When regulations became effective on February 9, 2007, a \$25 background check application fee was added by the BCU for a total of \$84 per new application. Fingerprint capture fees are not included. Rates for capturing fingerprints vary greatly around the state and range from \$0 - \$50 per set. The average cost in urban areas is \$35 per set.

Policies and Procedures: The BCU consists of two sub-units; the Data Unit and the Determination Unit. These units are responsible for ensuring procedures are implemented and internal policies met.

The Data Unit is responsible for:

- Entering hard copy background check applications into the database.
- Ensuring receipt of and database recording of signed Release of Information forms.
- Reconciling fees.
- The transferring of fingerprint cards to the DPS.
- The placement of individuals on and monitoring of the APSIN program, and;
- Mailing of eligibility determinations.

The Determination Unit is responsible for:

- Conducting registry and court records checks.
- The review of DPS and FBI fingerprint results for disqualifying information, and;
- Determining eligibility for association with a licensed or certified LTC facility.

The application and determination are generally completed using a two step process. A complete background check application consisting of a completed hard copy or an on-line application, a completed Release of Information and disclosure of criminal history form, two fingerprint cards, submitted via ink hard copy or through a Livescan system, and all applicable fees, is received by the Data Unit. At that point, all information is recorded in the database. The electronic case file is then ready for review by the Determination Unit.

The Determination Unit conducts a review to determine if a provisional authorization for association with a facility should be granted. This first step of the background check process consists of a registry and court records check from both Alaska and those states the individual has lived in for the past 10 years.

Records searched are, but are not limited to:

- **Alaska Public Safety Information Network (APSIN)** - APSIN serves as a central repository for Alaska criminal justice information. This information is also known as an "Interested Persons Report".

- **Alaska Court System/Court View and Name Index** - Provides civil and criminal case information and is used to assist in determination of disposition for cases in APSIN.
- **Juvenile Offender Management Information System (JOMIS)** – JOMIS is the primary repository for juvenile offense history records for the State of Alaska, Division of Juvenile Justice.
- **Centralized Registry (employee misconduct registry)** - Includes those persons which have been investigated by a state investigator for abuse, neglect and/or exploitation, found guilty of abuse, neglect, and/or exploitation, and due process has been provided. Alaska and other states (birth and residence) as applicable.
- **Certified Nurses Aide (CNA) Registry** – Professional registry listing those individuals certified to perform duties as a CNA. In some states, this registry also serves an abuse registry. Alaska and other states (birth and residence) as applicable.
- **National Sex Offender Registry (NSOR)**- The NSOR provides centralized access to registries from all 50 states, Guam, Puerto Rico and the District of Columbia.
- **Office of Inspector General (OIG)** - a database which provides information relating to parties excluded from participation in the Medicare, Medicaid and all Federal health care programs; and,
- **Any other records/registries the Department deems are applicable.**

After a review of this information, a fitness determination is made. When no disqualifying information is found, the Determination Unit posts a provisional authorization on the BCU website. This information may only be viewed by the entity with which the individual will be associated. It is then necessary for the entity to ensure fingerprint cards and all applicable fees are submitted to the BCU prior to submittal to DPS.

Upon receipt of state and FBI criminal history results, the results are reviewed to determine whether there is any criminal history. As applicable to the results, the Data Unit prepares and mails a final fitness determination letter to the individual, the employer, and the state having oversight of the entity. If the results show a criminal history record, the Determination Unit reviews the information to determine if the history contains disqualifying information. When it is verified the information is not disqualifying, the Data Unit completes the final fitness determination notice.

After a final fitness determination is made on an individual, replacing the provisional eligibility for association with a LTC facility, the individual's name is flagged in the APSIN program. This program alerts the BCU to an individual's new criminal activity on a real time basis. The Determination Unit reviews the alert to determine whether or not it presents a barrier to association with a LTC facility. No action is taken if the activity does not present a barrier. If disqualifying information is found after a review of any information submitted, or from an APSIN alert, the Data Unit sends a barrier notification letter to the individual, the entity with which the individual was to be associated, and to the state oversight agency.

Individuals who are found ineligible for association with a LTC facility have two options for review of the barrier determination. The first option is a request to the BCU for reconsideration of the determination. This, however, can only be requested if the individual believes the barrier information is incorrect or has additional information they can submit regarding the barrier. The

second option is to work with the entity they wish to become associated with to request a variance. The entity has the option to submit a variance request on behalf of the individual. The variance must contain all criminal history information, a rationale why the department should grant the variance and a plan to ensure the health and safety of individuals in care. If approved, the individual would be eligible for association with the LTC facility. If disapproved, the individual may request reconsideration of the variance denial from the Commissioner of DHSS.

Program Data: Prior to the establishment of the pilot program, there was no centralized background check processing being done by DHSS. Little, if any, data concerning background checks was maintained by the division oversight agencies.

The following provides the most significant data from Alaska's Background Check Pilot Program:

• Applications received	24,204
• Provisional Authorizations	19,918
• Final Authorizations	5,067
• Barred individuals	477
• Withdrawn applications	3,235
• APSIN monitored	3,038
• Variances requested	42
• Variances approved	31

The following is a representation of the general categories for which individuals have been barred from association with a LTC facility from April 1, 2006 through September 30, 2007:

GENERAL CATEGORY OF BARRIER CRIMES	APSIN Bars	DPS Bars	FBI Bars	Total Bars
Offenses Against the Person	266	8	9	283
Offenses Against Property	131	5	0	136
Offenses Against Family and Vulnerable Adults	29	1	1	31
Offenses Against Public Order	10	0	0	10
Offenses Against Public Administration	13	0	0	13
Misconduct Involving Controlled Substances	22	0	0	22
Attempt, Solicitation, and Conspiracy to Commit a Crime	13	0	1	14
OIG – Mandatory Exclusion	2	0	0	2
OIG – Permissive Exclusion	1	0	0	1
Other Crimes and Registry Barriers	43	0	1	44
Total Number of Barriers Identified	530	14	12	556

Program Implementation Issues: The administrative structure for the BCU includes:

- Project Director, responsible for the overall implementation of the pilot project. This position is currently the Administrator of the Certification & Licensing Section.
- Program Manager, providing both technical leadership and team management for the pilot project. The Program Manager also oversees program design, documentation, all deliverables, structure, and make up of the project.
- Regulation Technical Assistance Expert, responsible for providing technical assistance for regulatory and statutory development, as well as providing critical insight and expertise to the projects design team.
- BCU supervisor, the front line supervisor for the BCU, in charge of staffing needs and overall implementation of internal requirements.

There were three critical areas which affected program implementation. These areas include regulatory implementation, the creation of the state's database, and initial staffing issues. One of Alaska's biggest barriers circumventing a smooth transition to the background check program had to do with the regulatory implementation issues. Alaska's goal for the pilot program had always been to create a program that would extend and continue beyond the life of the pilot. While LTC was the focus, BCU staff were dealing with multiple sets of regulations which caused a lengthy delay in creating common definitions and descriptions of disqualifying information for LTC facilities. The delay also caused inconsistencies of eligibility for individuals associated with more than one facility type.

The drafting and implementation of one set of regulations for all affected individuals proved to be a lengthy and arduous process. In hind sight, taking smaller steps in the regulation process by drafting and implementing regulations specific to those individuals affected by the pilot program would have given a much stronger foundation upon which to build and eventually incorporate all other individuals into the background check process.

The impact of the implementation of the regulations also flooded the BCU with a large influx of applications for background checks with little transition time. The regulations required not only individuals new to a LTC facility to have a fingerprint based criminal history check, but also required individuals currently associated with a facility to submit an application within 60 days of implementation. The regulation did not apply to current employees whom previously had a fingerprint based check that was less than 6 years old. Because the majority of applicants required a fingerprint based check, this created a large influx of background check applications which overwhelmed the BCU staff and caused long delays in issuing provisional and final authorizations for employment. Individuals who were currently employed were not affected by the delay as they were permitted to continue employment during the background check process.

Another hurdle Alaska experienced related to the development and implementation of an electronic operating system that met the operational needs of both CMS and the State of Alaska. The lack of initial communication between the CMS IT technical assistance contractors and the

State's IT staff created a backlog of technical work essential for a successful database. This disconnect abruptly halted work on the database system during the development of the new program.

As work on the database resumed, the BCU continued to experience setbacks. This left the BCU's project with an incomplete operating system requiring many work-a-rounds from state IT staff and the manual recording of certain information. Alaska did work to obtain a state based IT contract to support and supplement the database, once the initial technical assistance through CMS ended. Work continues today towards a productive, efficient database system.

Critical staff issues set the project progress back several months during the second year into the project. The resignation of the initial project director and program manager had a devastating impact on the project and this stalled processes until those positions were filled. The break in leadership did not interrupt on-going BCU work, but the lack of management was apparent in attempting to maintain communication with the CMS pilot program contacts and in meeting the pilot requirements. The program is still regaining composure and a lesson well learned is the importance of consistent leadership, especially in managing a new program.

Information Technology (IT) Enhancements: Many IT enhancements have been accomplished during the pilot program. Not only does the BCU have the capability of receiving and transferring electronic fingerprints but the BCU has worked with Alaska's OCS to provide live scan fingerprint services in 23 rural communities (Appendix C). The state-supported system operates in accordance with a Memorandum of Agreement between the Division of Public Health and OCS in providing fingerprinting access to areas where little to no services were available. Most rural areas are accessible only by air, sea, snow machine, four wheeler or dog sled (Appendix D). Because of their statewide locations and involvement with local communities, OCS was chosen as the DHSS agency to implement the electronic fingerprinting service to rural Alaska. The Live Scan system utilizes a combination of vendor live scan services from urban areas and the department live scan services through OCS.

An unexpected outcome for Alaska's pilot was the creation of a database identifying those individuals associated with LTC facilities. This resource has proven to be a valuable asset. Real time criminal history monitoring, APSIN alerts, in conjunction with the database has allowed early detection and removal of individuals from facilities who are found to be threat to the health, safety and welfare of recipients in care.

Program costs and use of funds – The program use of the \$3,400,000 authorized for the Alaska CMS Background Check Pilot Program grant is shown below.

- 52 percent, \$1,771,621 Program Staff
- 13 percent, \$440,000 Indirect costs
- 13 percent, \$435,994 Rural Live Scan System
- 7 percent, \$249,517 Program infrastructure – equipment, supplies, etc
- 7 percent, \$205,810 Department core services
- 3 percent, \$95,000 State IT contractor database enhancements
- 2 percent, \$76,750 Legislation and regulation development – Professional services
- 2 percent, \$70,000 State IT database enhancements

- 1 percent, \$55,308 Travel and training

Actions to sustain the background check program -- The BCU, responsible for implementing the Department's background check program, has been made an organizational element of the Department and will be funded and staffed by the state upon completion of the CMS Background Check Pilot Program grant.

Future goals of the background check program are:

- To extend the background checks and fitness determinations processed by the BCU to all staff serving vulnerable populations in programs that are required by statute or regulation to be licensed or certified by DHSS or who are eligible to receive payments, in whole or in part, from the department;
- To develop and implement a comprehensive set of measurements and reports across all DHSS licensed and certified programs;
- To develop and implement electronic data interchange interfaces for submission and reporting fingerprint based background results; and
- Continued development of the background check information technology infrastructure to improve current services and meet future needs.

**Alaska Statute Title 47**  
**Article 3**  
**Criminal History; Registry**

**47.05.300. Applicability.** (a) The provisions of AS 47.05.310 - 47.05.390 apply to any individual or entity that is required by statute or regulation to be licensed or certified by the department or that is eligible to receive payments, in whole or in part, from the department to provide for the health, safety, and welfare of persons who are served by the programs administered by the department.

(b) Those individual service providers subject to AS 47.05.310 - 47.05.390 under (a) of this section include

- (1) public home care providers described in AS 47.05.017;
- (2) providers of home and community-based waiver services financed under AS 47.07.030(c); and
- (3) case managers to coordinate community mental health services under AS 47.30.530.

**47.05.310. Criminal history; criminal history check; compliance.** (a) If an individual has been charged with, convicted of, found not guilty by reason of insanity for, or adjudicated as a delinquent for, a crime that is inconsistent with the standards for licensure or certification established by the department by regulation, that individual may not own an entity, or be an officer, director, partner, member, or principal of the business organization that owns an entity. In addition, an entity may not

- (1) allow that individual to operate the entity;
- (2) hire or retain that individual at the entity as an employee, independent contractor, or unsupervised volunteer of the entity;
- (3) allow that individual to reside in the entity if not a recipient of services; or
- (4) allow that individual to be present in the entity if the individual would have regular contact with individuals who receive services from the entity, unless that individual is a family member of or visitor of an individual who receives services from the entity.

(b) The department may not issue or renew a license or a certification for an entity that is in violation of (a) of this section or that would be in violation based on the information received as part of the application process.

(c) The department may not issue or renew a license or certification for an entity if an individual is applying for a license, license renewal, certification, or certification renewal for the entity and that

- (1) individual has been found by a court or agency of this or another jurisdiction to have neglected, abused, or exploited a child or vulnerable adult under AS 47.10, AS 47.24, or AS 47.62 or a substantially similar provision in another jurisdiction, or to have committed medical assistance fraud under AS 47.05.210 or a substantially similar provision in another jurisdiction; or
- (2) individual's name appears on the centralized registry established under AS 47.05.330 or a similar registry of this state or another jurisdiction.

(d) An entity shall provide to the department a release of information authorization for a criminal history check for an individual who is not a recipient of services from the entity and, after the entity has been issued a license, license renewal, certification, or certification renewal by the department,

(1) who intends to become an owner of the entity, or an officer, director, partner, member, or principal of the business organization that owns the entity;

(2) whom the entity intends to hire or retain as the operator of the entity's business;

(3) whom the entity intends to hire or retain as an employee, independent contractor, or unsupervised volunteer of the entity; or

(4) who will be present in the entity or at the places of operation of entity, and would have regular contact with individuals who receive services from the, but who is not a family member or visitor of an individual who receives services from the entity.

(e) An individual for whom a release of information authorization has been provided to the department shall submit the individual's fingerprints to the department, with the fee established under AS 12.62.160, for a report of criminal justice information under AS 12.62 and for submission by the Department of Public Safety to the Federal Bureau of Investigation for a national criminal history record check. The Department of Public Safety shall provide the report of criminal justice information and the results of the national criminal history record check to the department for its use in considering an application for a license, license renewal, certification, or renewal, or in considering other approval or selection regarding an entity, for compliance with the standards established in this section. For purposes of obtaining access to criminal justice information maintained by the Department of Public Safety under AS 12.62, the department is a criminal justice agency conducting a criminal justice activity. The department may waive the requirement for fingerprint submission if an individual is unable to provide fingerprints due to a medical or physical condition that is documented by a licensed physician.

(f) The provisions of this section do not apply if the department grants an exception from a requirement of (a) - (e) of this section under a regulation adopted by the department.

(g) The department shall adopt regulations listing those criminal offenses that are inconsistent with the standards for licensure or certification by the department.

(h) An individual service provider is subject to the provisions of (a) - (g) of this section as if the individual service provider were an entity subject to those provisions.

(i) For purposes of (b) and (c) of this section, in place of nonissuance or nonrenewal of a license or certification, an entity or individual service provider that is not required to be licensed or certified by the department or a person wishing to become an entity or individual service provider that is not required to be licensed or certified by the department is instead ineligible to receive a payment, in whole or in part, from the department to provide for the health, safety, and welfare of persons who served by the programs administered by the department if the entity, individual service provider, or person

(1) is in violation of (a) of this section or would be in violation based on information received by the department as part of an application, approval, or selection process;

(2) has been found by a court or agency of this or another jurisdiction to have neglected, abused, or exploited a child or vulnerable adult under AS 47.10, AS 47.24, or AS 47.62 or a substantially similar provision in another jurisdiction, or to have committed medical assistance fraud under AS 47.05.210 or a substantially similar provision in another jurisdiction; or

(3) appears on the centralized registry established under AS 47.05.330 or a similar registry of this state or another jurisdiction.

**47.05.320. Criminal history use standards.** The department shall by regulation establish standards for the consideration and use by the department, an entity, or an individual service provider of the criminal history of an individual obtained under AS 47.05.310.

**47.05.330. Centralized registry.** (a) The department shall by regulation provide for a centralized registry to facilitate the licensing or certification of entities and individual service providers, the authorization of payments to entities or individual service providers by the department, and the employment of individuals by entities and individual service providers.

(b) Except for the name of each victim being redacted before the information is placed on the registry, the registry shall consist of the following information for an entity or individual service provider, an applicant on behalf of an entity or individual service provider, or an employee or unsupervised volunteer of an entity or individual service provider:

(1) decisions, orders, judgments, and adjudications finding that the applicant, employee, or unsupervised volunteer committed

(A) abuse, neglect, or exploitation under AS 47.10, AS 7.24, AS 47.62, or a substantially similar provision in another jurisdiction; or

(B) medical assistance fraud under AS 47.05.210 or a substantially similar provision in another jurisdiction;

(2) orders under a state statute or a substantially similar provision in another jurisdiction that a license or certification of the entity or individual service provider to provide services related to the health, safety, and welfare of persons was denied, suspended, revoked, or conditioned.

(c) As a condition for applying for licensure or certification of an entity or individual service provider, or for payment to an entity or individual service provider by the department, an applicant must agree to submit timely to the registry the information required under this section relating to the entity, any individual, the applicant, employees, and unsupervised volunteers of the entity or individual service provider.

(d) Within 24 hours of a court decision, order, judgment, or adjudication that an entity, individual service provider, or employee or unsupervised volunteer of an entity or individual service provider committed an act listed under (b) of this section, the entity, individual service provider, or employee or unsupervised volunteer of an entity or individual service provider shall report the court action to the department.

(e) Within 24 hours of receiving notice of an allegation that an employee, unsupervised volunteer, or former employee or unsupervised volunteer of an entity or individual service provider committed an act listed under (b) of this section within the past 10 years, the entity or individual service provider shall report the allegation to the department.

(f) The department shall prescribe by regulation the form or format by which an applicant shall submit required information to the registry.

(g) Notwithstanding any contrary provision of law, the department may also submit information described in this section to the registry. An entity or individual that is exempt from department licensure or certification and that does not receive money from the department for its services may voluntarily submit information described in this section to the department for placement in the registry.

(h) Information contained in the registry is confidential and is not subject to public inspection and copying under AS 40.25.110 - 40.25.125. However, information contained in the registry may be released to entities, individual service providers, and governmental agencies authorized and in a manner provided under this section and regulations adopted under this section.

(i) A person is presumed to be acting in good faith and is immune from civil and criminal liability if the person

- (1) makes a report of medical assistance fraud, abuse, neglect, or exploitation;
- (2) submits information to the registry; or
- (3) fails to hire or retain an employee or unsupervised volunteer because the employee or unsupervised volunteer is included in the registry.

(j) A person about whom information is placed in the registry shall be notified of the placement by the department and may request the department to delete or modify the information to correct inaccuracies. The department shall investigate the request and make necessary deletions or modifications if the department finds no relationship between the information placed in the registry and the risk of harm to the entity's clientele.

**47.05.340. Regulations.** The department shall adopt regulations to implement AS 47.05.300 - 47.05.390.

**47.05.350. Use of information; immunity.** An entity or individual service provider that obtains information about an employee under a criminal history check under AS 47.05.310 may use that information only as provided for in regulations adopted by the department under AS 47.05.320. However, if an entity or individual service provider reasonably relies on the information provided under the regulations adopted by the department to deny employment to an individual who was selected for hire as an employee, including during a period of provisional employment, the entity or individual service provider is not liable in an action brought by the individual based on the employment determination resulting from the information.

**47.05.390. Definitions.** In AS 47.05.300 - 47.05.390, unless the context otherwise requires,

- (1) "criminal history records" has the meaning given in AS 12.64.010;
- (2) "criminal justice activity" has the meaning given in AS 12.62.900;
- (3) "criminal justice agency" has the meaning given in AS 12.62.900;
- (4) "criminal justice information" has the meaning given in AS 12.62.900;
- (5) "department" means the Department of Health and Social Services;
- (6) "entity" means an entity listed in AS 47.32.010(b) and includes an owner, officer, director, member or partner of the entity;
- (7) "individual service provider" means an individual described in AS 47.05.300(a), and includes those listed in AS 47.05.300(b);
- (8) "license" includes a provisional license;
- (9) "unsupervised" means that an individual who is licensed under AS 47.32, after submitting a criminal history background check, is not physically present to observe the volunteer at the entity.

**Title 7. Health and Social Services.**  
**Part 1. Administration.**  
**Chapter 10. Licensing, Certification, and Approvals.**

**Article 3. Barrier Crimes, Criminal History Checks, and Centralized Registry.**

**Section**

- 900. Purpose and applicability; exceptions
- 905. Barrier crimes
- 910. Request for criminal history check
- 915. Criminal history check
- 920. Provisional valid criminal history check
- 925. Monitoring and notification requirements
- 930. Request for a variance
- 935. Review of request for a variance
- 940. Posting of variance decision required
- 945. Revocation of valid criminal history check or variance
- 950. Request for reconsideration
- 955. Centralized registry
- 960. Termination of association
- 990. Definitions

- 7 AAC 10.900. Purpose and applicability; exceptions.** (a) The purpose of 7 AAC 10.900 – 7 AAC 10.990 is to establish standards, requirements, and procedures dealing with barrier crimes and conditions, criminal history checks, and the centralized registry, including
- (1) the identification of offenses and conditions that would bar an individual from
    - (A) licensure, certification, or approval by the department;
    - (B) a finding of eligibility to receive certain payments from the department; and
    - (C) association with an entity or individual service provider in a manner described in (b) of this section;
  - (2) requirements for requesting a criminal history check and procedures to determine whether a barrier crime exists;
  - (3) requirements for maintaining compliance with AS 47.05.300 – 47.05.390, AS 47.32, and 7 AAC 10.900 – 7 AAC 10.990, including standards for association and requirements for continued monitoring and notification; and
  - (4) the establishment of a centralized registry as required by AS 47.05.330.
- (b) The provisions of 7 AAC 10.900 – 7 AAC 10.990 apply to an entity or individual service provider seeking licensure, certification, approval, or a finding of eligibility to receive payments from the department. Each individual who is to be associated with the entity or provider in a manner described in this subsection must have a valid criminal history check conducted under 7 AAC 10.900 – 7 AAC 10.990 if that individual is 16 years of age or older and will be associated with the entity or provider as
- (1) an administrator or operator;
  - (2) an individual service provider;
  - (3) an employee, an independent contractor, an unsupervised volunteer, or a board member if that individual has
    - (A) regular contact with recipients of services;

- (B) access to personal or financial records maintained by the entity or provider regarding recipients of services; or
- (C) control over or impact on the financial well-being of recipients of services, unless the only recipient whose financial well-being is affected is a
  - (i) relative of the individual who has authorized that individual to make financial decisions for that relative;
  - (ii) recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or
  - (iii) recipient for whom a court has authorized that individual to make financial decisions;
- (4) an officer, director, partner, member, or principal of the business organization that owns an entity, if that individual has
  - (A) regular contact with recipients of services;
  - (B) access to personal or financial records maintained by the entity or provider regarding recipients of services; or
  - (C) control over or impact on the financial well-being of recipients of services, unless the only recipient whose financial well-being is affected is a
    - (i) relative of the individual who has authorized that individual to make financial decisions for that relative;
    - (ii) recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or
    - (iii) recipient for whom a court has authorized that individual to make financial decisions;
- (5) except as provided in (c) and (d)(10) of this section, an individual who resides in a part of an entity, including a residence if services are provided in the residence, if the individual remains, or intends to remain, in the entity for 45 days or more, in total, in a 12-month period; or
- (6) except as provided in (c) and (d) of this section, any other individual who is present in the entity and would have regular contact with recipients of services.
- (c) A criminal history check under 7 AAC 10.900 – 7 AAC 10.990 is not required for a recipient of services, unless that individual is also associated with the entity or individual service provider in any manner described in (b)(1) – (4) of this section.
- (d) A criminal history check under 7 AAC 10.900 – 7 AAC 10.990 is not required for the following individuals, if supervised access is provided in accordance with (e) of this section:
  - (1) a relative of a recipient of services, unless that relative is also associated with the entity or provider in any manner described in (b)(1) – (5) of this section;
  - (2) a visitor of a recipient of services, unless that visitor is also associated with the entity or provider in any manner described in (b)(1) – (4) of this section;
  - (3) an individual for whom the entity or provider submits evidence to the department of a fingerprint-based background check
    - (A) conducted and implemented under a process that meets or exceeds the standards of 7 AAC 10.900 – 7 AAC 10.990; and
    - (B) that is required
      - (i) as a condition for obtaining a professional license or certification under AS 08;
      - (ii) by federal law for an entity or individual service provider described in AS 47.05.300; or
      - (iii) as a condition of employment or association that is imposed by an entity or individual service provider described in AS 47.05.300;
  - (4) an employee, independent contractor, unsupervised volunteer, board member, officer, director, partner, member, or principal of the business organization that owns an entity if that individual is not associated with the entity or an individual service provider in any manner described in (b)(1) – (4) of this section;
  - (5) an approved relative provider under 7 AAC 41.200(e);
  - (6) a personal physician, an infant learning teacher, an attendant for a child with special

needs as described in 7 AAC 57.940, a licensor, a fire marshal, a food services sponsor, or another similar individual who

- (A) is not associated with the entity or provider under (b) of this section; and
- (B) provides support services to the entity or provider or to a recipient of

services;

(7) an individual who is a vendor or an industry representative, or who provides delivery, installation, maintenance, or repair services;

(8) an individual who resides in any part of an entity, including a residence if services are provided in the residence, if the individual remains in the entity or residence for less than 45 days, in total, in a 12-month period;

(9) a parent's designee to drop off and pick up a child in care, unless the designee is also associated in a manner described in (b) of this section with the entity providing child care;

(10) a parent who receives money from the department for purposes of paying an approved in-home child care provider under 7 AAC 41.370, and any other individual who resides in that parent's household; however, the exemption in this paragraph does not apply to an approved in-home child care provider who resides in the household;

(11) an occasional guest of the administrator or operator of an entity or of a provider.

(e) An entity or individual service provider must provide supervised access for an individual exempted under (d) of this section if the individual is present in the entity during hours of operation. Supervised access is not required in a residence where in-home child care is provided under 7 AAC 41.370.

(f) For purposes of (b)(5) and (d)(8) of this section, "individual who resides in any part of an entity" means an individual who dwells continuously in, or legally occupies, the premises housing the entity or provider, as evidenced by

(1) the individual's address on the individual's permanent fund dividend received under AS 43.23, driver's license, fishing or hunting license, or other official record; or

(2) observation by another individual of the individual occupying the premises. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.905. Barrier crimes.** (a) A barrier crime is a criminal offense that is inconsistent with the standards for licensure, certification, approval, or eligibility to receive payments. The barrier crime standards and prohibitions in this section apply to an individual who

(1) seeks to be associated or to remain associated in a manner described in 7 AAC 10.900(b) with an entity or individual service provider that is subject to AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990; and

(2) has been charged with, convicted of, found not guilty by reason of insanity for, or adjudicated as a delinquent for, a crime listed in this section or a crime with similar elements in another jurisdiction.

(b) Except as otherwise provided in this section, the following are permanent barrier crimes, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this or another jurisdiction with similar elements:

(1) an unclassified, a class A, or a class B felony under AS 11.41 (Offenses Against the Person);

(2) a crime involving domestic violence that is a felony under AS 11;

(3) a crime that is a felony and involves a victim who was a child under 18 years of age at the time of the conduct, including a crime involving a perpetrator who was a person responsible for the child's welfare; in this paragraph, "person responsible for the child's welfare" has the meaning given in AS 47.17.290;

(4) a crime under AS 11.41.220 (Assault in the Third Degree);

(5) a crime under AS 11.41.460 (Indecent Exposure in the Second Degree);

- (6) a crime under AS 11.46.400 or 11.46.410 (Arson in the First or Second Degree);
  - (7) a crime under AS 11.51 (Offenses Against the Family and Vulnerable Adults) as follows:
    - (A) AS 11.51.100 (Endangering the Welfare of a Child in the First Degree);
    - (B) AS 11.51.200 (Endangering the Welfare of a Vulnerable Adult in the First Degree);
    - (C) AS 11.51.210 (Endangering the Welfare of a Vulnerable Adult in the Second Degree);
  - (8) a crime under AS 11.56 (Offenses Against Public Administration) as follows:
    - (A) AS 11.56.835 (Failure to Register as a Sex Offender or Child Kidnapper in the First Degree);
    - (B) AS 11.56.840 (Failure to Register as a Sex Offender or Child Kidnapper in the Second Degree);
  - (9) a crime under AS 11.61 (Offenses Against Public Order) as follows:
    - (A) AS 11.61.123 (Indecent Viewing or Photography);
    - (B) AS 11.61.125 (Distribution of Child Pornography);
  - (10) a crime under AS 11.66 (Offenses Against Public Health and Decency) as follows, if the person induced or caused to engage in prostitution was under 18 years of age at the time of the offense:
    - (A) AS 11.66.110 (Promoting Prostitution in the First Degree);
    - (B) AS 11.66.120 (Promoting Prostitution in the Second Degree);
    - (C) AS 11.66.130 (Promoting Prostitution in the Third Degree);
  - (11) any sex offense, as defined in AS 12.63.100, that is not already listed in this subsection;
  - (12) two or more class B felonies that are not included in this subsection.
- (c) The following are 10-year barrier crimes, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this or another jurisdiction with similar elements:
- (1) a crime under AS 11.41.260 (Stalking in the First Degree);
  - (2) a crime under AS 11.46 (Offenses Against Property) as follows:
    - (A) AS 11.46.120 (Theft in the First Degree);
    - (B) AS 11.46.280 (Issuing a Bad Check), if the crime is a class B felony;
    - (C) AS 11.46.285 (Fraudulent Use of an Access Device), if the crime is a class B felony;
    - (D) AS 11.46.300 (Burglary in the First Degree);
    - (E) AS 11.46.475 (Criminal Mischief in the First Degree);
    - (F) AS 11.46.480 (Criminal Mischief in the Second Degree);
    - (G) AS 11.46.500 (Forgery in the First Degree);
    - (H) AS 11.46.565 (Criminal Impersonation in the First Degree);
    - (I) AS 11.46.600 (Scheme to Defraud);
    - (J) AS 11.46.730 (Defrauding Creditors), if the crime is a class B felony;
  - (3) a crime under AS 11.56.807 (Terroristic Threatening in the First Degree), if it is a crime involving domestic violence;
  - (4) a crime under AS 11.61 (Offenses Against Public Order) as follows:
    - (A) AS 11.61.190 (Misconduct Involving Weapons in the First Degree);
    - (B) AS 11.61.195 (Misconduct Involving Weapons in the Second Degree);
    - (C) AS 11.61.240 (Criminal Possession of Explosives), if the crime is a class A or B felony;
  - (5) a crime under AS 11.66.110 (Promoting Prostitution in the First Degree), if the person who was induced or caused to engage in prostitution was 18 years of age or older at the time of the offense;
  - (6) a crime under AS 11.71.010 – 11.71.030 (Misconduct Involving a Controlled Substance in the First, Second, or Third Degree);
  - (7) a crime under AS 11.73.030 (Delivery of an Imitation Controlled Substance to a

Minor);

(8) a class B felony under AS 21.36.360 (Fraudulent or Criminal Insurance Acts);

(9) a class C felony under AS 28.35.030(n) (Operating a Vehicle, Aircraft, or Watercraft While Under the Influence of an Alcoholic Beverage, Inhalant, or Controlled Substance), if the individual has had two or more convictions since January 1, 1996, and within the 10 years preceding the date of the present offense, for operating a vehicle, aircraft, or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance;

(10) a class C felony under AS 28.35.032(p) (Refusal to Submit to Chemical Test), if the individual has had two or more convictions since January 1, 1996, and within the 10 years preceding the date of the present offense, or if punishment under AS 28.35.030(n) or 28.35.032(p) was previously imposed within the last 10 years.

(d) The following are five-year barrier crimes, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this or another jurisdiction with similar elements:

(1) a crime under AS 11.41 (Offenses Against the Person) as follows:

(A) AS 11.41.230 (Assault in the Fourth Degree);

(B) AS 11.41.250 (Reckless Endangerment);

(C) AS 11.41.270 (Stalking in the Second Degree);

(D) AS 11.41.330 (Custodial Interference in the Second Degree);

(E) AS 11.41.530 (Coercion);

(2) a class C felony under AS 11.46 (Offenses Against Property);

(3) a crime under AS 11.51 (Offenses Against Family and Vulnerable Adults) as follows:

(A) AS 11.51.110 (Endangering the Welfare of a Child in the Second Degree);

(B) AS 11.51.120 (Criminal Nonsupport), if the crime is a class C felony;

(C) AS 11.51.121 (Aiding the Nonpayment of Child Support in the First Degree);

(D) AS 11.51.130 (Contributing to the Delinquency of a Minor);

(4) a crime under AS 11.56 (Offenses Against Public Administration) as follows:

(A) AS 11.56.765 (Failure to Report a Violent Crime Committed Against a

Child);

(B) AS 11.56.810 (Terroristic Threatening in the Second Degree), if it is a crime

involving domestic violence;

(C) AS 11.56.815 (Tampering With Public Records in the First Degree);

(5) a crime under AS 11.61 (Offenses Against Public Order) as follows:

(A) AS 11.61.130 (Misconduct Involving a Corpse);

(B) AS 11.61.140 (Cruelty to Animals);

(C) AS 11.61.145 (Promoting an Exhibition of Fighting Animals), if the crime is a class C felony;

(D) AS 11.61.200 (Misconduct Involving Weapons in the Third Degree);

(E) AS 11.61.240 (Criminal Possession of Explosives), if the crime is a class C

felony;

(F) AS 11.61.250 (Unlawful Furnishing of Explosives);

(6) a crime under AS 11.66.120 (Promoting Prostitution in the Second Degree), if the person who was induced or caused to engage in prostitution was 18 years of age or older at the time of the offense;

(7) a crime under AS 11.71.040(a)(1), (2), (5), (6), (7), (8), or (10) (Misconduct Involving a Controlled Substance in the Fourth Degree);

(8) a class C felony under AS 11.73 (Imitation Controlled Substances);

(9) a serious offense as defined in AS 12.62.900, except for

(A) a serious offense included in (b) or (c) of this section; and

(B) an offense under AS 11.61.110 (Disorderly Conduct);

(10) a class C felony under AS 21.36.360 (Fraudulent or Criminal Insurance Acts);

(11) a felony under AS 47.30.815 (Bad Faith Initiation of an Involuntary Mental Commitment Proceeding).

(e) The following are three-year barrier crimes, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this or another jurisdiction with similar elements:

(1) a crime under AS 11.46 (Offenses Against Property) as follows:

(A) AS 11.46.140 (Theft in the Third Degree);

(B) AS 11.46.320 (Criminal Trespass in the First Degree), if it is a crime involving domestic violence;

(C) AS 11.46.430 (Criminally Negligent Burning), if it is a crime involving domestic violence;

(D) AS 11.46.484 (Criminal Mischief in the Fourth Degree), if it is a crime involving domestic violence;

(E) AS 11.46.510 (Forgery in the Third Degree);

(F) AS 11.46.710 (Deceptive Business Practices), if the crime is a class A misdemeanor;

(2) a crime under AS 11.51.120 (Criminal Nonsupport), if the crime is a class A misdemeanor;

(3) a crime under AS 11.56 (Offenses Against Public Administration) as follows:

(A) AS 11.56.740 (Violating a Protective Order), if it is a crime involving domestic violence;

(B) AS 11.56.745 (Interfering With a Report of a Crime Involving Domestic Violence);

(4) a crime under AS 11.61.240 (Criminal Possession of Explosives), if the crime is a class A misdemeanor.

(f) The following are one-year barrier crimes, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this or another jurisdiction with similar elements:

(1) a crime under AS 11.46.486 (Criminal Mischief in the Fifth Degree), if it is a crime involving domestic violence;

(2) a crime under AS 11.56.750 or 11.56.755 (Unlawful Contact in the First or Second Degree);

(3) a crime under AS 11.61.120 (Harassment), if it is a crime involving domestic violence.

(g) If an individual does not pass a criminal history check as a result of a barrier crime established in this section, the individual is prohibited from associating with an entity or provider in a manner described in 7 AAC 10.900(b), unless the department grants a variance under 7 AAC 10.935.

(h) If an individual is charged with a barrier crime, that individual is barred from any contact with recipients of care during the pendency of the charge, unless the department grants a variance under 7 AAC 10.935. The crime charged ceases to be a barrier under this section on the date that the

(1) individual is acquitted of that crime;

(2) charge is dismissed; or

(3) district attorney's office decides not to prosecute the charge.

(i) Except as otherwise provided in this section, the barrier times listed in this section begin to run from the date that an individual was charged with or convicted of the crime, whichever period ends at a later date. If the individual is subject to a judgment of a court related to sentencing, probation, or parole, the individual is barred as described in (a)(1) of this section for the barrier time listed in this section or until the individual has fully complied with the conditions of the sentencing, probation, or parole, whichever period is longer.

(j) If an individual is convicted of a lesser crime than was originally charged, the length of time an individual is barred will be based upon the crime for which the individual was convicted.

(k) If an entity or individual is also subject to federal criminal history check requirements, and the federal standards, including standards related to civil findings, are more stringent than those set out in this section, the federal standards apply.

(l) For the purpose of determining whether a person is convicted of a single offense or of multiple offenses, the provisions of AS 12.55.145(a)(1)(C) apply.

(m) In this section,

(1) "charged with" means a person

(A) has been indicted by information or presentment for an offense, or has been arrested and provided a uniform summons and complaint for an offense; and

(B) is awaiting adjudication or dismissal of the matter, or a decision by the district attorney's office not to prosecute;

(2) "convicted" or "conviction" means a judgment entered by a court of competent jurisdiction in this state or another jurisdiction, either upon the entry of a plea, or after a bench or jury trial; "convicted" or "conviction"

(A) includes a suspended imposition of sentence, even if the conviction is formally set aside under AS 12.55.085; and

(B) does not include an executive order of clemency, or a record that has been expunged by order of a court. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.320 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030

**7 AAC 10.910. Request for criminal history check.** (a) An entity or individual service provider that is subject to AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990 must request a criminal history check under this section, or provide proof of a valid fingerprint-based criminal history check, for each individual to be associated, or to remain associated, with the entity or provider in a manner described in 7 AAC 10.900(b). An entity or individual must request a criminal history check

(1) when the entity or provider submits an initial application for a license, certification, approval, or finding of eligibility to receive payments from the department;

(2) for a new owner, officer, director, partner, member, or principal of the business organization if there is a change in ownership of the business organization, or if an officer, director, partner, member, or principal of the business organization is replaced; the criminal history check must be completed before the individual begins association unless the department issues notice of a provisional valid criminal history check under 7 AAC 10.920;

(3) except as provided otherwise in this section, if the entity or provider wishes to hire or retain an employee, independent contractor, or unsupervised volunteer described in 7 AAC 10.900(b)(3); the criminal history check must be completed before hiring unless the department issues notice of a provisional valid criminal history check under 7 AAC 10.920;

(4) for an individual 16 years of age or older who is not a recipient of services, and who wishes to reside in the entity or to be present as described in 7 AAC 10.900(b)(5) or (6); the criminal history check must be completed before the individual begins association unless

(A) the department issues notice of a provisional valid criminal history check under 7 AAC 10.920; or

(B) the individual is residing in the entity before that individual's 16th birthday; for an individual described in this subparagraph, the entity or provider must submit the information required under (b) of this section within 30 days before the individual's 16th birthday;

(5) at any time requested by the department

(A) to show compliance with 7 AAC 10.900 – 7 AAC 10.990 during inspection, monitoring, or investigation; or

(B) for an individual if the department has good cause to believe that the individual's criminal history has changed; or

(6) on or before April 10, 2007, for each individual who is associated with an entity or provider operating under a current license, certification, approval, or finding of eligibility to receive payments, and who

(A) does not have a valid criminal history check; or

- (B) passed a criminal history check conducted before February 9, 2007 that
  - (i) was not fingerprint-based; or
  - (ii) was fingerprint-based and conducted more than six years before

February 9, 2007.

(b) The entity or provider must submit the following with each request for a criminal history check:

(1) a release of information authorization, on a form provided by the department, signed by the individual for whom the request is submitted;

(2) an authorization, on a form provided by the department and signed by the individual for whom the request is submitted, permitting the department to mark the individual's name in the Alaska Public Safety Information Network (APSIN) under 7 AAC 10.915(e);

(3) two sets of fingerprints for the individual for whom the request is submitted;

(4) a signed statement, on a form provided by the department, from the individual who took the fingerprints, attesting that at least one government-issued picture identification was used to verify the identity of the individual fingerprinted;

(5) the fees required by the Department of Public Safety under 13 AAC 68.900(a)(2)(B) and (5); if the legislature makes an appropriation for the department to pay those fees for unpaid volunteers,

(A) the department will not pay a fee for a volunteer who is a household member who resides in the entity as described in 7 AAC 10.900(b)(5); and

(B) an entity or provider must reimburse the fee to the department if an unpaid volunteer for whom the department paid a fee becomes a paid employee within 60 days after that fee was paid;

(6) an additional \$25 application fee; the department will waive this fee for an unpaid volunteer, unless that volunteer is a household member who resides in the entity as described in 7 AAC 10.900(b)(5); if an unpaid volunteer for whom the department waived an application fee becomes a paid employee within 60 days after that fee was waived, the entity or provider must pay the waived fee.

(c) Unless a more frequent fingerprint-based criminal history check is required under federal law, or for certain entities and providers under (f) of this section, a fingerprint-based criminal history check is valid for six years from the date the check became valid under (h) of this section for an individual who

(1) remains associated with an entity or provider in a manner described in 7 AAC 10.900(b), subject to verification under (d) of this section;

(2) becomes re-associated with the same entity or provider in a manner described in 7 AAC 10.900(b) within 100 days after terminating association with that entity or provider, subject to verification under (e) of this section; or

(3) becomes associated with another entity or provider in a manner described in 7 AAC 10.900(b) within 100 days after terminating association with a previous entity or provider, subject to verification under (e) of this section.

(d) Upon renewal of a license, certification, or approval, or when a finding is made for continued eligibility to receive payments, an entity or individual service provider must provide to the department proof that an individual described in (c)(1) of this section has a valid criminal history check. If the department determines that the criminal history check is not valid, the department will notify the entity or provider that a request for a new criminal history check must be submitted under this section.

(e) An individual described in (c)(2) or (c)(3) of this section must verify with the department that the current fingerprint-based criminal history check is still valid. The entity or provider shall submit to the department a \$25 fee for this verification. The department will waive the fee for an unpaid volunteer, unless that volunteer is a household member who resides in the entity as described in 7 AAC 10.900(b)(5). If an unpaid volunteer for whom the department waived a verification fee becomes a paid employee within 60 days after the department waived the fee, the entity or provider must pay the waived fee. If the department determines during the verification process that the criminal history check is not valid, the department will notify the entity or

provider that a request for a new criminal history check must be submitted under this section, and that the department will consider the verification fee the department's application fee under (b)(6) of this section.

(f) Except as provided otherwise in this subsection, and unless the department granted a variance under 7 AAC 10.935, a new criminal history check is not required if a person associated with an entity or provider in a manner described in 7 AAC 10.900(b) is transferred from one site operated by the entity or provider to another site operated by that entity or provider, if all sites are identified in the request for a criminal history check. Before October 1, 2007, an entity or provider must submit the items required under (b) of this section for an individual described in the following list, each time that individual changes employment, regardless of what entities or providers were listed on the request for a criminal history check:

(1) an individual associated with

(A) a nursing facility;

(B) a hospital that provides swing-bed services or that is reimbursed under 7 AAC 43 for treatment described in the definition of "swing-bed day" set out in 7 AAC 43.709; for purposes of this subparagraph,

(i) "hospital that provides swing-bed services" has the meaning given "swing-bed hospital" in 42 C.F.R. 413.114(b); and

(ii) the definition of "swing-bed hospital" in 42 C.F.R. 413.114(b), as revised as of October 1, 2006, is adopted by reference;

(C) an intermediate care facility for the mentally retarded or persons with related conditions;

(D) an assisted living home;

(E) a hospice agency;

(F) a home and community-based services provider as defined in 7 AAC 43.110;

(G) a home health agency; or

(H) a personal care agency enrolled under 7 AAC 43.786 or 7 AAC 43.787;

(2) an individual providing care coordination, case management, adult day services, or respite care services.

(g) A willful misrepresentation of an individual's criminal or civil history by an entity or provider, or by the individual, is cause for immediate denial of a request for a criminal history check, or revocation of a valid criminal history check.

(h) A valid criminal history check means that, within the applicable timeframes referred to in this section,

(1) the person submitted all items listed under (b) of this section;

(2) the department determined that a barrier crime or condition did not exist;

(3) the person's name has been marked in APSIN on a continuous basis; and

(4) if applicable, any variance granted under 7 AAC 10.935 is still in effect and authorized by the department, and the individual who was the subject of the variance is associated with the same entity or provider.

(i) Nothing in this section precludes an entity or provider from requiring

(1) an individual who is subject to a criminal history check under 7 AAC 10.900 – 7 AAC 10.990 to pay a cost involved in the submittal of a request under this section; the provisions of this paragraph do not apply to a foster home; or

(2) a criminal history check for an individual who is not otherwise subject to 7 AAC 10.900 – 7 AAC 10.990. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.340 AS 47.32.030 AS 47.05.310 AS 47.32.010

**Editor's note:** Forms referred to in 7 AAC 10.910 may be obtained from the Department of Health and Social Services, Division of Public Health, Section of Certification and Licensing, 619 East Ship Creek Avenue, Suite 232, Anchorage, Alaska 99501, or are available at the department's website: <http://www.hss.state.ak.us/dph/CL/bgcheck>.

**7 AAC 10.915. Criminal history check.** (a) The department will screen a request for a criminal history check through the

(1) centralized registry established under 7 AAC 10.955 to determine whether a barrier condition exists for the individual who is the subject of the criminal history check;

(2) registry of certified nurse aides under AS 08.68.333;

(3) central registry of sex offenders and child kidnappers under AS 18.65.087;

(4) United States Department of Health and Human Services, Office of the Inspector General database of individuals and entities excluded under 42 U.S.C. 1320a-7 and 1320c-5 (secs. 1128 and 1156 of the Social Security Act); and

(5) any other registry or database determined by the department to be relevant to the screening being conducted for an individual, including any registry or database maintained by another state where that individual has resided.

(b) In addition to its review under (a) of this section, the department will review the criminal justice information supplied by the Department of Public Safety, court or other applicable government agency records, and the national criminal history record check supplied by the Federal Bureau of Investigation, to determine whether a barrier crime exists for the individual who is the subject of the criminal history check.

(c) If, after reviewing all available information described in (a) and (b) of this section, the department determines that a barrier crime or condition does not exist, the department will notify the entity or provider that submitted the request, and the individual who was the subject of the criminal history check, that the individual passed the criminal history check. The department will include in the notification the following:

(1) the period during which the criminal history check is valid, unless revoked or rescinded under this section;

(2) a statement that the valid criminal history check is conditioned upon the individual continuing to meet the applicable standards of AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990;

(3) a statement that, if the individual ceases to be associated with the entity or provider in a manner described in 7 AAC 10.900(b),

(A) the individual's continued compliance with the applicable standards of AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990 must be verified by the department in accordance with 7 AAC 10.910(e) before that individual may become associated with another entity or provider, or re-associated with the same entity or provider; and

(B) a time period during which the individual is not associated with an entity or provider that is 100 days or longer is subject to (g) of this section.

(d) If, while conducting a criminal history check, the department determines that a barrier crime or condition exists, the department will notify the

(1) entity or provider that submitted the request under 7 AAC 10.910; the department will include in the notification the following statements:

(A) that the department has determined a barrier crime or condition exists; the department will not identify the crime or condition, but will identify the applicable barrier time under 7 AAC 10.905 or 7 AAC 10.955, as applicable;

(B) that the individual who was the subject of the criminal history check has been given an opportunity to challenge the department's determination under 7 AAC 10.950 if the individual believes the determination was based on erroneous information, or if the individual has additional information for the department to consider;

(C) that if the individual is willing to disclose the barrier crime or condition to the entity or provider, and if the entity or provider continues to desire a valid criminal history check for that individual, the entity or provider may request a variance, if allowed under 7 AAC 10.930; and

(2) individual who was the subject of the criminal history check; the department will include in the notification the following:

(A) the reason for the determination, including identification of the barrier crime or condition and the applicable barrier time under 7 AAC 10.905;

(B) a statement that if the individual wishes to disclose the barrier crime or condition to the entity or provider that submitted the request, the entity or provider may be able to obtain a variance, if allowed under 7 AAC 10.930;

(C) a statement that if the individual believes there is an error in the information relied upon by the department, or if the individual has additional information for the department to consider, the individual may submit a request for reconsideration under 7 AAC 10.950.

(e) For each request for a criminal history check processed under this section, the department will mark in APSIN the name of the individual who was the subject of the criminal history check. If the department receives notification under APSIN of law enforcement activity for an individual, the department will review the information. If the department determines that the activity creates a barrier under 7 AAC 10.905, the department will immediately notify the entity or provider and the individual. The department will include in the notification information advising the entity or provider and the individual that

(1) the department intends to revoke the valid criminal history check in accordance with 7 AAC 10.945; the department will not identify the barrier crime or condition in the notice to the entity or provider, but will identify the crime or condition in the notice to the individual;

(2) the individual may request reconsideration under 7 AAC 10.950 if the individual believes there was an error in the information relied upon by the department; and

(3) if the individual wishes to disclose the barrier crime or condition to the entity or provider, the entity or provider may request a variance, if allowed under 7 AAC 10.930.

(f) Except as provided otherwise in this subsection, an entity or provider must, within 24 hours after receiving notification under (d) or (e) of this section, terminate association with the individual in accordance with 7 AAC 10.960. If the entity or provider requests a variance under 7 AAC 10.930, or if the individual requests reconsideration under 7 AAC 10.950, the individual may remain associated with the entity or provider, pending a decision on the request, if

(1) the individual is removed from direct contact with recipients of services; and

(2) the entity or provider ensures that the individual is provided with direct supervision if the individual is present in any area where services are provided, during hours of operation.

(g) If an individual remains out of association with an entity or provider for 100 days or longer, the department will revoke a valid criminal history check without prior notice. A new criminal history check is required if the individual wishes to become associated with any entity or provider in a manner described in 7 AAC 10.900(b).

(h) If an individual with a valid criminal history check ceases to be associated with an entity or provider, and wishes to have the individual's name unmarked in APSIN, the individual shall submit a written request to the department that the valid criminal history check be rescinded. The department will send a written acknowledgment of the rescission to the individual and to the entity or provider with whom the individual was most recently associated. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.920. Provisional valid criminal history check.** (a) The department may issue notification of a provisional valid criminal history check after screening the individual under 7 AAC 10.915(a) and reviewing the criminal justice information supplied by the Department of Public Safety, if a barrier crime or condition is not discovered in that screening and review and if

(1) the department determines that its further review time might unduly delay the process;

(2) an entity or provider has requested an expedited review and has

(A) included justification for the expedited review;

(B) submitted, at a minimum, the documents required under 7 AAC 10.910(b)(1) and (2); and

(C) agreed to submit within 30 days the fingerprints required under 7 AAC

10.910(b)(3) and any items required under 7 AAC 10.910(b)(4) – (6) that were not included with the request; or

(3) a request for a criminal history check does not include the required sets of fingerprints because fingerprinting acceptable to the Department of Public Safety is not available within 100 miles by road, and the entity or provider agrees to submit within 30 days the fingerprints required under 7 AAC 10.910(b)(3) and any items required under 7 AAC 10.910(b)(4) – (6) that were not included with the request.

(b) Notification of a provisional valid criminal history check issued under this section is valid until the results of a fingerprint-based criminal history check are processed under 7 AAC 10.915, unless revoked under this section. If the entity or provider fails to submit fingerprints and other required items within 30 days, or the individual does not pass the criminal history check, the provisional valid criminal history check is automatically revoked, and the entity or provider must terminate association with the individual in accordance with 7 AAC 10.960. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.320 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030

**7 AAC 10.925. Monitoring and notification requirements.** (a) An entity or provider shall monitor to ensure that all individuals associated with the entity or provider in a manner described in 7 AAC 10.900(b) continue to meet the applicable requirements of AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990. The entity or provider shall require each individual for whom a criminal history check is required to report to the entity or provider within 24 hours, or the next business day if the individual is

(1) charged with, convicted of, found not guilty by reason of insanity for, or adjudicated as a delinquent for, a barrier crime listed in 7 AAC 10.905; or

(2) is the subject of a matter that must be reported under 7 AAC 10.955(c) for the centralized registry.

(b) In addition to the reporting requirements of 7 AAC 10.955(c) for the centralized registry, the entity or provider shall notify the department by telephone, by electronic mail, by facsimile, by letter, or in person within

(1) 24 hours, or the next business day, after the entity or provider has knowledge that an individual associated with the entity or provider has been

(A) arrested for, charged with, convicted of, found not guilty by reason of insanity for, or adjudicated as a delinquent for, a barrier crime listed in 7 AAC 10.905; or

(B) is the subject of a matter that must be reported under 7 AAC 10.955(c) for the centralized registry; or

(2) 14 days after any change in association with the entity or provider for an individual who has a valid criminal history check or is the subject of a provisional valid criminal history check, including a change that involves an individual

(A) whose association described in 7 AAC 10.900(b) has been terminated; or

(B) who has not been associated with the entity or provider for 61 days or more, but becomes re-associated within 100 days.

(c) Failure to notify the department as required under this section may result in an enforcement action, including suspension or revocation of the license, certification, approval, or finding of eligibility to receive payments. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.930. Request for a variance.** (a) Except for a crime or condition listed in (g) of this section, an entity or provider notified under 7 AAC 10.915(d) that a barrier crime or condition exists may request a variance under this subsection. The request must be submitted to the department office responsible for that entity's or provider's licensing, certification, approval,

or finding of eligibility to receive payments. The request must be submitted no later than 30 days after the entity or provider receives notice under 7 AAC 10.915(d), or, if the individual who was the subject of the criminal history check submits a request for reconsideration as allowed under 7 AAC 10.915(d)(2)(C), no later than 30 days after the department issues its decision on reconsideration under 7 AAC 10.950(b)(3), whichever date is later. The request must be submitted on a form provided by the department, and must include the following:

- (1) a comprehensive rationale for granting a variance;
  - (2) a demonstration of how the health, safety, and welfare of recipients of services will be adequately protected;
  - (3) copies of all known information relevant to determining whether the health, safety, and welfare of recipients of services are adequately protected, including the following information regarding the individual for whom a variance is sought:
    - (A) a copy, as applicable, of that individual's record of
      - (i) protective orders issued or filed under AS 18.66 (Domestic Violence and Sexual Assault) or a substantially similar law or ordinance of another jurisdiction;
      - (ii) conviction;
      - (iii) indictment or presentment, or of charging by information or complaint;
      - (iv) having been charged with a crime, without subsequent conviction;
      - (v) having been charged with a crime that was reduced to a lesser charge;
      - (vi) having been charged with a crime for which a suspended imposition of sentence was granted by the court; and
      - (vii) any circumstance that led to a barrier condition under 7 AAC 10.955;
    - (B) if the individual was incarcerated,
      - (i) a copy of the order from the local, state, or federal jurisdiction that released the individual from incarceration;
      - (ii) the date of release from incarceration; and
      - (iii) any terms and conditions of parole;
    - (C) if the individual was sentenced and, as a part of that sentence, the individual was placed on supervised or unsupervised probation, a copy of the terms and conditions of probation;
    - (D) the extent, nature, and seriousness of the following:
      - (i) the individual's offense and past criminal record;
      - (ii) a behavioral health problem if it exists;
      - (iii) a domestic violence problem if it exists;
      - (iv) any circumstance that led to a barrier condition under 7 AAC 10.955;
    - (E) the age of the individual at the time of the offense, problem, or circumstance;
    - (F) the amount of time that has elapsed since the most recent offense, problem, or circumstance;
    - (G) evidence of rehabilitation, prevention, or treatment efforts;
    - (H) other evidence of the individual's present fitness, including at least two letters of recommendation from credible persons who are aware of the individual's criminal and civil history, behavioral health problem, or domestic violence problem, and who recommend that a variance be granted; any letters must be from persons who are unrelated to the individual for whom the variance is requested and who are not associated with the entity or provider that submitted the request for a variance; nothing in this subparagraph precludes the entity or provider from submitting additional letters of recommendation;
    - (I) if the individual is an employee or volunteer, or a potential employee or volunteer, information related to job responsibilities that would be performed, hours and days of service, whether the individual would be in contact with recipients of services, and plans for supervision, including whether the individual would be subject to direct supervision while on the premises during hours of operation.
- (b) The department office responsible for the licensing, certification, approval, or finding of eligibility to receive payments for the entity or provider seeking a variance will review each

request for a variance received by that office and will

(1) make a written recommendation to the variance committee appointed under 7 AAC 10.935 to grant or deny the request;

(2) include the reasons for the recommendation; and

(3) recommend any conditions that should be placed on any variance issued.

(c) If the individual was convicted of a lesser charge, in the department's review under (b) of this section, the department will consider information regarding the original charge in making its recommendation to the variance committee, including whether the original charge was a permanent barrier crime or condition for which a variance would be prohibited under (g) of this section.

(d) If the department granted a variance for an offense revealed in a fingerprint-based criminal history check conducted six or more years before February 9, 2007, and if the offense for which the variance was granted is not a permanent barrier under 7 AAC 10.905, the entity or provider must submit a new request for a variance, if allowed under this section, at the time of application for renewal of that entity's current license, certification, approval, or finding of eligibility to receive payments. Except as provided in (h) and (i) of this section, if the offense for which the department granted the variance is a permanent barrier under 7 AAC 10.905, the variance is void and the entity must terminate association with the individual in accordance with 7 AAC 10.960.

(e) If the department granted a variance for a barrier condition described in 7 AAC 10.955 six or more years before February 9, 2007, the entity or provider must submit a new request for a variance at the time of application for renewal of that entity's current license, certification, approval, or finding of eligibility to receive payments.

(f) The department will not grant a variance from the requirement in AS 47.05.310 for conducting a criminal history check for an individual who has regular contact with recipients of services. For any other individual subject to AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990, an entity or provider may request a variance from the requirement to conduct a criminal history check by submitting a written request to the department office responsible for that entity's or provider's licensing, certification, approval, or finding of eligibility to receive payments. The request must be submitted on a form provided by the department and must include a comprehensive rationale for the request and demonstrate that the health, safety, and welfare of recipients of services will be adequately protected.

(g) Except as provided in (h) - (j) of this section, the department will not grant a variance for a

(1) conviction for an offense that is a permanent barrier under 7 AAC 10.905; or

(2) crime or civil finding for which federal law prohibits certain approvals, or restricts payment of benefits, during the most stringent barrier period set by federal law for that crime or civil finding; for the purpose of this paragraph,

(A) "federal law" includes an offense described in

(i) 42 U.S.C. 670 – 679b (secs. 470 – 479A of the Social Security Act), revised as of August 21, 2006, and adopted by reference;

(ii) 42 U.S.C. 1320a-7(a) (sec. 1128(a) of the Social Security Act), revised as of August 21, 2006, and adopted by reference;

(iii) 45 C.F.R. 1356.30, revised as of October 1, 2005, and adopted by reference; and

(iv) another applicable federal statute or regulation; and

(B) the prohibition applies to all entities and providers subject to 7 AAC 10.900 – 7 AAC 10.990, regardless of whether the federal law is directly applicable to only one of those entities or providers.

(h) Notwithstanding the prohibition in (g)(1) of this section, the department may grant a variance for an individual convicted of a permanent barrier crime listed in (i) of this section, if

(1) a behavioral health problem was a factor in the commission of the crime; and

(2) the individual

(A) is associated in a manner described in 7 AAC 10.900(b) with an entity that provides a treatment program to individuals with a behavioral health problem;

(B) has completed any treatment required by a court; and

(C) has demonstrated a sustained self-directed program of recovery for at least five years, as determined through the assessment of a mental health professional clinician or a substance abuse counselor with at least three years of experience; for purposes of this subparagraph,

(i) "mental health professional clinician" has the meaning given in 7 AAC 43.1990;

(ii) "substance abuse counselor" means a counselor providing services for a substance abuse treatment facility or program certified under 7 AAC 29; and

(iii) "recovery" includes, as applicable, absence of symptoms, stabilization in life domains, compliance with any medical orders, and abstinence from substance use.

(i) For the purpose of (h) of this section, the department may grant a variance for the following permanent barrier crimes, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this or another jurisdiction with similar elements:

- (1) AS 11.41.200 (Assault in the First Degree);
- (2) AS 11.41.210 (Assault in the Second Degree);
- (3) AS 11.41.220 (Assault in the Third Degree);
- (4) AS 11.41.320 (Custodial Interference in the First Degree);
- (5) AS 11.41.460 (Indecent Exposure in the Second Degree);
- (6) AS 11.41.500 (Robbery in the First Degree);
- (7) AS 11.41.510 (Robbery in the Second Degree);
- (8) AS 11.41.520 (Extortion);
- (9) AS 11.46.400 (Arson in the First Degree);
- (10) AS 11.46.410 (Arson in the Second Degree).

(j) Notwithstanding the prohibition in (g)(1) of this section, the department may grant a variance for an individual adjudicated as a delinquent for a permanent barrier crime under 7 AAC 10.905(b). (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.935. Review of request for a variance.** (a) The commissioner will appoint three or more department employees to serve as a variance review committee to review requests for variances submitted under 7 AAC 10.930. The commissioner will include at least one employee from each department office responsible for licensing, certification, approval, or finding of eligibility to receive payments, but will not include an employee substantively involved in any recommendation to the committee made under 7 AAC 10.930(b).

(b) In its review of a request for a variance, the review committee shall determine whether a variance is prohibited under 7 AAC 10.930(f) or (g). If a variance is prohibited, the review committee shall deny the variance.

(c) In its review of a request for a variance, the review committee shall

- (1) consider the recommendations made by the department office under 7 AAC 10.930(b);
- (2) consider the information supplied with the request and any other relevant information available to the department;
- (3) determine whether the individual charged with a crime was subsequently convicted;
- (4) if the individual was convicted of a lesser charge, determine whether the original charge was a permanent barrier crime or condition for which a variance would be prohibited under 7 AAC 10.930(g);
- (5) determine whether any suspended imposition of sentence is still in effect, and review the nature of any applicable conditions;
- (6) verify, as applicable, that
  - (A) conditions of parole or probation were met;

- (B) court-ordered restitution has been made, or payments are current; and
  - (C) treatment, if required by the court, has been completed;
- (7) if the crime committed related to financial exploitation, including theft, fraud, and bribery, or involved another form of dishonesty, including perjury and official misconduct, verify that the individual's duties make it unlikely that exploitation or dishonesty could occur with regard to recipients of services;
- (8) if the barrier condition related to the abuse, neglect, or exploitation of a child or vulnerable adult, verify that the individual's duties make it unlikely that abuse, neglect, or exploitation could occur with regard to recipients of services; and
- (9) consider mitigating factors, including whether the individual has been employed by the entity or provider for a substantial period, has performed duties in a responsible and trustworthy manner, and has not been the subject of any complaint from a recipient of services or a representative of a recipient of services.
- (d) The review committee may require the individual for whom a variance is sought to appear in person or by telephone for an interview.
- (e) If the review committee, after its review of available information, determines that the health, safety, and welfare of recipients of services will be adequately protected, the review committee shall recommend that the commissioner grant the request for a variance. If the committee determines that the health, safety, and welfare of recipients of services will not be adequately protected, the review committee shall recommend that the commissioner deny the request for variance.
- (f) The commissioner will consider the recommendation of the review committee and will issue a decision on a request for a variance within 30 days after receiving all information required under 7 AAC 10.930. The commissioner will deliver a copy of the decision to grant or deny the request for a variance to the requesting entity or provider by mail or facsimile. The commissioner will include in the decision to deny a request the reasons for the denial, and will advise the entity or provider of the right to request reconsideration of the decision under 7 AAC 10.950. A copy of the decision will be provided to the department office responsible for conducting criminal history checks, the department office responsible for maintaining the centralized registry established under 7 AAC 10.955, and the department office responsible for licensing, certification, approval, or a finding of eligibility to receive payments.
- (g) In a variance granted under this section, the department will not identify the individual for whom the variance was requested, but will specify the barrier crime or condition for which the variance was granted, and will set out the terms and conditions of the variance, including an expiration date not to exceed the expiration date of the license, certification, approval, or finding of eligibility to receive payments applicable to the entity or provider that requested the variance.
- (h) A variance may not be transferred to another entity or provider. If the individual for whom the department granted a variance under this section remains associated with the entity or provider that requested the variance, and the variance is not revoked under (i) of this section, the entity or provider need not submit a new variance request each time it submits its application for renewal of its license, certification, approval, or finding of eligibility to receive payments, but must request a new criminal history check for that individual with each application.
- (i) The department office responsible for the licensing, certification, approval, or finding of eligibility to receive payments for an entity or provider will, in accordance with 7 AAC 10.945, immediately revoke a variance granted under this section if
- (1) the department learns that it granted the variance based on false information provided by the individual to whom the variance applies or by the entity or provider that requested the variance; or
  - (2) the individual to whom the variance applies
    - (A) violates a term or condition of the variance;
    - (B) subsequently becomes subject to AS 47.05.310(c), or is charged with, convicted of, found not guilty by reason of insanity for, or adjudicated as a delinquent for, a crime listed in 7 AAC 10.905, or a similar crime in another jurisdiction; or
    - (C) ceases to be associated with the entity or provider that requested the variance.

(Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.940. Posting of variance decision required.** If the department grants a variance under 7 AAC 10.935, the entity or individual service provider shall post a copy of the variance decision with the copy of the license, certification, approval, or finding of eligibility to receive payments that was issued by the department, in a conspicuous place where the copy of the variance can be readily viewed by persons interested in obtaining the services offered by the entity or provider. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.945. Revocation of valid criminal history check or variance.** (a) Subject to AS 47.32, if the department decides to revoke a valid criminal history check issued under 7 AAC 10.900 – 7 AAC 10.990, the department will provide written notice of revocation to the entity or provider, and to the individual for whom the criminal history check was conducted. The notice will include the reasons for the department's decision and will advise the individual of the right to request reconsideration under 7 AAC 10.950. A notice of revocation issued under this section is effective 30 days after it is received by the individual unless a request for reconsideration is submitted.

(b) Subject to AS 47.32, if the department decides to revoke a variance issued under 7 AAC 10.900 – 7 AAC 10.990, the department will provide written notice of revocation to the entity or provider to whom the variance was issued, and to the individual who was the subject of the variance. The notice will include the reasons for the department's decision and will advise the entity or provider of the right to request reconsideration under 7 AAC 10.950. A notice of revocation issued under this section is effective 30 days after it is received by the entity or provider unless a request for reconsideration is submitted.

(c) Nothing in this section precludes the department from issuing a notice of immediate revocation if the department finds that the life, health, safety, or welfare of a recipient of services is threatened. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.950. Request for reconsideration.** (a) A request for reconsideration of a department decision under 7 AAC 10.900 – 7 AAC 10.990 must be submitted within 30 days after the requestor receives the notice of the decision. The request for reconsideration must include

(1) the requestor's name, mailing address, telephone number, and, if available, electronic mail address and facsimile number;

(2) a clear description of the department's decision to be reviewed; and

(3) a clear and concise statement of the reason for the request, including

(A) a statement of the nature and scope of the requestor's interests, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision;

(B) the contested terms and conditions of the department's decision, and any proposed alternatives; and

(C) copies of any documents or other information that would assist the department in its review.

(b) After reviewing a request for reconsideration of the

(1) commissioner's decision to deny a request for a variance under 7 AAC 10.935(f), the

commissioner will notify the requestor of the commissioner's decision on reconsideration in writing within 30 days after receiving the request, and will state the reasons for that decision;

(2) department's decision to revoke a valid criminal history check under 7 AAC 10.910(g) or 7 AAC 10.915(e), or a variance under 7 AAC 10.935(i), the department office that made the decision to revoke will notify the requestor of that office's decision on reconsideration in writing within 30 days after receiving the request, and will state the reasons for that decision; or

(3) department's determination under 7 AAC 915(d) that a barrier crime or condition exists, the department office responsible for conducting criminal history checks will, within 30 days after receiving the request, notify in writing the

(A) requestor of that office's decision on reconsideration and state the reasons for that decision; and

(B) entity or provider that submitted the request for a criminal history check under 7 AAC 10.910 that, if the decision on reconsideration confirms the determination that a barrier crime or condition exists, and if the individual is willing to disclose the barrier crime or condition to the entity or provider, the entity or provider may request a variance, if allowed under 7 AAC 10.930, within 30 days after receiving notice under this subparagraph.

(c) A decision under (b)(1) and (b)(2) of this section is a final agency decision for purposes of seeking judicial review. A decision under (b)(3) of this section is a final agency decision unless the department grants a variance under 7 AAC 10.935.

(d) A copy of a decision on reconsideration under this section will be provided to the department office responsible for conducting criminal history checks, and to the department office responsible for licensing, certification, approval, or a finding of eligibility to receive payments. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.955. Centralized registry.** (a) A centralized registry is established in the department to accomplish the purpose of AS 47.05.330 as that purpose relates to an individual

(1) who seeks to be or to remain associated with an entity or individual service provider in a manner described in 7 AAC 10.900(b); and

(2) whose name appears on the centralized registry because of a matter described in AS 47.05.330(b)(1)(A) involving the abuse, neglect, or exploitation of a child or vulnerable adult.

(b) An individual whose name appears on the centralized registry may not be associated with an entity or individual service provider in a manner described in 7 AAC 10.900(b) unless a variance is granted under 7 AAC 10.935.

(c) An entity or individual service provider that is subject to AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990 shall, using a form prescribed by the department, submit to the department reports as required or allowed under AS 47.05.330 for any matter described in (a)(2) of this section.

(d) Upon receipt of a report required under (c) of this section, the department will enter the information on the centralized registry as required by AS 47.05.330(b).

(e) Separately or in conjunction with an investigation or audit under AS 47.05.200, AS 47.10, AS 47.24, or AS 47.62, the department will investigate a report of abuse, neglect, or exploitation submitted under (c) of this section. If, after its investigation, the department makes a substantiated finding that an individual committed abuse, neglect, or exploitation, the department will notify any entity or individual service provider that made the report, and the individual who is the subject of the investigation, that the department has made a substantiated finding, and that it intends to place the finding in the centralized registry. In the notice, the department will

- (1) describe the nature of the substantiated finding;
- (2) identify each statute or regulation that supports the finding;
- (3) state the effective date for placement in the registry; and
- (4) advise that the individual who is the subject of the investigation may request a

hearing under (f) of this section.

(f) An individual who is the subject of an investigation that results in a substantiated finding against the individual may request a hearing from the department within 30 days after receipt of the notice described in (e) of this section. A request under this subsection must be submitted to the department's office responsible for maintaining the centralized registry. The request must be in writing, must include the individual's reasons for believing the department's finding to be in error, and must be accompanied by any relevant documentation to support those reasons.

(g) If the department determines that questions of material fact, if any, raised in a request for hearing under (f) of this section and relevant to the department's substantiated finding, were previously decided in a civil or criminal court action, or in an administrative hearing conducted in accordance with AS 44.62.330 – 44.62.630 (Administrative Procedure Act), and that under the facts as previously decided, the individual committed abuse, neglect, or exploitation, the department will send the individual written notice that the department intends to issue a summary decision to dismiss the individual's claim. The individual may submit a written objection to the department's proposed dismissal, identifying any issue of material fact that the individual believes still to be in dispute, providing reasons why the individual disagrees with the department's proposed dismissal, and providing any relevant documentation to support those reasons. If the department does not receive a written objection within 30 days after the individual received notice of the department's proposed dismissal, or if the department rejects the individual's objection,

(1) the department's substantiated finding becomes a final department decision for purposes of judicial review, and the department will enter the information in the centralized registry; if the previous court action or hearing resulted in a decision, order, judgment, or adjudication that the individual committed abuse, neglect, or exploitation, the department will also enter the information in the centralized registry; and

(2) the department will give notice as required in (k) of this section.

(h) If a hearing is requested under (f) of this section,

(1) the department will hold the hearing within 45 days after receiving the request; and

(2) the entity or provider may allow the individual to remain associated with the entity or provider, pending a decision on the request, if

(A) the individual is removed from direct contact with individuals receiving services; and

(B) the entity or provider ensures that the individual has supervised access if present in any area where services are provided, during hours of operation.

(i) If a hearing is requested under (f) of this section, the department will conduct the hearing in accordance with AS 44.62.330 – 44.62.630 (Administrative Procedure Act). The hearing officer shall issue a decision within 30 days after the hearing is concluded. The decision is a final department decision for purposes of judicial review. If the hearing officer finds by a preponderance of the evidence that the individual who is the subject of the hearing committed abuse, neglect, or exploitation, the hearing officer shall submit this information to the department office responsible for maintaining the centralized registry. The department will enter the information on the centralized registry and give notice as required in (k) of this section.

(j) If the individual who is the subject of the investigation does not request a hearing within 30 days after receipt of the notice described in (e) of this section, or waives the right to a hearing, the substantiated finding becomes a final department decision for purposes of judicial review, and the department will enter the information in the centralized registry. The department will give notice as required in (k) of this section.

(k) If a hearing or waiver of hearing under this section results in a finding that an individual committed abuse, neglect, or exploitation, the department will notify any entity or provider that made a report under (c) of this section, and the individual who is the subject of the hearing, of the hearing or waiver results and of the entry of the information on the centralized registry. The department will notify the individual of the right to request that the department delete or modify the information on the centralized registry to correct an inaccuracy in accordance with AS 47.05.330(j).

(l) If, after an investigation in accordance with AS 47.05.330(j) to determine whether there is an inaccuracy related to information on the centralized registry, the department determines that the information is correct, the department will notify the individual who made the request that the department has denied the individual's request to delete or modify the information.

(m) The department will remove from the centralized registry information regarding a finding that an individual has committed abuse, neglect, or exploitation if the department receives notice that the individual has died.

(n) For purposes of this section, "substantiated finding" means a determination made by the department after an investigation that, based on available information, it is more likely than not that abuse, neglect, or exploitation occurred. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.960. Termination of association.** (a) Except as provided in (b) and (c) of this section, if an entity or provider is required to terminate association with an individual, the entity or provider shall

(1) notify the individual that the individual's employment, volunteer services, or other association with the entity or provider under 7 AAC 10.900(b) is ended, effective immediately, unless the entity or provider takes immediate action under (2) of this subsection; the entity or provider must notify the individual under this paragraph

(A) immediately, if the individual is present at the entity or premises where the provider is providing services; or

(B) before or upon the individual's next arrival at the entity; or

(2) if the entity or provider intends to request a variance under 7 AAC 10.930, immediately reassign the duties and responsibilities of that individual so that the individual

(A) does not have contact with recipients of services;

(B) cannot access personal or financial records maintained by the entity or provider regarding recipients of services;

(C) has no control over or impact on the financial well-being of a recipient of services, unless the only recipient whose financial well-being is affected is a

(i) relative of the individual who has authorized that individual to make financial decisions for that relative;

(ii) recipient who has executed a power of attorney for that individual to make financial decisions for that recipient; or

(iii) recipient for whom a court has authorized that individual to make financial decisions; and

(D) is provided with direct supervision if present in the entity or premises where the provider is providing services during hours of operation.

(b) If the entity or provider is required to terminate association with an individual who is subject to a union agreement or employment contract that requires more notice than allowed under (a) of this section, the entity or provider shall, within 24 hours after receiving notice to terminate association, deliver a copy of the relevant language of the agreement or contract to the department. The entity or provider shall cooperate with the department in developing an appropriate termination plan for the individual that includes the measures set out in (a)(2)(A) – (D) of this section during the notice period mandated by the agreement or contract.

(c) If the individual for whom termination of association is required is a relative of the operator, administrator, or provider, and resides in the entity or premises where services are provided, termination of association must occur within 24 hours, and the entity or provider shall ensure that the individual

(1) does not have contact with recipients of services; and

(2) is provided with direct supervision if, during that 24-hour period, the individual is present in the entity or premises where the provider is providing services during hours of

operation. (Eff. 2/9/2007, Register 181)

**Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

**7 AAC 10.990. Definitions.** (a) In 7 AAC 10.900 – 7 AAC 10.990, unless the context requires otherwise,

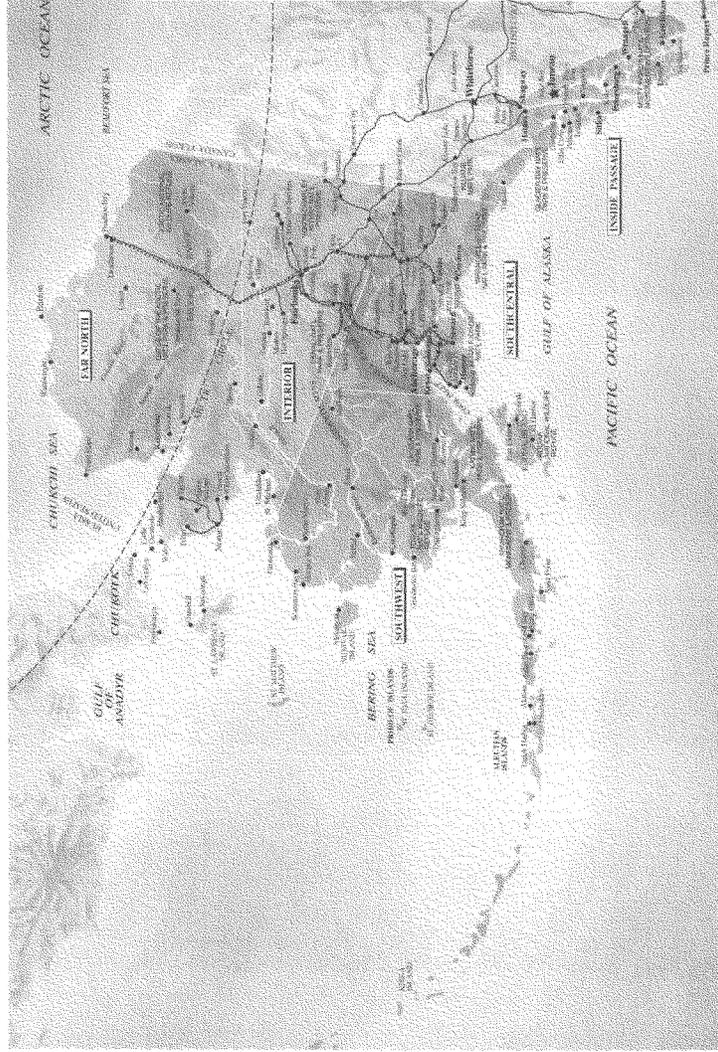
- (1) "APSIN" means the Alaska Public Safety Information Network;
  - (2) "barrier time" means the length of time a barrier crime under 7 AAC 10.905 bars an individual from association with an entity or provider under 7 AAC 10.900(b);
  - (3) "behavioral health problem" means a mental disorder, substance use disorder, or co-occurring disorder;
  - (4) "centralized registry" means the centralized registry established in 7 AAC 10.955;
  - (5) "certification" has the meaning given "certified" in (b) of this section;
  - (6) "commissioner" means the commissioner of health and social services;
  - (7) "condition" means a barrier to association under 7 AAC 10.900(b) that results from
    - (A) a matter described in AS 47.05.330(b)(1)(A) involving the abuse, neglect, or exploitation of a child or vulnerable adult; and
    - (B) the entry of that information in the centralized registry;
  - (8) "co-occurring disorder" has the meaning given in 7 AAC 57.990;
  - (9) "crime" means barrier crime under 7 AAC 10.905;
  - (10) "crime involving domestic violence" has the meaning given in AS 18.66.990;
  - (11) "criminal justice information" has the meaning given in AS 12.62.900;
  - (12) "department" means the Department of Health and Social Services;
  - (13) "direct supervision" means that the administrator, or a care provider who is at least 18 years of age,
    - (A) is within sight or sound of the individual being supervised;
    - (B) has received the training required under applicable department regulations;
    - (C) is present to observe the individual; and
    - (D) is available to the individual for consultation or assistance;
  - (14) "domestic violence problem" means the individual
    - (A) has been charged with, convicted of, found not guilty by reason of insanity for, or adjudicated as a delinquent for a crime involving domestic violence listed in AS 18.66.990(3); or
    - (B) is or has been subject to a protective order issued or filed under AS 18.66 or a substantially similar law or ordinance of another jurisdiction;
  - (15) "eligibility to receive payments" means eligibility to receive payments that are used for the direct provision of services for the health, safety, and welfare of persons who are served by programs administered by the department; "eligibility to receive payments" does not include payments used solely for administrative costs;
  - (16) "individual service provider" has the meaning given in AS 47.05.390;
  - (17) "provider" means an individual service provider;
  - (18) "relative" means an individual who is related to another by marriage, blood relationship, or court decree;
  - (19) "substance use disorder" has the meaning given in 7 AAC 57.990;
  - (20) "supervised access" means that the entity or provider maintains a prudent level of awareness of the whereabouts of an individual for whom supervised access is required, to ensure the protection of recipients of services;
  - (21) "terminate association" means to sever an individual's association under 7 AAC 10.900(b) with an entity or provider;
  - (22) "volunteer" means an individual who regularly or routinely provides services or care, without pay, on behalf of an entity or provider.
- (b) Notwithstanding 7 AAC 10.990, in 7 AAC 10.900 – 7 AAC 10.990, unless the context requires otherwise,

- (1) "entity" has the meaning given in AS 47.05.390;
  - (2) "recipient of services" means an individual receiving services from an entity or provider.
  - (c) In AS 47.05.300 – 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990, unless the context requires otherwise, "regular contact" means direct interaction with a recipient of services that occurs daily, or less frequently but on a recurring basis.
  - (d) In AS 47.05.300(a),
    - (1) "certified" means certified under 7 AAC 43.1090;
    - (2) "eligible to receive payments" has the meaning given "eligibility to receive payments" under (a) of this section. (Eff. 2/9/2007, Register 181)
- Authority:** AS 47.05.300 AS 47.05.330 AS 47.32.010 AS 47.05.310 AS 47.05.340  
AS 47.32.030 AS 47.05.320

## Rural Areas Supported by State Live Scan Equipment

<b>Location and Number of Scan Units</b>	<b>Area Serviced by Location</b>
Aniak – 1	Aniak and surrounding communities
Barrow – 1	Barrow and surrounding communities
Bethel – 2	Bethel, Aleknagik, and surrounding communities
Craig – 1	Craig and surrounding communities
Dillingham – 1	Dillingham and surrounding communities
Delta Junction – 1	Delta Junction, Tok, and surrounding communities
Galena – 1	Galena and surrounding communities
Glenallen – 1	Glenallen and surrounding communities
Homer – 1	Homer and surrounding communities
Kenai/Soldotna – 1	Kenai, Soldotna, Kasilof, Sterling, and surrounding communities
Ketchikan – 1	Ketchikan, Metlakatla, Wrangle, and surrounding communities
King Salmon – 1	King Salmon and surrounding communities
Kodiak – 1	Kodiak and surrounding communities
Kotzebue – 1	Kotzebue and surrounding communities
McGrath – 1	McGrath and surrounding communities
Nome – 1	Nome and surrounding communities
Petersburg – 1	Petersburg and surrounding communities
Seward - 1	Seward and surrounding communities
Sitka – 1	Sitka and surrounding communities
St. Mary's – 1	St. Mary's and surrounding communities
Unalaska – 1	Unalaska and surrounding communities
Valdez – 1	Valdez, Cordova, and surrounding communities
Wrangell – 1	South Prince of Wales Island

Appendix D  
Alaska State Road Map



Alaska Background Check Pilot Program Final Report

IDAHO'S BACKGROUND CHECK PILOT PROGRAM  
FINAL REPORT  
(JANUARY 1, 2005 – SEPTEMBER 30, 2007)

by Mond D. Warren, Bureau Chief

Federal Project Officer: Susan Larsen

Idaho Department of Health and Welfare,  
Bureau of Audits and Investigations

Federal Grant 11-P-93032/0

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The statements contained in the report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare & Medicaid Services. The awardee assumes responsibility for the accuracy and completeness of the information contained in the report.

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## SUMMARY

Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (PL 108-173) established the framework for a program to evaluate national and state background checks on prospective employees with direct access to individuals in long-term care settings. The grant provided funding to operate a federal pilot project for select states to implement background check requirements on those who had access to individuals in long term care settings. The federal pilot project was administered by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and was designed to provide information for Congress to evaluate the feasibility of implementing a national background check requirement.

The Idaho Department of Health and Welfare is the umbrella agency responsible for oversight of the majority of human services programs in Idaho and has conducted criminal history and background checks on individuals providing care or services to vulnerable adults and children in many of its programs. The Idaho Department of Health and Welfare applied for this grant opportunity and in January 2005 it was one of seven states selected to participate in the federal pilot project and was awarded \$2,072,026 in federal grant dollars.

Idaho modified regulations and statutory authority to require background checks on individuals who had access to vulnerable adults and children in certain long term care settings. These settings included skilled nursing facilities, intermediate care facilities for the mentally retarded, residential and assisted living facilities, home health, hospice, and hospitals with swing beds. Idaho regulations for mandatory background checks for employees and contractors who had access to vulnerable adults and children in those settings went into effect on October 1, 2005 with a sunset of September 30, 2007 at the end of the pilot project.

In Idaho, the criminal history and background checks prior to the federal pilot project were conducted using a paper intensive process with an antiquated system. Approximately 15,000 criminal history and background check applications were processed each year. The system involved paper applications, fingerprints rolled on paper hard cards and mailed to the State Police for processing, and it took an average of six to eight weeks to receive background check clearances. The Idaho Criminal History Unit utilized the grant funding to upgrade its systems. A web-based system was implemented allowing individuals to go to the Internet to complete and submit a background check application, schedule a fingerprint appointment, and check on the status of their application. This new web-based system was implemented in August, 2005. Live scan technology was also implemented to allow fingerprints to be collected and transmitted electronically. This reduced the timeframe for application clearances and 73 percent of the applications were finalized and cleared within three days of fingerprinting.

With the new web-based system, Idaho was able to reduce the number of staff for processing applications and placed eight full time staff in the field for fingerprint collection and provider training. With the pilot project the number of criminal history and background check applications increased to over 28,000 applications.

During the federal pilot project Idaho processed 20,117 applications for those individuals working in long term care settings. Of those applications, 3.2 percent or 648 individuals were denied access from working with vulnerable adults or children due to information found during a criminal record or other record search. Of those, 408 were denied a background check clearance and 240 individuals withdrew their applications due to the background check requirement. It is not known how many individuals were deterred from applying for employment in a long-term care setting due to the background check requirement.

Idaho evaluated the success of the requirements for background checks in long term care settings and implemented regulations to continue with this requirement after the federal pilot project. These new regulations went into effect on October 1, 2007.

## INTRODUCTION

The Idaho Department of Health and Welfare (IDHW) conducted background checks on many different classes of individuals within its programs to include various Medicaid providers, adoption and foster care applicants, child care providers, and others who provided care or services to vulnerable adults and children. These background checks were conducted by the Criminal History Unit within the Bureau of Audits and Investigations. Also within IDHW is the Bureau of Facility Standards which is the state survey and certification agency responsible for licensing and certification of long term care providers.

In 2004, long-term care provider stakeholders requested IDHW to consider application for the federal pilot project to conduct fingerprint-based background checks on those who had access to patients and residents in certain long-term care settings. Since the Criminal History Unit was already conducting background checks on human service agency providers and licensees, it was decided this unit would be the lead and utilize those current systems as the base for the Idaho background check model. Once selected, IDHW would modify those systems to incorporate newer technology to accommodate the anticipated increase in the number of applicants for the federal pilot project.

IDHW was one of seven states accepted to participate in the federal pilot project to conduct background checks on employees who had access to individuals in long-term care settings. IDHW modified the existing background check processes to accommodate the requirements to participate in the federal pilot project. IDHW developed one system and processes which included the long-term care providers required for the federal pilot project.

## PROJECT IMPLEMENTATION

## STAKEHOLDER COLLABORATION

Successful implementation of this pilot project was a result of key stakeholder involvement to outline requirements, processes and timelines. The IDHW Division of Information and Technology played a key role in project requirements gathering and in-house system design, build, and maintenance. The Idaho State Police, as the single state agency allowed to submit fingerprints to the FBI, provided necessary information relating to background check processes, technology for electronic fingerprint submission, and the development of the necessary statutes and regulations. The Bureau of Facility Standards, the Idaho facility survey and licensing agency provide support in development of regulations and program compliance and oversight. Provider input played a vital role in ensuring public and legislative support for the pilot project. Provider stakeholders included the Idaho Health Care Association; the Idaho Assisted Living Association; the Idaho Hospital Association; the Idaho Hospice Association; and representatives from home health agencies and long-term care facility operators and administrators.

## STATE AUTHORITY

State regulations for background checks are found within the Idaho Administrative Procedures Act (IDAPA). Specific programs which require background checks detail those requirements in various program regulations. A separate section of regulations detail the background check processes or protocols. These are found under IDAPA 16.05.06 Criminal History and Background Checks. In order to participate in the federal pilot project and require background checks for long term care providers it was necessary for IDHW to modify its regulations and statutes to include those classes of individuals in the requirements.

Idaho Code Section 56-1004A was adopted by the 2005 Idaho Legislature and went into effect July 1, 2005. This legislation allowed Idaho to participate in the federal pilot project and required background checks for providers, employees and contractors who had access to individuals in certain long-term care settings. The legislation also provided immunity for employment decisions based upon the background check results. This legislation included a sunset clause ending these requirements after September 30, 2007, at the conclusion of the federal pilot project.

Regulations were developed under IDAPA 16.05.05 Criminal History and Background Checks in Long Term Care Settings, for the pilot project requiring background checks on providers, employees and contractors who had access to individuals in long-term care settings. These settings included nursing homes; residential or assisted living facilities; home health; hospices; intermediate care facilities for persons with mental retardation (ICFs/MR) and hospitals with swing beds. The regulations became effective on October 1, 2005, and required the background check to be in accordance with the processes spelled out in IDAPA 16.05.06 Criminal History and Background Checks. These regulations included a sunset of September 30, 2007, at the conclusion of the federal pilot project.

## SYSTEM MODIFICATIONS

Prior to the federal pilot project, the IDHW background process involved paper fingerprint applications and fingerprints were rolled on paper cards to be mailed to the State Police. Average times for background check results were six to eight weeks. Information from the background check applications was imported into the criminal history database utilizing an optical character recognition (OCR) software which required manual interventions and corrections. Prior to the federal pilot project, IDHW processed approximately 15,000 background check applications. It was anticipated that due to the federal pilot project, and the addition of other classes of individuals, the background check applications would double to approximately 30,000 a year. As a result, and due to the large amounts of paper and manual processes, it was necessary to streamline background checks and transition the fingerprinting processing into current technology.

IDHW designed and implemented a web based system which allows on-line processing of applications. With this system, an applicant can find the requirements for a background check on the Internet, submit a background check application, schedule a fingerprint appointment at a location nearest to them, and track the status of their application. The system also sends notices to applicants and their employers informing them of the status of each application as it goes through the process and allows them to print a clearance letter if necessary. IDHW also implemented live scan technology to collect and transmit fingerprints electronically to the State Police. Both the web-based system and the live scan technology reduced much of the paper and manual processes and increased the timeframe for applicant clearances to as little as two days for those without criminal records. With the number of required registry checks, IDHW included workflow screens identifying which registry checks needed to be completed on applications and where possible, integrated certain registries into the system to allow automatic comparisons of an applicant against the registry.

## STAFFING

The changes in systems and the anticipated increase in applications necessitated a review of staffing. The manual efforts of processing paper, and mailing applications and clearance letters would be automated however there needed to be an increased availability to the public for electronic fingerprint collection. Prior to the federal pilot project and the new system, IDHW employed five full time positions and one temporary staff to process the background checks. This included a full time unit supervisor. One of the staff members, in addition to numerous additional part time positions around the state, was responsible for collecting fingerprints on hard paper cards. Three of the staff and the temporary staff were responsible for processing the paper applications and researching crime disposition.

IDHW reorganized the Criminal History Unit into eleven full time positions. This included one supervisor, eight staff to collect electronic fingerprints, and two staff in a central location responsible for researching disposition information and handling the criminal history help desk. Personnel assigned to collect fingerprints were responsible for a regional area and often had several different fingerprint locations in each regional area. Field personnel are also responsible for provider and applicant training in their area.

## BACKGROUND CHECK COMPONENTS

## REQUIRED ENTITIES

The Criminal History Unit processes criminal history and background check applications for numerous classes of individuals. For the purposes of the federal pilot project, Idaho included limited classes of long-term care settings into the requirement for background checks. These include:

- Nursing Facilities
- Assisted Living or Residential Care Facilities
- Intermediate Care Facilities for Persons with Mental Retardation (ICFs/MR)
- Home Health
- Hospice
- Hospitals with Swing Beds

Although the federal pilot project included personal care attendants as part of the required entities, Idaho already had existing regulations requiring personal care attendants to have a background check therefore they were not included in the pilot project.

Idaho regulations required criminal history and background checks on providers, employees, and contractors who had access to individuals in those long term care settings. Volunteers in those settings were excluded from background check requirements and were prohibited as part of the federal grant funding for background checks.

## APPLICATION FOR BACKGROUND CHECKS

Idaho regulations require each individual requesting a criminal history and background check to complete an application disclosing crimes or other relevant information in their background. The individual must sign the application and disclosure and have it notarized attesting to the information and its accuracy. The application authorizes the criminal history unit to complete the background check, obtain information, and release it in accordance with applicable laws. Applications may be completed on the criminal history website and submitted electronically, or an individual may complete a paper application and mail it to the criminal history unit.

To complete an application on-line, an individual must go to the criminal history website site at [www.chu.dhw.idaho.gov](http://www.chu.dhw.idaho.gov) and register as a new user. The individual creates their own identification and password which allows them to log-on to the website and submit an application and check on the status of their application. The application asks the individual a series of questions relating to their employer, the services they will be providing, and information about their background. An applicant can submit the application to the criminal history unit on-line. This automatically updates the criminal history database reducing the manual effort inputting applicant information into the system. An individual also has the option of printing their application, having it notarized, and bringing it to their fingerprint appointment

or mailing it to the criminal history unit with a set of ten-rolled fingerprints. Kiosks or computers with the criminal history application are set up around the State in local offices where applicants who do not have access to the internet are able to utilize these computers to complete and submit an application.

#### PROVISIONAL WORK PERIOD

During requirements gathering for the pilot project stakeholders expressed concerns relating to facilities being able to hire staff pending the outcome of the background checks. Stakeholders voiced concerns of high employee turnover with some positions and due to the staffing requirements for patient/staff ratios there was a need to get staff trained and working quickly. As a result, Idaho regulations allow a provisional work period for employees of providers pending the completion of the background check. In order to allow an employee a provisional work period, the employer must ensure the individual has completed the application and it has been notarized, and the employer must review the information and no disqualifying offenses are disclosed. If a disqualifying offense is disclosed the individual is not allowed to work in the environment which requires the criminal history and background check. The individual must be fingerprinted within twenty-one days of completing the application. Once fingerprinted, the applicant may continue to work until the completion of the background check. Those individuals who are licensed or certified by the State are not available for licensure or certification until the background check is completed.

#### FINGERPRINTING

Idaho has fourteen fingerprint locations throughout seven regional areas where criminal history unit personnel roll fingerprints electronically utilizing live scan technology and transmit the fingerprint images to the State Police for processing. A few remote locations utilize part time staff who capture applicant fingerprints on hard cards and mail them to the nearest fingerprinting location.

Once an individual completes the application on-line and it is submitted, the system provides them the option to schedule a fingerprint appointment at one of the locations. The individual can select the location nearest them and available appointment times are displayed allowing the person to select one. Once selected, the system provides them verification of the appointment location, time and date, and any applicable fees.

At the fingerprint appointment, the Criminal History Unit staff retrieves the application from the on-line system and reviews the information disclosed by the applicant. The application is then printed and the applicant's signature is notarized. The applicant's fingerprints are collected using live scan technology and transmitted to the Idaho State Police for processing. Applicants who do not schedule a fingerprinting appointment may have their ten rolled fingerprints collected by law enforcement or their employer, and mailed to the Criminal History Unit with the notarized application.

#### APPLICATION FEES

Idaho law requires the applicants to pay the cost of the background check unless otherwise designated by regulations. The current cost for a background check in Idaho is \$48.00. This includes the cost per application for the State and FBI checks and the operating and personnel costs of the Criminal History Unit. The federal grant dollars paid the cost of the background checks for the long-term care providers included in the federal pilot project so no fee was collected at fingerprinting.

#### REGISTRY CHECKS

The Criminal History Unit staff completes the required registry checks, often before or during the fingerprinting appointment, to identify any concerns relating to an applicant before processing their fingerprints. These registry checks include:

- Idaho Child Protection Registry
- Idaho Adult Protection Registry
- National Sex Offender Registry
- Office of Inspector General List of Excluded Individuals and Entities
- Nurse Aide Registry
- Idaho Department of Motor Vehicles Driving Records

The criminal history system includes a work flow engine which lists all applications where registry checks still need completion. The applicants are displayed from the oldest received to the most recent by each registry. This allows a registry check to be completed by any of the Criminal History Unit staff around the State, not just for applicants at their fingerprint locations. The application also includes screens to document the completion of each registry check and if any information was found.

#### STATE AND FEDERAL CRIME RECORDS

The criminal history and background check includes a ten-rolled fingerprint comparison against State and federal crime records. The fingerprints are transmitted to the Idaho State Police who conducts a comparison of the fingerprints against Idaho crime records. The Idaho State Police then forwards the fingerprints electronically to the FBI for comparison against national crime records. The FBI returns the results of the match to the Idaho State Police who in turn sends a "hit" or "no hit" electronic notice to the Criminal History Unit for each applicant. This information is put into the criminal history database and automatically updates each applicant record with the results of the State Police and FBI criminal record search indicating whether information was or was not found. If no criminal record is found, the criminal history database looks at the applicant's records in the database and if no registry information is found then the system automatically changes an individual's background check status to "cleared". If a "hit" is indicated, the Idaho State Police forwards a hard copy of the crime record for those applications and the criminal history system records that information was found during the State Police and FBI crime record search. The Criminal History Unit must wait for the hard copy crime results in order to review the crime(s) found and complete the processing of the application.

## DISPOSITION OF CRIME INFORMATION

Crime information received by the Idaho State Police and FBI is often returned showing arrests with no disposition of the incident to identify if the individual was convicted of the offense(s). When this occurs, the Criminal History Unit must contact the originating entity reporting the incident, or the courts, to determine the disposition of the incident. Often this is completed by phone calls or by sending a fax request to the courts. Sometimes a payment is required for the information and a letter request and payment must be sent through the mail. Once the final disposition of the incident is received the Criminal History Unit updates the applicant's record in the system with the correct disposition information.

## DISQUALIFYING OFFENSES

The criminal history and background check regulations found at IDAPA 16.05.06 define a disqualifying offense as a crime listed in the regulations which result in an unconditional denial. An individual is not able to provide direct care or services, or have access to vulnerable adults or children when the individual discloses or the criminal history and background check reveals a conviction for a disqualifying crime. The regulations have two sections which list disqualifying offenses. One section requires a denial for anyone who has a conviction for the listed offenses and the other section lists five year disqualifying offenses where the unconditional denial will be issued if the conviction is within five years from the date of the background check application. A conviction is defined in regulations to include:

- When a judgment of conviction, or an adjudication, has been entered against the individual by any federal, state, military, or local court;
- When there has been a finding of guilt against the individual by any federal, state, military, or local court;
- When a plea of guilty or nolo contendere by the individual has been accepted by any federal, state, military, or local court; or
- When the individual has entered into or participated in first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld including when the individual has entered into participation in a drug court; or the individual has entered into participation in a mental health court.

The disqualifying crimes listed in Idaho regulations include the following crimes or the equivalent in other state law:

- Abuse, neglect, or exploitation of a vulnerable adult, as defined in Section 18-1505, Idaho Code;
- Aggravated, first-degree and second-degree arson, as defined in Sections 18-801 through 18-803, and 18-805, Idaho Code;
- Crimes against nature, as defined in Section 18-6605, Idaho Code;
- Forcible sexual penetration by use of a foreign object, as defined in Section 18-6608, Idaho Code;
- Incest, as defined in Section 18-6602, Idaho Code;

- Injury to a child, felony or misdemeanor, as defined in Section 18-1501, Idaho Code;
- Kidnapping, as defined in Sections 18-4501 through 18-4503, Idaho Code;
- Lewd conduct with a minor, as defined in Section 18-1508, Idaho Code;
- Mayhem, as defined in Section 18-5001, Idaho Code;
- Murder in any degree, voluntary manslaughter, assault, or battery with intent to commit a serious felony, as defined in Sections 18-4001, 18-4003, 18-4006, and 18-4015, Idaho Code;
- Poisoning, as defined in Sections 18-4014 and 18-5501, Idaho Code;
- Possession of sexually exploitative material, as defined in Section 18-1507A, Idaho Code;
- Rape, as defined in Section 18-6101, Idaho Code;
- Robbery, as defined in Section 18-6501, Idaho Code;
- Felony stalking, as defined in Section 18-7905, Idaho Code;
- Sale or barter of a child, as defined in Section 18-1511, Idaho Code;
- Sexual abuse or exploitation of a child, as defined in Sections 18-1506 and 18-1507, Idaho Code;
- Video voyeurism, as defined in Section 18-6609, Idaho Code;
- Enticing of children, as defined in Sections 18-1509 and 18-1509A, Idaho Code;
- Inducing individuals under eighteen (18) years of age into prostitution or patronizing a prostitute, as defined in Sections 18-5609 and 18-5611, Idaho Code;
- Any felony punishable by death or life imprisonment;
- Attempt, conspiracy, or accessory after the fact, as defined in Sections 18-205, 18-306, and 18-1701, Idaho Code, to commit any of the disqualifying designated crimes.

Unconditional denials are issued to individuals who have committed the following crimes within five years from the date of the application:

- Aggravated assault, as defined in Section 18-905, Idaho Code;
- Aggravated battery, as defined in Section 18-907(1), Idaho Code;
- Arson in the third degree, as defined in Section 18-804, Idaho Code;
- Burglary, as defined in Section 18-1401, Idaho Code;
- A felony involving a controlled substance;
- Felony theft, as defined in Section 18-2403, Idaho Code;
- Forgery of and fraudulent use of a financial transaction card, as defined in Sections 18-3123 and 18-3124, Idaho Code;
- Forgery and counterfeiting, as defined in Sections 18-3601 through 18-3620, Idaho Code;
- Grand theft, as defined in Section 18-2407(1), Idaho Code;
- Insurance fraud, as defined in Sections 41-293 and 41-294, Idaho Code;
- Public assistance fraud, as defined in Sections 56-227 and 56-227A, Idaho Code; or
- Attempt, conspiracy, accessory after the fact, or aiding and abetting, as defined in Sections 18-205, 18-306, and 18-1701, Idaho Code, to commit any of the disqualifying five (5) year crimes.

## OTHER RELEVANT RECORDS

Idaho regulations define a relevant record as a record from criminal records or registries that may result in a conditional denial. A conditional denial is a denial issued by the Criminal History Unit which allows the applicant to request a further review of the crimes or incidents to determine the suitability of the individuals to provide care or services to vulnerable adults or children. For individuals who are licensed or certified by the IDHW, a relevant record may include:

- A plea, finding, or adjudication of guilt to any felony or misdemeanor, or any crime other than a traffic violation, that does not result in a suspension of the individual's driver's license;
- A substantiated child protection complaint or a substantiated adult protection complaint;
- The Department determines there is a potential health and safety risk to vulnerable adults or children;
- The individual has falsified or omitted information on the application form;
- The individual is listed with a finding on the Nurse Aide Registry; or
- The Department determines additional information is required.

For employees of providers or contractors a relevant record may include:

- A substantiated child protection complaint or a substantiated adult protection complaint;
- The individual is listed with a finding on the Nurse Aide Registry; or
- The Department determines additional information is required.

Idaho regulations allow the Criminal History Unit to consider the underlying facts and circumstances of felony or misdemeanor conduct including a guilty plea or admission in determining whether or not to issue a clearance, regardless of whether or not the individual received one of the following:

- A withheld judgment;
- A dismissal, suspension, deferral, commutation, or a plea agreement where probation or restitution was or was not required;
- An order according to Section 19-2604, Idaho Code, or other equivalent state law; or
- A sealed record.

## FITNESS DETERMINATION

An individual who receives a conditional denial may request an exemption review within fourteen days from the date of the issuance of a conditional denial. The review is completed by the Criminal History Unit supervisor who serves as the exemption review hearing officer. The review may consist of examining documents and supplemental information provided by the individual, a telephone interview, an in-person interview, or any other review the hearing officer determines is necessary. Upon receipt of a request for an exemption review, the hearing officer will determine the type of review and conduct the review within thirty days from the date of the request. Where an in-person review is appropriate, the hearing officer will provide the individual

at least seven days notice of the review date unless the time is waived by the individual. When an in-person review is scheduled, the individual is notified by the hearing officer that he is able to bring witnesses and present evidence during the review.

The hearing officer considers the following factors or evidence during the exemption review:

- The severity or nature of the crime or other findings.
- The period of time since the incident under review occurred;
- The number and pattern of incidents;
- Circumstances surrounding the incident that would help determine the risk of repetition;
- Relationship of the incident to the care of children or vulnerable adults;
- Activities since the incident, such as continuous employment, education, participation in treatment, payment of restitution, or any other factors that may be evidence of rehabilitation;
- Granting of a pardon by the Governor or the President;
- The falsification or omission of information on the application form and other supplemental forms submitted.

The hearing officer determines the individual's suitability based upon the information provided during the exemption review. The hearing officer issues a notice of decision within fifteen business days of the close of the review. The review decision is effective for three years from the date of the notice of decision.

#### APPEAL OF DENIALS

Exemption review decisions may be appealed under Idaho regulations IDAPA 16.05.03, "Rules Governing Contested Cases Proceedings and Declaratory Rulings." The filing of a notice of appeal does not stay the denial action. These appeals are heard by an independent contract hearing officer and the individual who files an appeal must establish that the Department's denial was arbitrary and capricious. An individual may appeal the decision of the independent hearing officer to District Court.

An exemption review is not available for those applicants who receive an unconditional denial for a disqualifying offense. The individual may challenge the denial within thirty days of the issuance of the denial. The individual must submit the challenge in writing and provide court records or other information which demonstrates the issuance of the unconditional denial is incorrect. The criminal history unit supervisor reviews this information and must issue a decision within thirty days from the receipt of the challenge. The individual may appeal this decision to District Court.

#### CRIMINAL ACTION PENDING

When the applicant is identified as having a pending criminal action for a crime that may disqualify him from receiving a clearance for the criminal history and background check, the Criminal History Unit may issue a notice of inability to proceed. The applicant is not available to provide service or have access to vulnerable adults or children when a notice of inability to

proceed is issued. The applicant can submit documentation that the matter has been resolved to the Criminal History Unit for reconsideration. When the documentation is received that the matter has been resolved the Criminal History Unit will notify the applicant of the reconsideration and issue a clearance or denial.

#### NOTICE TO APPLICANTS AND EMPLOYERS

Applicants and employers are notified of events occurring with each application through automated e-mail notifications. They also have the ability to look up information on the criminal history website. Every applicant for a criminal history and background check has either an employer or licensing entity attached to their record. Prior to an individual being able to submit a background check application, their employer must register with the Criminal History Unit by logging onto the website and entering the business or entity information to include the contact person(s) and their telephone number and e-mail address. The employer or licensing entity is then assigned an employer identification number to give each of their employees to use when applying. The individual enters this employer number on their application which allows the system to attach the applicant to the employer. An applicant may have multiple employers and contact persons attached to their application.

At each stage of the application process, the system sends e-mail notifications to the employer and applicant informing them of any application status changes. For example, when an applicant completes an application on-line and submits it to the Criminal History Unit, the application status becomes "Pending Fingerprinting – Not Available". An e-mail notice is sent to the applicant and employer identifying the status and notifying them the individual has submitted a background check application and is pending fingerprinting. If the employer elects to have the individual work during the provisional period, the employer must have the application printed, signed by the applicant, and have the applicant's signature notarized. The employer must review the application to ensure no disqualifying offense or other relevant information is disclosed. Once the individual is fingerprinted by the Criminal History Unit, or hard paper fingerprint cards are received, the application status is changed to "Pending Background Checks in Process – Available" and a notice of this new status is e-mailed to the employer and applicant ensuring they know the applicant has completed the fingerprinting process. If the individual does not show for the fingerprint appointment, the application status is changed to "Missed Fingerprint Appointment" and e-mail notification is sent notifying the employer the employee missed the fingerprint appointment.

Applicants are allowed to withdraw their application at any time. There are instances where an individual discloses a disqualifying offense during the fingerprint appointment. If the individual elects to withdraw their application the status is changed to "Applicant Withdrew – Not Available" and notice is e-mailed to the employer. If a denial is issued at any time during the application process or an applicant withdraws their application, not only is an e-mail notice sent to the employers and the applicant but the Criminal History Unit calls the employer to ensure they are aware of the denial or withdrawal. A hard copy letter or notice of the denial is mailed to the applicant and employer.

If an individual receives a background check clearance and no crimes or relevant incidents are found, the application status is changed to reflect the clearance and e-mail notifications are immediately sent to the applicant and employer. The applicant has the ability to log-on to the criminal history website and view their application status at any time. If a clearance is received the individual may print a clearance letter. Employers also have the ability to log-on to the criminal history website and may look up, or search the names of applicants who have used their employer identification number. The employer may also verify the application status and print a clearance letter for their records.

The criminal history system produces two different clearance letters if crimes or incidents are found relating to the applicant. One letter is a notice to the applicant and the other letter is a notice to the employer. All crimes and incidents are published on the letter to the applicant providing them an opportunity to review and dispute the information found. This applicant letter is accessed by the individual logging on to the criminal history system, or a unique number is assigned to each application which may be used by the individual to access their information from the website.

When an employer logs on and accesses the clearance letter, all crimes and incidents found are published on the employer's copy of the clearance letter unless the crime or incident was solely learned through the FBI records search. Since the employer letter does not notify the employer of any crimes solely from the FBI information, the letter does tell the employer that FBI crimes were found and they need to discuss the information with their prospective employee. If the applicant previously disclosed the FBI crime then it is published to the employer as a self disclosed crime.

#### EMPLOYER RESPONSIBILITIES

Employers are responsible for ensuring those individuals who are required to have a criminal history and background check receive a clearance before providing any services to vulnerable adults or children, or for long-term care providers, before individuals have access to those in the long-term care setting. If the employer needs to have the individual working on a provisional basis the employer must ensure the application is signed and notarized and no disqualifying offenses are disclosed.

While individuals must receive a criminal history and background check clearance to work in a setting which requires the background check, Idaho regulations specify background check clearance is not a determination of suitability for employment. The background check clearance means that an individual was found to have no disqualifying crimes or relevant record. Employers are responsible for determining the individual's suitability for employment. The employer must screen applicants prior to initiating a criminal history and background check to determine suitability of the applicant for employment. If an applicant discloses a disqualifying crime or offense, or discloses other information that would indicate a risk to the health and safety of children and vulnerable adults, a determination of suitability for employment should be made during the initial application screening by the employer. The employer is also responsible to ensure the required time frames are met for completion and submission of the application and fingerprints to the Criminal History Unit. If the criminal history and background check reveals

any incidents which do not result in a denial, the employer is responsible for reviewing any crimes or incidents and making a determination as to the ability of the individual to provide care or services or risk to children or vulnerable adults.

#### TIMEFRAME FOR BACKGROUND CHECKS

Idaho regulations allowed a background check to be transferable between employers for up to one year if the individual changed employment. This is primarily to curb unnecessary checks and costs and due to the high employee turnover. The Criminal History Unit maintains a website for employers to look up prospective employees to verify the individual has had a criminal history and background check clearance within one year from the date of hire. Employers have the discretion of requiring prospective employees to have a criminal history and background check at any time. In January 2007, Idaho regulations expanded this timeframe to allow a criminal history and background check to be transferable to another employer for a period of three years. The regulations also required that if an employer elected to utilize a previous fingerprint-based background check completed within three years, the employer must complete a name based state only check on the individual as an update to the fingerprint based check.

## STATE EVALUATION OF THE PILOT PROGRAM

## APPLICATIONS AND RESULTS

The Idaho Criminal History Unit began accepting applications from long-term care providers for the federal pilot project on a voluntary basis on August 29, 2005. The date for mandatory submission for long-term care providers was October 1, 2005 through the end of the federal pilot project on September 30, 2007. During this time period the Criminal History Unit received 20,117 applications for background checks from individuals working in long-term care settings. Of those applications there were 408 individuals denied background check clearances for disqualifying offenses or registry findings. An additional 240 individuals withdrew their application at the fingerprinting and interview stage where they disclosed a disqualifying offense or other incident which would have likely resulted in a denial. This represents 3.2 percent of the total applicants who were either denied access or not allowed to work in a setting where the individual had access to a vulnerable adult or child in a long-term care setting. It is not known how many individuals were deterred from applying for employment in a long-term care setting or picked up an employment application however did not return due to the background check requirement.

The majority of the fingerprints were collected utilizing live scan technology however the Criminal History Unit also accepted paper applications and fingerprints rolled on hard paper cards. This primarily occurred with providers in remote locations. Of the 20,117 applications 88 percent of those applications were collected utilizing live scan and 12 percent were received on hard paper cards. The hard cards are mailed to the State Police where they are scanned utilizing a card scanner to allow them to submit them to the FBI electronically. All Idaho transmissions were submitted to the FBI electronically. Occasionally, the FBI is unable to read the fingerprints due to poor quality and the State is asked to submit re-prints for the applicant. Of the fingerprints submitted, only 2.5 percent required re-print submissions.

Prior to the implementation of the new system and live scan technology many applications in Idaho were six to eight weeks to process. With the new technology, 73 percent of the applications submitted were cleared within three days from fingerprinting.

As of January 1, 2007, Idaho's regulations allowed discretion for employers to update a criminal history background check with a State name-based check if the individual had a previous fingerprint-based background check within three years. Providers and employers were surveyed regarding employees where they elected to utilize this discretion. The survey identified 416 individuals hired from January 1, 2007 through September 30, 2007, in long term care settings where the employer utilized its discretion and allowed the applicant to transfer their fingerprint based background check to a new employer.

## PROGRAM COSTS

The costs incurred by Idaho to conduct criminal history and background checks during the period of the federal pilot project were funded by both the state and the federal grant. This is primarily due to the State already conducting background checks therefore the costs charged to

the grant were limited to those expansions for the federal pilot project where it could be determined. This included system development, additional staff hired for fingerprint collection, the cost of the background check charged by the Idaho State Police and FBI, travel or other operating costs, and the indirect costs associated with the federal pilot project. Idaho estimated a total budget for the federal pilot project in an amount of \$2,072,026. The total expenditures charged to the federal grant for the covered activities as of the date of this report were \$2,004,071.

The Criminal History Unit operated with eleven staff. This included a unit supervisor, two support staff to research disposition information and answer phones, and eight fingerprinting staff. The eight fingerprinting staff were added to the existing criminal history unit functions to support the added efforts of the federal pilot project therefore only those personnel costs were charged to the grant. The personnel costs for those eight staff from July 1, 2005, through September 30, 2007, were \$649,967.

System requirements and development of the new web-based criminal history system began as soon as the State was notified of being awarded the grant for the federal pilot project. Although the system was implemented in August 2005, maintenance and enhancements to the system were necessary as business processes were adjusted and feedback on the system was received. System development, enhancement and maintenance costs for the federal pilot project were \$330,171. Live scan equipment was implemented however the equipment costs were incurred by the State and not charged to the federal pilot project. Total equipment costs for acquiring live scan technology paid by the state was \$149,515 which included eight portable live scan devices and a store and forward server, to include the annual maintenance.

The Criminal History Unit charges \$48 for criminal history and background checks. This amount includes the \$10 cost by the Idaho State Police for the state records check, the \$34 cost from the FBI for the national records check, and the personnel and operating costs of the Criminal History Unit. Since the federal pilot project paid for the cost of the eight Criminal History Unit personnel, the federal grant was not charged the personnel and operating cost of the unit but was only charged the direct cost for the pilot project applicants from the Idaho State Police for the state and FBI records check. The total costs charged to Idaho by the Idaho State Police, and charged to the federal grant for the cost of criminal history and background checks were \$545,844.

Indirect costs incurred on behalf of the federal pilot project include motor pool, attorney, accounting support, management, human resources, office space and other indirect costs. The total indirect costs incurred for the federal pilot project were \$450,593. Other operating costs directly charged to the federal grant included travel expenses to the annual grantee conferences. Those operating expenses were \$27,496.

IDAHO FEDERAL PILOT PROJECT GRANT COST	
Personnel	\$649,967
Travel/Operating	27,496
Criminal History Checks	545,844
IT System Development/Maintenance	330,171

Indirect Costs	450,593
Total Grant Expenditures	2,004,071

#### SURVEY OF PROVIDERS

In order to help determine the success of Idaho's involvement in the federal pilot project and to determine if the requirements should be continued after the project ended, a survey was conducted of all of the long-term care facilities. 204 surveys were mailed to providers and facilities in January 2007 with a total of 65 percent responding. The survey attempted to understand if facilities and providers would elect to continue with the background requirement under certain conditions or if they felt the background requirements improved the quality of staff hired. The survey included the following questions and responses:

- Did the background check requirement affect the number of people who picked up a job application but did not return due to the requirement?
  - Of the responders, 26 percent indicated yes and 74 percent indicated no.
- Was the background check requirement successful in screening potential workers?
  - Of the responders, 86 percent indicated yes and 13 percent indicated no.
- Was the quality of employees hired increased due to the background check requirements?
  - Of the responders 63 percent indicated yes and 37 percent indicated no.
- If funding was available, should the background check requirement continue?
  - Of the responders, 88 percent indicated yes and 12 percent indicated no.
- If funding was not available should the background check requirement continue?
  - Of the responders, 61 percent indicated yes and 39 percent indicated no.
- If the background check was optional with a fee, would the facility or provider continue to use it as a resource?
  - Of the responders, 73 percent indicated yes and 27 percent indicated no.

Comments received from some of the responders indicated several providers or facilities had some type of background check process in place prior to the pilot project therefore they felt the requirement did not affect their ability to hire prospective employees. Some facilities and providers indicated they held a standard for hiring prospective employees which was higher than the disqualifying offenses in the regulations therefore the additional regulations did not adversely affect hiring employees. Several facilities or providers indicated it was their corporate policy to utilize a private firm to conduct background checks and felt the regulations were duplicative and caused employees to undergo two background checks. Those facilities or providers felt the private name-based background check was sufficient and fingerprint-based background checks were not necessary.

## ACTIONS TO SUSTAIN LONG-TERM CARE PROVIDER BACKGROUND CHECKS

The Bureau of Facility Standards, the State licensing and certification unit, has implemented requirements to continue background checks for individuals working in several of the long-term care settings. These include skilled nursing facilities, intermediate care facilities for the mentally retarded; residential care and assisted living facilities; and home health agencies. This decision was based upon the provider and facility survey, the need to continue those protections for clients in long term care settings, and the pending legislation for a national requirement.

These regulations went into effect on October 1, 2007, just after the sunset of the federal pilot project regulations. During negotiations with providers some stakeholders such as the skilled nursing facility industry, wanted to be able to continue utilizing private background check companies to conduct the pre-employment background checks instead of the current system. As a result, the regulations implemented in Idaho allow a provider to have the background check conducted by an entity other than the Criminal History Unit as long as the background check included a fingerprint-based search of state and federal criminal records. Providers and facilities are responsible for reviewing those background check results and making hiring decisions and are prohibited from allowing employees or contractors who have any of the disqualifying offenses to have access to individuals in those long-term care settings.

## APPENDIX

**Conditional Denial:** A denial that may be issued at any point in time during the criminal history and background check when items are revealed that are not a disqualifying offense but are of a nature that may be a health or safety risk to a vulnerable adult or child. A Conditional Denial is in effect immediately and prevents the applicant from providing service. The Conditional Denial notice allows the applicant to either accept the denial that carries a three year eligibility sanction, or choose to have an Exemption Review.

**Criminal History and Background Check:** A fingerprint based check of state and federal crime records and a check of available registries for potentially disqualifying information

**Criminal History Unit:** The unit within the Idaho Department of Health and Welfare which is responsible for collecting and processing applicant fingerprints and conducting the background checks for Idaho Department of Health and Welfare programs.

**Direct Patient Access Employee:** Any applicant (other than a volunteer) that has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider.

**Disqualifying Offense:** A crime listed in Idaho regulations which results in an automatic denial of a background check application.

**Employer identification number:** A unique numbers assigned to each employer or licensing entity who is responsible for sending employees or licensees through the Idaho criminal history and background check.

**Exemption Review:** A fitness determination or further review of an applicant record and may consist of a review of the documents and supplemental information provided by the applicant, a telephonic interview, an in-person interview or any other review before the Department designee, and allows the applicant to provide additional information relating to rehabilitation.

**Federal Pilot Project:** The initiative funded by Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (PL 108-173) which established the framework for a program to evaluate national and state background checks on prospective employees with direct access to patients of long-term care facilities or providers. Seven States were selected to participate in the federal pilot project (Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin).

**Fitness Determination:** A decision made by the criminal history unit in order to determine clearance or denial of a background check based upon an individual's criminal history and background check results, or an employment decision by a facility or provider to offer a position of employment or to deny a position of employment, based on the information obtained through the background check search.

**Live Scan:** Automated devices for generating and transmitting digitized fingerprint images. Live scan devices capture fingerprint images directly from subjects' fingers, which are rolled onto glass scanning plates.

**Long-Term Care Facility or Provider:** Those facilities and providers participating in Idaho participating in the federal pilot project and include skilled nursing facilities, intermediate care facilities for persons with mental retardation; assisted living or residential care facilities, home health agencies, hospice agencies, and hospitals with swing beds.

**Registries:** Information search by the Idaho criminal history unit which may identify instances of abuse, neglect or exploitation or other information which may disqualify an individual from access to or providing services to vulnerable adults or children. These registries and databases include the National Sex Offender Registry; the Office of Inspector General List of Excluded Individuals and Entities; the Idaho Child Abuse Registry; the Idaho Adult Abuse/Neglect Registry; the Nurse Aide Registry; the Idaho Department of Motor Vehicles database.

**Unconditional Denial:** A denial issued to the applicant and provider agency for any of the Designated Crimes listed in regulations.

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**ILLINOIS  
BACKGROUND CHECK  
PILOT PROGRAM  
FINAL REPORT**

**By Jonna Veach, Project Director**

**Federal Project Officer: Susan Larsen**

**Illinois Department of Public Health**

**CMS Grant No. 11-P-93038/5**

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**The statements contained in this report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare & Medicaid Services. The grantee assumes responsibilities for the accuracy and completeness of the information contained in this report.**

## ACKNOWLEDGMENT

The Illinois background check pilot would not have been possible without the cooperative efforts of all the stakeholders involved. Special thanks are extended for the original efforts of Illinois Department of Public Health employees Patricia Heidenreich, Project Director and Enrique Unanue, Deputy Director of the Office of Health Care Regulations. When Patricia retired in the spring of 2005, the pilot was sustained by Naomi Dunn and Debra Bryars, until a new project director could be hired in November of that same year. All of these individuals are credited with laying the foundation for the pilot and for gaining the legislative authority required.

The Illinois Department of State Police has been a very critical stakeholder in this pilot. Several individuals were extremely helpful in providing their expertise and assistance. The principal supporters were Tammi Kestel, Maureen O'Donnell, John Jesernik, Sherri Anderson-Martin, Karen Levy McCanna and Darrin Turner. Particular credit goes to Marcel Reid, Executive Officer of the Bureau of Identification, who has devoted a tremendous amount of time and energy toward the success of this pilot from the very beginning and consistently until the end.

The Illinois Department of Human Services played a vital role in providing the information for one of the mandated provider types. Many thanks go to Connie Sims and Dawna Weyant for their help in collecting the data needed from that agency.

The livescan services during the pilot were provided by Accurate Biometrics, who happened to be on the statewide contract. However, Jim and Peggy Critchfield, who head up that organization, have gone above and beyond the requirements of the state contract to promote the success of the pilot.

The long-term care provider associations in Illinois were extremely helpful in disseminating information to the health care providers that were affected by the pilot. Their positive opinion toward the pilot aided the efforts put forth to obtain the needed legislative amendment.

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## EXECUTIVE SUMMARY

Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003 directed the Secretary of Health and Human Services, in consultation with the Attorney General, to establish a pilot program to identify efficient, effective and economical procedures to conduct background checks on prospective long-term care direct patient access employees. Illinois was one of seven states selected by the Centers for Medicare & Medicaid Services (CMS) to participate in the CMS Background Check Pilot Program.

The scope of the pilot in Illinois originally included the entire state and all the requested provider types but was negotiated down to include only ten counties in the northern part of the state and only five of the mandated provider types. The smaller scope allowed grant funds to be used to subsidize the cost of the fingerprint background checks. The reduced scope retained a true representation of the geographic, social and economic structure of the entire state. Illinois consists of an extraordinary amount of border counties where workers can live in one state and work in another. Eight of the ten counties bordered another state. The scope captured enough rural area to be characteristic of the plan states. Illinois has one of the most concentrated metropolitan areas in the United States; therefore, one of the counties included in the pilot was a highly populated urban area.

The principle lessons learned from the pilot are as follows:

- The name-based background checks that Illinois required prior to the pilot do not provide the needed accuracy of identification, while the fingerprint background checks do.
- Requiring the entire background check to be electronically processed reduced the average result time to about 48 hours, while the name-based checks could take up to two months to get a result.
- By having a governmental entity request the fingerprint background checks, the state police could provide notifications to the original requestor of future crimes associated with the fingerprints on file. This prevented redundant background checks through the state police and still allowed the background check to be continually up-to-date.
- The national background check does reveal additional convictions from other states but is cost prohibitive because it must be conducted at the time of each new hire. In Illinois the national check eliminated only one third of one percent (0.3%) that the state police did not disqualify.
- By having the background check results first reported to a governmental entity, a few trained people were able to make disqualifying conviction determinations and take the responsibility off of the facility. This also allowed the revocation of a waiver of the prohibition to work quicker if the applicant had a new disqualifying conviction.

- Waiver applications were processed faster because the fingerprint background check results were already available.

The process used in Illinois to participate in the pilot allowed better protection for the residents in the participating facility. It also allowed the facility to conduct the background check quickly enough to have the results returned either before the hire date or while the applicant was still in orientation. The health care employers who participated in the pilot expressed their satisfaction with the fingerprint process and were quite concerned about going back to the required named-based background check after the pilot. Illinois listened to their concerns and was able to pass an amendment that will require fingerprint background checks through the state police.

## INTRODUCTION

### **Pilot Program Background**

To have the legislative authority for Illinois to participate in the pilot program, it was necessary to amend the Health Care Worker Background Check Act (Act). House Bill 2531 was filed in February, 2005. The bill had multiple sponsors in both the House and the Senate. In May the bill passed both houses and became a Public Act in August 2005.

During the summer the Illinois Department of Public Health (IDPH) communicated with all the various stakeholders. Many conversations and meetings were held with the Illinois State Police (ISP) learning about the background check process. The livescan fingerprint process was investigated. Equipment and staffing were examined along with other budget needs.

By October it was becoming painfully clear that an enormous cost would be involved in the redundant Federal Bureau of Investigation (FBI) background checks that would be required under the pilot design. ISP had implemented a “rap back” system that notifies a governmental requestor of any future convictions once a set of fingerprints are on file, which meant that a direct access worker only had to have one ISP fingerprint background check. However, the FBI does not have that capability and a new FBI check would be required every time a direct access worker was hired. The turnover rate is approximately 100 percent for many health care workers (e.g., nurse aides, personal care workers, etc.) in Illinois. The Act only required health care employers to pay the background check fees for CNAs. All other workers could be required to pay the background check fees themselves. The health care industry felt that the cost to the low paid direct access workers in Illinois would make the project prohibitive.

In November 2005, Illinois started negotiating with CMS to reduce the scope of the pilot to a few representative counties instead of the entire state, saving costs in order to use the grant funds to pay for the background checks. Those negotiations continued into the New Year. On February 17, 2006, an agreement on a new scope that included 10 counties and five provider types was reached. Those counties include: Boone, Carroll, Jo Daviess, Lake, Lee, McHenry, Ogle, Stephenson, Whiteside and Winnebago (see Appendix B).

The provider types are skilled nursing facilities/nursing facilities; intermediate care facilities for persons with mental retardation, home health agencies, long-term care hospitals/hospitals with swing beds and home-and-community-based service (HCBS) facilities over eight beds. Statistics were obtained by CMS from the CMS Online Survey Certification & Reporting (OSCAR) regional office databases. Their calculations showed total pilot county facilities (see Table 1) to be 188 (including an estimate of 28 HCBS facilities) (188 – 28 = 160)

Table 1 Provider Types

	SNF		NF	ICF/ MR	HHA	LTC HOSP	SWING BEDS	COUNTY TOTAL
	DUAL	DIST PART						
Boone	2	1	1					4
Carroll	1		1	1				3
Jo Davies			3	1	1			5
Lake	7	13	4	5	10	5		44
Lee	1	2	1	1	12	1		18
McHenry	1	6	2		1	5		15
Ogle	3	2		1	1			7
Stephenson	2	2		1	2	1		8
Whiteside	4	3	5	5	3			20
Winnebago	4	12		2	11	6	1	36
Grand Totals	425	41	12	20	42	19	0	160
								+ HEDIS Pilot Estimate
								28
								188

- skilled nursing facility/nursing facility, dually certified (SNF DUAL)
- skilled nursing facility/nursing facility (SNF DIST PART)
- skilled nursing facilities (SNF)
- nursing facilities (NF)
- home health agencies (HHA)
- intermediate care facility for persons with mental retardation (ICF/MR)
- long term care hospitals (LTC HOSP)
- hospitals with swing beds (SWING BEDS)

CMS also agreed to increase the grant funds awarded from \$2,551,628 to \$3 million, so the funds were sufficient to cover the additional costs related to the implementation of the Illinois background check pilot:

- Fees related to ISP checks for non-nurse aide applicants
- Livescan vendor fees for the collection of fingerprints
- FBI background checks for all direct access patient staff
- Fingerprint transmission processing for repeat checks.

#### **System Infrastructure Prior to the Pilot**

The system infrastructure was made up of the Legacy MVS Mainframe platform using Nomad as the database and programming language. It had 375 cylinders and was 85 percent full. There was a Visual FoxPro database and application that was used for the Voice Response application; however, that system was very old (MS DOS operating system) and was not going to be supported much longer. There was a DB2 database with an ASP front end that was used for the web application. Each night records from the legacy Nomad application that had been updated within the previous 3 days were pulled and loaded into both the Visual FoxPro and DB2 databases so all three systems remained synchronized.

#### **Registry Prior to the Pilot**

Illinois' registry for nurse aides was staffed by only two individuals who were to process all the equivalency evaluations, maintain the database and respond to all inquiries. All

procedures were done through manual processes which caused entries that were delayed, inconsistent and error prone. In addition, many of the manual procedures had not been updated to fully meet current state and federal regulations.

Before the pilot the Act required a new name-based background check from ISP at the time of a new hire if the background check was over a year old. Fingerprint checks were only done when there were multiple results from a name search, when an applicant or employee challenged the results of a name search and when the name search revealed disqualifying convictions if a waiver of the prohibition of work was requested. Disqualifying conviction determinations were made by the health care employer and copies of the background check results were mailed in to the registry for nurse aides for manual entry. The background check process could take up to two months to complete (see Appendix C).

## PROGRAM DISCUSSION

### Authorizing Legislation

In the fall of 2005, the Act was amended to add the provisions for Illinois to participate in the CMS Background Check Pilot Program. Under the pilot provisions the amendment required a fingerprint background check submitted as a fee applicant request for all workers with duties that involve or may involve contact with residents or access to the living quarters or the financial, medical, or personal records of residents. This included licensed and unlicensed personnel. Physicians (who are generally not an employee of the long-term care facility) and volunteers were omitted from the background check requirements for the pilot.

### **Web Link to Act and Rules**

Health Care Worker Background Check Act [225 ILCS 46]

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1303&ChapAct=225%26nbsp%3BILCS%26nbsp%3B46%2F&ChapterID=24&ChapterName=PROFESSIONS+AND+OCCUPATIONS&ActName=Health+Care+Worker+Background+Check+Act%2E&Print=True>

Health Care Worker Background Check Code (77 Ill. Adm. Code 955)

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1303&ChapAct=225%26nbsp%3BILCS%26nbsp%3B46%2F&ChapterID=24&ChapterName=PROFESSIONS+AND+OCCUPATIONS&ActName=Health+Care+Worker+Background+Check+Act%2E&Print=True>

### **Disqualifying Offenses**

The following offenses are disqualifying under the Act and this Part. Offenses marked with an asterisk (\*) were added to the Act effective January 1, 2004. Offenses marked with a double asterisk (\*\*) were added to the Act effective July 24, 2006.

Violations under the Criminal Code of 1961:

- Solicitation of murder, solicitation of murder for hire [720 ILCS 5/8-1.1 and 8-1.2] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 8-1.1 and 8-1.2);
- Murder, homicide, manslaughter or concealment of a homicidal death [720 ILCS 5/9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.1, 9-3.2, and 9-3.3] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.1, 9-3.2, and 9-3.3; Ill. Rev. Stat. 1985, ch. 38, par. 9-1.1; Ill. Rev. Stat. 1961, ch. 38, pars. 3, 236, 358, 360, 361, 362, 363, 364, 364a, 365, 370, 373, 373a, 417, and 474);

- Kidnapping or child abduction [720 ILCS 5/10-1, 10-2, 10-5, and 10-7] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 10-1, 10-2, 10-5, and 10-7; Ill. Rev. Stat. 1985, ch. 38, par. 10-6; Ill. Rev. Stat. 1961, ch. 38, pars. 384 to 386);
- Unlawful restraint or forcible detention [720 ILCS 5/10-3, 10-3.1, and 10-4] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 10-3, 10-3.1, and 10-4; Ill. Rev. Stat. 1961, ch. 38, pars. 252, 252.1, and 252.4);
- Indecent solicitation of a child, sexual exploitation of a child, sexual misconduct with a person with a disability, exploitation of a child, child pornography [720 ILCS 5/11-6, 11-9.1, 11-9.5\*\*, 11-19.2, and 11-20.1] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 11-6, 11-19.2, and 11-20.1; Ill. Rev. Stat. 1983, ch. 38, par. 11-20a; Ill. Rev. Stat. 1961, ch. 38, pars. 103 and 104);
- Assault; aggravated assault; battery; battery of an unborn child; domestic battery; aggravated domestic battery\*; aggravated battery; heinous battery; aggravated battery with a firearm; aggravated battery with a machine gun or a firearm equipped with a silencer\*; aggravated battery of a child; aggravated battery of an unborn child; aggravated battery of a senior citizen; or drug-induced infliction of great bodily harm [720 ILCS 5/12-1, 12-2, 12-3, 12-3.1, 12-3.2, 12-3.3\*, 12-4, 12-4.1, 12-4.2, 12-4.2-5\*, 12-4.3, 12-4.4, 12-4.6, and 12-4.7] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 12-1, 12-2, 12-3, 12-3.1, 12-3.2, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-4.4, 12-4.6, and 12-4.7; Ill. Rev. Stat. 1985, ch. 38, par. 9-1.1; Ill. Rev. Stat. 1961, ch. 38, pars. 55, 56, and 56a to 60b);
- Tampering with food, drugs, or cosmetics [720 ILCS 5/12-4.5] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 12-4.5).
- Aggravated stalking [720 ILCS 5/12-7.4] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 12-7.4);
- Home invasion [720 ILCS 5/12-11] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 12-11);
- Criminal sexual assault; aggravated criminal sexual assault; predatory criminal sexual assault of a child; criminal sexual abuse; aggravated criminal sexual abuse [720 ILCS 5/12-13, 12-14, 12-14.1, 12-15, and 12-16] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 11-1, 11-2, 11-3, 11-4, 11-5, 12-13, 12-14, 12-15, and 12-16; Ill. Rev. Stat. 1985, ch. 38, pars. 11-1, 11-4, and 11-4.1; Ill. Rev. Stat. 1961, ch. 38, pars. 109, 141, 142, 490, and 491);
- Abuse and gross neglect of a long-term care facility resident [720 ILCS 5/12-19] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 12-19);
- Criminal abuse or neglect of an elderly or disabled person [720 ILCS 5/12-21] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 12-21);
- Endangering the life or health of a child [720 ILCS 5/12-21.6] (formerly Ill. Rev. Stat. 1991, ch. 23, par. 2354; Ill. Rev. Stat. 1961, ch. 38, par. 95);
- Ritual mutilation, ritualized abuse of a child [720 ILCS 5/12-32 and 12-33] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 12-32 and 12-33);

- Theft; theft of lost or mislaid property\*; retail theft; financial identity theft\*; aggravated financial identity theft\* [720 ILCS 5/16-1, 16-2\*, 16A-3, 16G-15\*, and 16G-20\*] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 16-1, 16-2, and 16A-3; Ill. Rev. Stat. 1961, ch. 38, pars. 62, 207 to 218, 240 to 244, 246, 253, 254.1, 258, 262, 262a, 273, 290, 291, 301a, 354, 387 to 388b, 389, 393 to 400, 404a to 404c, 438, 492 to 496);
- Financial exploitation of an elderly person or a person with a disability [720 ILCS 5/16-1.3] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 16-1.3);
- Forgery [720 ILCS 5/17-3] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 17-3; Ill. Rev. Stat. 1961, ch. 38, pars. 151 and 277 to 286);
- Robbery, armed robbery, aggravated robbery [720 ILCS 5/18-1, 18-2, and 18-5] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 18-1 and 18-2);
- Vehicular hijacking, aggravated vehicular hijacking [720 ILCS 5/18-3 and 18-4];
- Burglary, residential burglary [720 ILCS 5/19-1 and 19-3] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 19-1 and 19-3; Ill. Rev. Stat. 1961, ch. 38, pars. 84 to 86, 88, and 501);
- Criminal trespass to a residence [720 ILCS 5/19-4] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 19-4);
- Arson, aggravated arson, residential arson\* [720 ILCS 5/20-1, 20-1.1 and 20-1.2\*] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 20-1 and 20-1.1; Ill. Rev. Stat. 1961, ch. 38, pars. 48 to 53 and 236 to 238);
- Unlawful use of weapons, unlawful use or possession of weapons by felons or persons in the custody of Department of Corrections facilities\*; aggravated discharge of a firearm; aggravated discharge of a machine gun or a firearm equipped with a silencer; reckless discharge of a firearm; aggravated unlawful use of a weapon\*; unlawful discharge of firearm projectiles\*; unlawful sale or delivery of firearms on the premises of any school\* [720 ILCS 5/24-1, 24-1.1\*, 24-1.2, 24-1.2-5\*, 24-1.5, 24-1.6\*, 24-3.2\*, and 24-3.3\*] (formerly Ill. Rev. Stat. 1991, ch. 38, pars. 24-1, 24-1.1, 24-1.2, 24-1.2-5, 24-1.5, 24-1.6, 24-3.2, and 24-3.3; Ill. Rev. Stat. 1961, ch. 38, pars. 152, 152a, 155, 155a to 158b, 414a to 414c, 414e, and 414g);
- Armed violence [720 ILCS 5/33A-2] (formerly Ill. Rev. Stat. 1991, ch. 38, par. 33A-2).

Violations under the Wrongs to Children Act:

- Endangering life or health of a child [720 ILCS 150/4] (formerly Ill. Rev. Stat. 1991, ch. 23, par. 2354);
- Permitting sexual abuse of a child\* [720 ILCS 150/5.1\*] (formerly Ill. Rev. Stat. 1991, ch. 23, par. 2355.1).

Violations under the Illinois Credit Card and Debit Card Act:

- Receiving a stolen credit or debit card\* [720 ILCS 250/4\*] (formerly Ill. Rev. Stat. 1991, ch. 17, par. 5917);

- Receiving a lost or mislaid card\* [720 ILCS 250/5\*] (formerly Ill. Rev. Stat. 1991, ch. 17, par. 5918);
- Sale or purchase of card without user's consent\* [720 ILCS 250/6] (formerly Ill. Rev. Stat. 1991, ch. 17, par. 5919);
- Prohibited use of a credit card\* [720 ILCS 250/8\*] (formerly Ill. Rev. Stat. 1991, ch. 17, par. 5921);
- Fraudulent use of electronic transmission\* [720 ILCS 250/17.02\*] (formerly Ill. Rev. Stat. 1991, ch. 17, par. 5930.2).

Violation under the Criminal Jurisprudence Act: Cruelty to children (formerly Ill. Rev. Stat. 1991, ch. 23, par. 2368).

Violations under the Cannabis Control Act: Manufacture, delivery, or trafficking of cannabis; delivery of cannabis on school grounds or delivery to person under 18; violation by person under 18; calculated criminal cannabis conspiracy [720 ILCS 550/5, 5.1, 5.2, 7, and 9] (formerly Ill. Rev. Stat. 1991, ch. 56 ½, pars. 705, 705.1, 705.2, 707, and 709).

Violations under the Illinois Controlled Substances Act: manufacture, delivery or trafficking of controlled substances, calculated criminal drug conspiracy [720 ILCS 570/401, 401.1, 404, 405, 405.1, 407, and 407.1] (formerly Ill. Rev. Stat. 1991, ch. 56 ½, pars. 1401, 1401.1, 1404, 1405, 1405.1, 1407, and 1407.1).

Violation under the Nursing and Advanced Practice Nursing Act: practice of nursing without a license\* [225 ILCS 65/10-5\*] (formerly Ill. Rev. Stat. 1991, ch. 111, par. 3506).

#### **Waiver of the Prohibition of Work**

An applicant may request a waiver of the prohibition against employment by submitting a completed Waiver Application and the results of a fingerprint background check. Illinois has a committee of individuals comprised of representatives of the legal department, the Health Care Worker Registry (HCWR) and the complaints investigation. This committee reviews the completed application giving consideration to whether fines, restitutions, rehabilitation and parole have been successfully completed. Additionally the committee evaluates the mitigating circumstances involved which include:

- The age of the individual when the crime was committed;
- The circumstances surrounding the crime;
- The length of time since the conviction;
- The criminal history since the disqualifying conviction;
- The work history;
- The current employment references;
- The character references;

- The record on other state's registries for nurse aides; and
- Other evidence demonstrating the ability of the applicant or employee to perform the employment responsibilities competently and evidence that the applicant does not pose a threat to the health or safety of residents, which may include, but is not limited to, the applicant's participation in anger management or domestic violence prevention programs.

Waivers will not be granted to individuals who have not met the following time frames.

- Single disqualifying misdemeanor conviction – no earlier than one year after the conviction date;
- Two to three disqualifying misdemeanor convictions – no earlier than three years after the most recent conviction date;
- More than three disqualifying misdemeanor convictions – no earlier than five years after the most recent conviction date;
- Single disqualifying felony convictions – no earlier than three years after the conviction date;
- Two to three disqualifying felony convictions – no earlier than five years after the most recent conviction date;
- More than three disqualifying felony convictions – no earlier than ten years after the most recent conviction date.

IDPH attempted to lengthen the time periods before granting a waiver but the rules that would have accomplished that met with a serious political challenge just before they were adopted and were put on hold.

#### **Offenses that May Not be Waived**

Waivers will not be granted to individuals who have been convicted of committing or attempting to commit one or more of the following offenses:

- Solicitation of murder, solicitation of murder for hire [720 ILCS 5/8-1.1 and 8-1.2];
- Murder, drug induced homicide, involuntary manslaughter and reckless homicide, intentional homicide of an unborn child, voluntary manslaughter of an unborn child, involuntary manslaughter and reckless homicide of an unborn child, or concealment of a homicidal death [720 ILCS 5/9-1, 9-1.2, 9-2, 9-2.1, 9-3, 9-3.1, 9-3.2, and 9-3.3];
- Kidnapping or aggravated kidnapping [720 ILCS 5/10-1 and 10-2];
- Indecent solicitation of a child, sexual exploitation of a child, sexual misconduct with a person with a disability, exploitation of a child, child pornography [720 ILCS 5/11-6, 11-9.1, 11-9.5, 11-19.2, and 11-20.1];
- Aggravated domestic battery, aggravated battery, heinous battery, aggravated battery with a firearm, aggravated battery with a machine gun, aggravated battery of a child,

aggravated battery of an unborn child, aggravated battery of a senior citizen, or drug induced infliction of great bodily harm [720 ILCS 5/12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.2-5, 12-4.3, 12-4.4, 12-4.6, and 12-4.7];

- Criminal sexual assault or aggravated criminal sexual assault [720 ILCS 5/12-13, 12-14, and 12-14.1];
- Criminal sexual abuse, aggravated criminal sexual abuse or predatory criminal sexual assault of a child [720 ILCS 5/12-15 and 12-16];
- Abuse and gross neglect of a long-term care facility resident [720 ILCS 5/12-19];
- Criminal abuse or neglect of an elderly or disabled person [720 ILCS 5/12-21];
- Financial exploitation of an elderly person or a person with a disability [720 ILCS 5/16-1.3];
- Armed robbery [720 ILCS 5/18-2];
- Aggravated vehicular hijacking [720 ILCS 5/18-4]; and
- Aggravated robbery [720 ILCS 5/18-5].

The Director of IDPH may grant a waiver to an individual who does not meet the above stated requirements.

IDPH attempted to make several other convictions always disqualifying but the rules that would have accomplished that met with a serious political challenge just before they were adopted and were put on hold.

#### **State Agency and Stakeholder Collaboration**

While the Act does affect many different state agencies in Illinois, only IDPH and Illinois Department of Human Services (IDHS) were involved in the pilot program. IDHS' state owned operations are not legally subject to the Act but it is used as a guideline in their hiring processes. That agency already used both state and national fingerprint-based background checks for all of their employees as part of their normal business practices and had developed their own fitness determination and waiver process as well. An intergovernmental agreement was processed to allow IDHS to participate in the pilot and provide the data elements required for reporting during the pilot.

Illinois is rich in long-term care provider associations as there are approximately 2500 long-term care facilities in Illinois that IDPH license, not to mention all that are licensed by other state agencies. The provider associations were very responsive to this pilot. They supported and encouraged IDPH's participation. They were instrumental in getting information about the pilot out to the health care employers and assisted in creating a positive atmosphere toward the pilot.

**Restructuring and Automation of Data Processes****IT Technical Assistance**

IT technical assistance was provided to Illinois through CNA Corporation (CNAC), the CMS contracted technical assistance agency. After a thorough review of the current process, the entire system design was changed to one of minimal manual entry and as much automation as possible. The Illinois project director conducted a full systems analysis on IDPH's processes. A determination was made on what policies and procedures would need to be changed to automate the processes. Use cases and work flowcharts were created by IDPH to present to CNAC. The work flowcharts were the principal tool that drove the discussions between CNAC, ISP and IDPH. IDPH wrote detailed descriptions of each process indicated in the flow charts. CNAC analyzed all the information that was provided and developed a cost proposal and timeline to install a server database with a web applicant interface. CNAC developed a timeline that included the following stages and tasks within each stage:

- Initiation Phase
  - Assess target environment
  - Define external data conversion and transformation
  - Develop Concept document
- Definition and Design Phase
  - Functional definition & design
  - Technical Definition and Design
- Implementation Phase
  - Facility & FP vendor input
  - Public Facing for New HCWR
  - Validate Authentication and data conversion
  - BG Check Review & Decision
  - Waivers
  - Implement data transmittal into database
  - IDPH Facing
  - ISP Facing
- Test & Deployment Phase
  - System Testing
  - System Deployment
    - Configure FTP Sites
    - Deploy, Migrate Production Data & Train

The projected time of completion was the end of August 2006.

#### **Creating a New Database**

IDPH made a concerted effort to reduce the number of records that were stored on the mainframe before moving those records to the new server based tables. No records had been physically deleted since the beginning of the registry. These records were used to populate the new database:

- All the IDHS employees
- All individuals who had an administrative finding for abuse, neglect, or theft
- All individuals who had a disqualifying offense
- Records of individuals that were known to be actively working in as certified nurse aides/assistants (CNA).

All the above records were then compared to those individuals who had a background check within the previous three years and anyone not already included in the dataset was added.

#### **New Procedures, Forms and Letters**

A thorough analysis of all the manual procedures used in the HCWR was conducted. In many cases it was determined that procedures had not been updated to be fully in compliance with the current governing federal and state statutes. A total of 54 procedures had to be documented and updated, including:

- Modifying twelve letters previously created manually to be automatically generated in the new web application.
- Updating all forms through a formal IDPH communications department approval process for posting on the web site to increase accessibility and reduce workload.

#### **Additional Letters and Reports**

As CNAC provided only the basic database and web-application, IDPH developed the ability to create automated reports and additional letters that are generated by a Microsoft Access database from the same tables with which the web-application interfaces.

The Access application allows HCWR staff to sort the training programs by name of program, county, zip code and city to help callers find training programs in their area. It also contains all the written procedures that are used in the HCWR for quick and easy reference. This application is used to process all of the requests for equivalencies, to record HCWR staff's productivity, to create registry verifications from the data in the web-applications that can be mailed to callers, to have pre-worded email responses to commonly asked questions, to collect all the waiver processing information, to create template letters relating to the

previously named processes as well as specific-needs letters requesting additional information.

**Background Check Process under the Pilot**

The following is the process that was used in the pilot (also see Appendix D).

- The human resource worker at a facility logged into the HCWR through a secure portal to use the web application.
- A search was done on the new applicant to determine if the applicant was on the registry. If the individual was on the registry the profile was checked to determine if the applicant met certain requirements to be considered for hire. The registry shows certain training; administrative findings of abuse, neglect or theft; disqualifying convictions; waivers that have been granted; and if there is an employment history the registry shows the type of position the applicant held.
- If the most recent background check in the profile screen was a “FEE\_APP” or a “CAAPP” background check, the background check had been completed under the pilot and another ISP background check was not required, but a new FBI check was required. The pilot applied only to new hires. Any applicant that went through this process had the results of their background check displayed on the HCWR.
  - The background check was requested by IDPH to make it a fee applicant request (FEE\_APP).
  - This type of request allowed ISP to store the fingerprints in their repository.
  - ISP put a flag on the file that indicated that IDPH was the original requestor of the background check.
  - Not only was a background check result sent to IDPH at the time of the request but, if there were any future convictions associated with those fingerprints, ISP sent additional no cost notifications to IDPH. This meant that the background check from ISP was always up-to-date and the applicant was not required to have another ISP fingerprint background check during the pilot.
  - IDPH used the information that the facilities entered into the work history portion of the web application to notify the current employer(s) of any future convictions.
  - The notices that went to the current employer(s) were in the form of an automatic email. Therefore, as soon as a disqualifying conviction determination was made the facility received an email.
  - If the conviction was disqualifying any waivers that had been granted were revoked if it was a new conviction.
  - A CAAPP background check was one that was sent by ISP as a part of the Rap Back as a revised background check result.

- The facility had the applicant sign an authorization and disclosure form (see Appendix E), which the facility kept in the applicant's employment records.
- The facility updated or, if not already in the registry, created a new record for the applicant and initiated a background check either before hire or within 10 days of hire. Initiating a background check required that the facility check certain other registries (links were provided).
  - Health and Human Services Office of Inspector General Exclusions List.
  - Illinois Sex Offenders Registration.
  - Illinois Department of Corrections Sex Registrant, Inmate Search and Wanted Fugitives.
  - National Sex Offender Public Registry.
  - The web application allowed the health care employer to document the date that these registries were checked. It is suggested that the facility print this web page as proof of compliance.
- The facility printed out a Livescan Request Form (see Appendix F), which the applicant took to a contracted livescan vendor.
- The livescan vendor collected the fingerprints electronically and, within one business day, electronically transmitted them to ISP and sent IDPH an electronic file with a Transaction Control Number (TCN) in it.
- ISP sent the results to IDPH electronically and the web application matched it to the TCN number. The results were put on the HCWR denoting that this was a "FEE\_APP" background check.
- If the background check was a "No Hit" record (no convictions), the facility received an email that was automatically generated by the application and sent as soon as the data was transmitted from ISP and processed.
- If there was a conviction on the background check, an IDPH reviewer looked at the results report to determine if the conviction(s) was disqualifying.
- If the conviction was not disqualifying, the facility got an email stating that the applicant had no disqualifying convictions.

The facility entered the employment information for the new hire (date of hire and position) and annually entered a date into the employment verification field of the employment record to verify that the employee was still employed at that facility. This kept the employee "Active" on the registry.

**Staffing Issues**

Due to increases in the retirement of state employees and an ongoing state hiring freeze, there was a backlog of data to be entered on the HCWR. Approval was provided to hire several temporary workers to help enter the data and work the phones. While the temporary staff did help to reduce the backlogs, retention was an issue. This required a continual staff training program to be in place.

**Fingerprint Collection****Livescan Vendor Contract**

Since IDPH was allowed to use grant funds to pay for most of the background check and livescan vendor fees, IDPH was required to use the master contract that the Illinois Department of Central Management Services had in place with a statewide livescan vendor. Therefore, multiple vendors were not used, permitting IDPH to work and train only one vendor for the pilot. IDPH also decided to only use livescan fingerprint collection with electronic transfer of data files to ISP and IDPH, to allow for the automatic processing of background checks.

**Livescan Vendor Criteria during the Pilot**

IDPH established some basic goals in addition to the criteria stated in the statewide contract for the vendor in collecting the livescan fingerprints:

- The applicant should not have to travel more than 35 miles to have their fingerprints collected.
- Even in the most rural areas the vendor should have mobilized units available to collect fingerprints at least once every two weeks.
- In the more populated areas the vendor should have permanent offices in the county where fingerprints could be collected on a walk-in basis.
- In the more populated areas, if the permanent office was more than 35 miles from a facility, the vendor should have mobilized units that would be available at least once every two weeks.
- Mobilized units must locate themselves in a neutral location so that applicants from one facility were not going to another facility to have their fingerprints collected.

**Background Check Fees**

Table 2 describes the fees associated with the Illinois Background Check Pilot Program:

Table 2 Cost of a Single Fingerprint-Based Background Check

Illinois State Police Fingerprint Background Check	\$15.00
FBI Fingerprint Background Check	\$24.00
Fingerprint Collection Cost from Contracted Livescan Vendor	\$ 7.95
	\$46.95

### **Training Users from Facilities that Participated in the Pilot**

IDPH provided three training sessions for those selected facilities that were to participate in the pilot. Due to the location of the pilot counties, two of the training sessions were held at Northern Illinois University's satellite location in Rockford, Illinois and a third session was held in a metropolitan area north of Chicago.

PowerPoint presentations that displayed the screens the facility would use in the application were offered along with detailed user instructions, which were provided to each user.

The facility users have proven to be very capable even though many thought of themselves as technology challenged. The web application was particularly easy to learn and the flood of phone calls that was anticipated did not occur.

### **Implementation Problems**

The first version of CNAC's web application did not allow a role for non-pilot users to be able to use the application. The non-pilot facilities required access to the web application to enter employment history but not initiate fingerprint background checks. In addition, the first version of the application would only permit the pilot facilities to initiate both FBI and ISP fingerprint background checks. Since ISP had established a rap back process, this caused unnecessary grant dollars to be spent. Finally, the initial version of the application provided no means for the facilities to voluntarily withdraw an applicant, if the hiring process was stopped for some reason.

The second version of the application was implemented in the middle of January 2007. It allowed the pilot facilities to initiate an FBI only background check and permitted non-pilot facilities to access the system to enter employment information. The second version also allowed the pilot facilities to withdraw the application; however, many did not go back and do this. Often, due to the location of where a user prints out a livescan request form, many unneeded background checks were initiated to just reprint that form. People that should be withdrawn are those who went elsewhere for employment, didn't pass the drug test, didn't want to have their fingerprints taken, etc.

IDPH has had more technical difficulty than expected. Due to a variety of challenges, it took IDPH's information technology (IT) staff close to a month to bring data over from the old main frame system into the new database. The second version of the application still would not allow an individual to be deleted off the registry or to initiate an ISP only background check. Because Illinois' database uses Social Security numbers (SSN) as the principal unique identifier

many people were entered into the database more than once, mainly due to typing errors or wrong information on background checks that were submitted for manual entry. CNAC provided a third version of the application within days of the pilot ending that allowed a person to be deleted and to initiate ISP only background check. Additionally, to meet the federal background check dissemination requirements, the third version did not display the fitness determination results based on the FBI background check information.

Our contracted livescan vendor's technical affiliate left without notice. As a result they were prevented from transmitting a daily file to IDPH and ISP for about three weeks.

ISP had two major upgrades to the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and one to the criminal history record information (CHRI) system that lead to a 6,000 background check back log throughout the State of Illinois. While the upgrades helped increase efficiencies in the long run, it caused another three-week delay in the pilot background check processing that we would have preferred to avoid.

IDPH's IT department is very understaffed, which created a backlog in web portal access requests submitted by the pilot facilities to access the web application through IDPH's secure intranet. It took three months to get all the facilities the needed access.

IDPH was required to use state contracts for purchasing equipment. Even though there was grant funds to use for the equipment the state contract would not allow new purchases until shortly before we were to implement the new process. IDPH has had to share an SQL server with other priority programs and our IT staff has shut down the processing of incoming files from ISP and the livescan vendor except for a short period of time once a day at 5 PM. IDPH used grant funds to purchase a very large SQL server to be used as a dedicated server for the HCWR but due to a variety of internal challenges, the new server is not functioning during the pilot.

#### **Data Results from the Pilot**

Data collected during the pilot program (see Table 3).

Table 3 Data Elements

Employer Type	Count/Record ID	State Disqualified	Federal Disqualified	Number Disqualified	Firm Determinations	No Determinations	Withdrawals
All Other Types	387	6	4	7	285	1	0
Certified Nurse Aide	2620	63	44	74	855	1	83
Cheerleader	217	7	4	8	191	1	59
Clerical	31	1	1	1	98	1	40
Cook	101	9	7	12	77	1	23
DD Aide	148	4	1	4	13	1	21
Dietitian	5				4		1
Director/Business Manager	25	1	1	1	22	1	2
Feeding Assistant	5				4		1
Janitor	57	1	1	1	43	1	9
Kitchen Worker, Food Preparer	543	19	12	23	395	1	122
Laboratory Technician	13				31		2
Licensed Practical Licensed Vocational Nurse	489	10	6	16	278	1	81
Mail	97	1	1	1	43	1	28
Medical Director	1				1		0
Medication Aide/Technician	6				6		0
Mental Health Professional	3				3		0
Miscellaneous duties	46	3	2	3	35	1	5
Nurse Aide in Training	162	8	6	9	19	1	24
Nursing Home Administrator	12				9		3
Occupational/Vocational Therapist	24				23		0
Occupational/Vocational Therapy Aide	12				10		2
Occupational/Vocational Therapy Assistant	1				1		0
Orderly Attendant	7				5		2
Other	289	7	3	7	222	1	34
Personal Care Worker	372	11	15	17	314	1	40
Pharmacist	2				2		0
Physical Therapy Aide	4				3		1
Physical Therapist	25				20		6
Physical Therapy Assistant	2				1		0
Physician Extender	1				1		0
Radiology Technician	14				12		3
Registered Nurse	442	3	1	4	318	1	97
Social Worker	10				6		2
Speech/Language Pathologist	14				9		4
Unknown	72	6	3	5	54	1	13
Waiver Waiver	193	2	2	3	126	1	22
	6316	184	112	197	4391	1	1242

Federal Fitness Determination	Number
Determined Qualified	158
Disqualified	4121
	112

State Fitness Determination	Number
Determined Qualified	108
Disqualified	4119
	164

Federal Agency Decision	Number
Denied	20
Granted	142
Not Required	5
Pending	19
Revoked	1

Month	Number of Applications
10 / 2006	147
11 / 2006	265
12 / 2006	322
1 / 2007	590
2 / 2007	521
3 / 2007	626
4 / 2007	595
5 / 2007	678
6 / 2007	679
7 / 2007	683
8 / 2007	717
9 / 2007	541

### PROGRAM COSTS AND USE OF FUNDS

Illinois was fortunate enough to have a livescan vendor that offered their services through the statewide contract for a rather inexpensive cost. Also we did not have to do redundant ISP background checks due to the rap back feature of a fee applicant request. This resulted in Illinois spending less than half of the grant funds provided.

**Table 4 Grant Funds Expended**

State Personnel	
Salaries	\$456,370
Fringe Benefits	\$209,300
Temporary Employees	\$140,045
General Expenses	\$144,428
Equipment	\$123,488
ISP and FBI Background Checks	\$124,574
Livescan Vendor	\$ 39,954
Software	\$ 32,437
Travel	\$ 9,646
Phones	\$ 7,030
Supplies	<u>\$ 3,142</u>
<b>Total</b>	<b><u>\$1,290,414</u></b>

## **ACTIONS TO SUSTAIN BACKGROUND CHECK PROGRAM**

From the training sessions forward through the pilot, health care employers expressed their concerns about having to go back to just a name-based background check after the pilot. Illinois listened to their concerns and has been able to get the Act amended to require fingerprint background checks statewide. We are facing many of the same problems now trying to implement the amendment. Knowing that we were going to face these difficulties would have been a justifiable reason to not seek the amendment; however, the pilot has demonstrated that the fingerprint background check is by far the best background check for health care workers. The benefit that we have seen through the pilot makes this arduous effort worth it.

### **Additional Legislative Amendment to the Act**

As a direct result of the lessons learned in the pilot, the Act was again amended in the fall of 2007 to require fingerprint-based background checks submitted as a fee applicant request through IDPH (see Appendix G). This amendment is only for an ISP background check because of the burden of cost that the FBI background check would cause. With the ISP rap back a health care worker will only be required to have one background check that will remain continually up-to-date as long as the worker stays active on the HCWR. The Uniform Conviction Information Act (UCIA) law used in the Act before it was amended did not allow ISP to store the fingerprints in their repository. Those background checks were only for a picture of time.

Healthcare employers affected by this Act that IDPH licenses are as follows:

- assisted living and shared housing establishments
- community living facilities
- children's respite homes
- freestanding emergency centers
- full hospices
- home health agencies
- hospitals
- life care facilities
- long-term care facilities
- post-surgical recovery care facilities
- sub-acute care facilities

There are additional health care providers that are affected by this Act that are regulated by the Illinois Department of Labor, Illinois Department on Aging, Illinois Department of Healthcare and Family Services and the Illinois Department of Human Services.

**Rehabilitation Waiver**

In the current proposed rules IDPH may consider the results of a fingerprint-based criminal history records check for a rehabilitation waiver, if specified criteria has been met. The rehabilitation waiver may be granted without a waiver application being submitted by the student, applicant, or employee. In cases where a rehabilitation waiver is granted, a letter shall be sent to the applicant notifying the applicant that he or she has received a waiver automatically.

To be considered for an automatic waiver IDPH will have received a criminal history records check.

A waiver without a waiver application shall be denied unless the student, applicant, or employee has met the following time frames:

- Single disqualifying misdemeanor conviction – 5 years after conviction date;
- Two disqualifying misdemeanor convictions – 7 years after conviction date;
- Three or more disqualifying misdemeanor convictions – 9 years after conviction date;
- Single disqualifying felony conviction – 7 years after conviction date;
- Two disqualifying felony convictions – 9 years after conviction date; and
- Three or more felony convictions shall not be considered for an automatic waiver.

A waiver without a waiver application may be granted to an individual who has been convicted of committing or attempting to commit one or more of the following offenses if the time frames have been met:

- Unlawful restraint, aggravated unlawful restraint, child abduction, or aiding and abetting child abduction [720 ILCS 5/10-3, 10-3.1, 10-5, and 10-7];
- Assault, battery, domestic battery (as a misdemeanor and if not preceded by a violation of an order of protection) [720 ILCS 5/12-1, 12-3, 12-3.2];
- Theft (as a misdemeanor), Theft of mislaid property, offense of retail theft (as a misdemeanor) [720 ILCS 5/16-1, 16-2, 16A-3];
- Criminal trespass to a residence [720 ILCS 5/19-4];
- Reckless discharge of a firearm [720 ILCS 5/24-1.5];

- Practice of nursing without a license [720 ILCS 65/10-5];
- Violations under the Criminal Jurisprudence Act (formerly Ill. Rev. Stat. 1991, ch.23, par. 2368);
- Receiving a stolen credit card or debit card [720 ILCS 250/4];
- Receiving a lost or mistaid credit or debit card with intent to use, sell or transfer [720 ILCS 250/5];
- Sale or purchase of a credit card without user's consent [720 ILCS 250/6];
- Use of a credit or debit card with the intent to defraud [720 ILCS 250/8; and
- Fraudulent use of electronic transmission [720 ILCS 250/17.02].

Upon receipt of the results of a criminal history records check that meets the requirements, a review of any convictions reported will be made by a reviewer at IDPH. The reviewer will determine whether the convictions are disqualifying. The reviewer shall further determine if the circumstances of the conviction(s) meets the criteria. If the criteria are met the reviewer may grant an automatic rehabilitation waiver to the applicant. In cases where a rehabilitation waiver is granted, a letter shall be sent to the applicant notifying the applicant that he or she has received a waiver automatically. The waiver will be recorded in the HCWR. If a rehabilitation waiver is not granted the individual may still apply for a waiver by submitting a completed waiver application for full committee review.

**Livescan Vendor Criteria in the Amended Act After the Pilot**

In proposed rules for the amendment to the Act that resulted from Illinois having participated in the pilot, a contracted vendor is defined as one or more vendors awarded a contract who provides statewide livescan services at an established price. The authorized vendor is defined as one or more private corporations or associations that offer livescan vendor services only to applicants, employees or students of its members and who meets the requirements stated in a written contract.

Contracted and authorized vendors shall meet the following requirements:

- The livescan vendor(s) shall only use equipment that has been certified by ISP to collect inkless fingerprints and software that is up-to-date and meets the requirements for fee applicant submissions.
- The vendor(s) shall electronically transmit fingerprints and required data to ISP in a manner prescribed by ISP.
- The vendor(s) shall electronically transmit the fingerprints to ISP within one business day of when the fingerprints are collected.

- The vendor(s) shall comply with all standards published by ISP and the FBI.
- The vendor(s) shall electronically transmit a daily file of required data successfully to ISP in a manner prescribed by IDPH. All records of prints from one business day must be transmitted in one data file to IDPH in the prescribed format.
- The vendor(s) shall store the fingerprints transmitted to ISP until the end of the contract or authorization, so that IDPH can follow-up at a later date to verify that a specific print was submitted or get the print resubmitted.
- The vendor(s) shall respond to any follow-up inquiries in a timely manner and provide any reporting required by IDPH.
- The vendor(s) shall effectively demonstrate that the vendor has 2 or more years of successful experience transmitting fingerprints electronically to ISP.
- The vendor(s) shall provide non-criminal fingerprinting services, including the collection of demographic data.
- The vendor(s) and the technicians that it employs shall meet any licensing requirements imposed by State of Illinois regulations.
- Only technicians trained and employed by the vendor(s) shall be used to collect fingerprints and transmit the data files electronically to the vendor(s).
- In cases where the health care employer or training program feels that it is in their best interest to have permanent livescan equipment in their facility, the equipment must be under the full control of the vendor(s).
- The vendor(s) shall provide a means where individuals, educational entities, staffing agencies, or health care employers (hereafter in this paragraph referred to as user) may pay the vendor(s) the amount due to ISP for any livescan fingerprints submitted for criminal history background checks.
  - The vendor(s) shall act as designee for the user in paying fees into the State Police Services Fund. The vendor(s) shall allow the user to deposit lump sums into a prepaid account that the vendor(s) maintains. Charges for the vendor's livescan services and the amount due to ISP shall be charged against this prepaid account. Either an on-line accounting or a paper accounting of these account transactions shall be made available to a user no less often than on a monthly basis. The amount of prepaid balance to be kept in the account by the user shall be determined by the vendor(s) based upon factors that may indicate the frequency in which the user may have charges against the account.
  - The vendor(s) shall be allowed to charge an additional amount per fingerprints processed over and above the rate of the livescan services to compensate the vendor(s) for the maintenance of these accounts. The vendor(s) shall be allowed to hold up transmitting any prints to ISP if there are not enough funds in the user's account to pay

for the prints being submitted. The vendor(s) shall notify ISP, IDPH and the educational entity, staffing agency, or health care employer when a fingerprint transition is held up due to lack of funds in the user's account.

- Only individuals presenting a livescan request form generated out of the HCWR web application shall be allowed to be printed under the terms of the contracts for the contracted or authorized vendor. The vendor(s) shall be allowed to charge an additional amount over and above the rate of the livescan services to compensate the vendor(s) for credit card fees.
- The vendor(s) shall only collect livescan prints not card scan prints.
- If an individual's fingerprints are rejected by ISP the vendor(s) shall collect a second set of prints. The vendor(s) shall not charge for the collection of the second set of prints.
- The vendor(s) shall comply with any other terms set forth in the contracts for the contracted or authorized vendor.
- The statewide contracted vendor shall provide service within 35 miles of the facility where the applicant is to be employed at least once every 10 working days.

## CONCLUSION AND RECOMMENDATIONS

At a time in our nation's history when many of our citizens fit into the commonly called "baby boomer" age group, the need for good health care and a safe environment within the health care system has never been more prevalent. Illinois would like to commend those who worked diligently in establishing this pilot program to evaluate the effectiveness of conducting fingerprint background checks on prospective employees with access to residents within the long-term care setting. It has been a privilege for Illinois to have the opportunity to participate in this pilot program. Illinois certainly had its problems in becoming a participant and rolling out a program that would be beneficial to both those gathering data and the populace of the State of Illinois. Anytime there is such a large undertaking as this pilot program, those involved should never expect it to be easy. If it were easy then change would not be taking place. In this particular situation the need for change is clearly apparent.

This pilot may have been just a project for some but we in Illinois have tried to absorb it into our social consciousness and truly realize the importance that the results of this pilot may play on individual lives. Most of the health care employers selected to participate in the pilot rallied around this effort with an exceptional enthusiasm. The procedures were drastically different than what they had used before. The requirement to use a computer and a web application was intimidating for some. All the employers demonstrated a genuine concern for those that reside within the realms of their responsibility and because of this the majority was willing to take a positive attitude toward the pilot. Many could clearly see how the automation would help them to quickly get results that were accurate either before the applicant started working or while the new hire was still in orientation training.

The value of the pilot program is indisputable. The theory that all health care workers should have a fingerprint background check is undeniable. The challenge is in how this should be done.

Illinois' law has specific criminal offenses that are to be considered disqualifying. There is merit in this approach in that it makes it fairer to all potential employees. If there is a judgment call made by each health care provider as they hire new workers, there is a potential that their judgment is influenced by their need for staff. If the employer is in an area where it is hard to recruit workers the bar may be lowered. If the bar is lowered enough, how effective is it to require a background check in the first place. The bar should be placed at a reasonably stringent level that legislatures are comfortable with on a national level for all employers to have to meet those requirements. States and employers could make stronger conditions of employment if they so desire.

A waiver program which eliminates workers who have recently been convicted of certain crimes should be available and outlined by law. Some may believe that once a convicted criminal then that person always has the propensity of committing similar offenses. The law should recognize that some do change their lives even though the law cannot determine the nature of any one's character. Laws can set the minimum requirements and establish criteria that most individuals fall within. If an individual did not commit a heinous crime and it has been several years since he or she has committed any crime, that person may not be a risk to the safety

of a patient, long-term care resident or health care client. A process of further reviewing that individual's situation should be in place.

During the pilot Illinois did not use its normal practice of having the health care employers make the determination as to whether a conviction was disqualifying. During the pilot all the determinations of disqualifying crimes were made by trained state employees that work with those crimes daily in the waiver program. After discussing this point in many training sessions with health care employers, it is more than apparent that employers are fearful of making a mistake and will just not hire individuals with convictions. This is their choice but not their preference. Their fear of a surveyor issuing a deficiency is stronger than their desire to be fully staffed. The pilot facilities remarked that they were especially happy for the determinations to be made by the department before receiving the background check results. Since everything in the pilot process was automated the result was back to the employer, on the average, within 48 hours of when it was electronically submitted by the livescan vendor to ISP. The work load was no heavier on IDPH because, outside of the pilot, the health care employers are required to mail a copy of the background check result to IDPH. That result is manually entered into the database and a determination made on those that have convictions. At least for the facilities that participated in the pilot IDPH's manual work load was reduced.

If the practices of this pilot are expanded to a national program the following recommendations are suggested:

- All direct access workers be required to have a fingerprint background check. Illinois did not include physicians and volunteers. An individual's status should not preclude them from being required to meet the same requirements as others. Volunteers and health care students should also be required to have the background check. If the entire process is electronic the results can come back in approximately two days, which is timely in nature for volunteers as well as workers and students.
- To help states to standardize the background check process and to obtain state rap backs in all states, a national non-profit association with federal government participation should be established. Each state would be invited to have a representative participate at the association so that all concerns could be addressed. As we found in the pilot, there are certain circumstances that cannot be legislated away, such as the rugged terrain of the State of Alaska. These circumstances are not always apparent to those from another state. This association should offer guidance on how a rap back system can easily and economically be developed with the various state police data systems. The association could also offer model laws to help states enact the required legislation for the rap back system and other efficiencies, such as centralizing all state required background checks through one state agency. The association could offer guidance on the establishment of a health care worker registry where the background check results, training information, license information, administrative findings, disqualifying offenses, etc. can be located. Through this association, recommendations could be implemented for standardizing state registries so information could be shared between the states, which in effect would establish a national registry with state background check rap back results. The FBI might find it easier to develop a rap back for the health care industry if they only reported back

to one entity, the association. Due to many state's having some of the same constraints that Illinois experienced with purchasing equipment, hiring staff, working under contract limitations and extremely limited budgets, some states might want to outsource their registry to the association.

- No health care worker registry should have a SSN look-up on the registry. No background checks or training test results should have a unique identifier of a Social Security number (SSN), as identity theft is running rampant across the nation. A health care worker's identity should be centered on a biometric identifier such as a combination of his or her fingerprints and picture rather than a SSN. A card that includes a worker's picture and holds certain electronic data about the worker is often referred to as a "smart card." The worker should be provided a smart card at the same time they have their fingerprints taken and submitted for a background check. This card would become the workers identification card to be used in any health care facility. At the time of hiring the smart card could be used in a card reader to access a secure internet web site for current background check results and training information. In the hiring process the employer would enter a smart card at the same time as the worker and make indication that the worker is now employed at that facility and in what type of position. This would provide the necessary information to notify the current employer of future crimes committed by the worker. Upon the worker ending their employment at a facility, the employer would have the capability of entering only the employer's smart card and indicating that the worker is no longer employed. Annual employment verifications could be made either manually or through an automatic upload by the employer to assist in verifying the certification of CNAs and keep workers active on the registry. Once a worker had a state and federal rap back background check, no additional background check would be required and the worker would be eligible for hire at any time.
- Consistency between the various registries and training requirements for CNAs or health care workers is of utmost importance. It is suggested that the legislation for a national registry be expanded to include requirements for the CNA testing program. If one state is to recognize the training of another state, which is crucial for the worker, there needs to be some assurance that a worker, such as a CNA, has received substantially the same training. Specific criteria should be established.
  - Require a fingerprint background check of a student or someone applying to be considered equivalent to a CNA before they attend class or participate in the equivalency evaluation.
  - Standardize the type, number and level of manual skills.
  - Standardize the requirements for a trainer.
    - What credentials a trainer must have;
    - What process an individual must go through to be authorized as a trainer;
    - How long that authorization should last; and
    - What has to be done to renew that authorization.

- Standardize the competency test from state to state.
  - Automate the competency test so that the student knows the results as soon as the test is taken;
  - Have the results electronically transmitted to the registry within 48 hours (if not instantly) of the student taking the test to assist the student in seeking faster employment instead of the one to two month wait that sometimes happens;
  - Have the test available in most of the popular languages used in the United States; and
  - Automated tests should be proctored but through a national test bank that can only be accessed by a proctor's smart card and the test taker's smart card.
- The requirements for a manual skills evaluator.
  - What credentials an evaluator must have;
  - What process an individual must go through to be authorized as an evaluator;
  - How long that authorization should last; and
  - What has to be done to renew that authorization.
- Standardize the number of skills and level of ability.
  - Specify the number of skills that must be tested, and
  - Specify the minimum level of the skill acceptable.
- Provide consistent information from an on-line source for all individuals seeking to be trained as a CNA.
- Provide an adequate amount of testing facilities and manual skills evaluators in reasonable convenient locations.

Illinois considers the pilot project to have been a success. Even though there were major difficulties involved in participating there were even more rewards. When comparing the pilot to the process before the pilot Illinois did the following:

- Trained a group of facilities, which had never participated in an effort of this nature before, to successfully initiate background checks and enter employment histories of workers through a web application.
- Took a completely manual process of facilities mailing in background checks to electronically processing background checks with automatic email notifications sent to facilities.
- Removed the burden of determinations from the facilities and placed it with trained professionals.
- Decreased the background check result time to approximately 48 hours or less.

- Changed from name-based background checks that were only for a picture of time to a continually up-to-date state fingerprint background check.
- Established written policies and procedures for all aspects of the HCWR.
- Automated letters and created professional forms.
- Amended the law to require all health care employers subject to that law to initiate fingerprint background checks.
- Accomplished all of the above and spent less than half of the grant funds awarded.

## **APPENDIXES**

- A. Definitions**
- B. Illinois' Pilot Counties**
- C. Background Check Process Prior to the Pilot**
- D. Work Flowcharts**
- E. Comparison of Legislative Amendments**
- F. Authorization and Disclosure Form**
- G. Livescan Request Form**

**Appendix A****Definitions**

- CAAPP** – This a revised response background check that is provided as a result of a conviction that has been matched to fingerprints that are stored in the state police repository. This revised response is sent to governmental entities that requested a background check previously on that same set of fingerprints.
- Direct Access Workers** – All individuals employed or retained by a health care employer as home health care aides, nurse aides, personal care assistants, private duty nurse aides, day training personnel, or an individual working in any similar health-related occupation where he or she provides direct care or has access to long-term care residents or the living quarters or financial, medical, or personal records of long-term care residents; individuals licensed by the Department of Financial and Professional Regulation, such as nurses, social workers, physical therapist, occupational therapist and pharmacists; individuals who provided services on site, through contract; and non-direct care workers, such as those who work in environmental services, food service and administration. It did not include physicians or volunteers.
- Fee Applicant Submission** – By routing the background check requests through a government entity, ISP is legally allowed to store that fingerprint in their repository and notify that government entity of any future crimes associated to the fingerprints submitted. This practice is commonly called a “rap back.” This type of background check is noted on the registry as a “FEE\_APP” background check.
- Health Care Worker Registry** – The registry is Illinois’ registry for nurse aides/assistants as well as the registry for other types of health care workers. It contains information about background checks, disqualifying convictions, waivers, training, administrative findings and work history.
- UCIA** – The Uniform Conviction Information Act is a statute that allows any public or private entity to request a background check on an individual in the State of Illinois. It allows both a name-based check and a fingerprint check. The name-based check is conducted by trying to match the submitted name to one or more of over 30 million names that are in the data files. This statute does not allow the state police to retain a copy of the fingerprints in their repository.

**Illinois' Pilot Counties**

**Population, 2006 U.S. Census Estimates**

<b>USA</b>	<b>299,398,484</b>
<b>Illinois</b>	<b>12,831,970 (4.3% of USA)</b>

**12.5% of the population in Illinois is 65 years old and over**



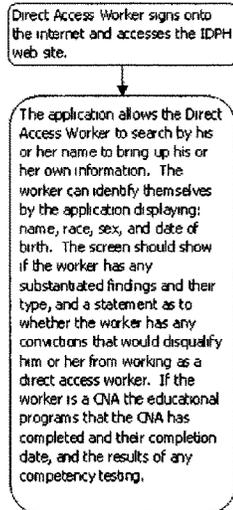
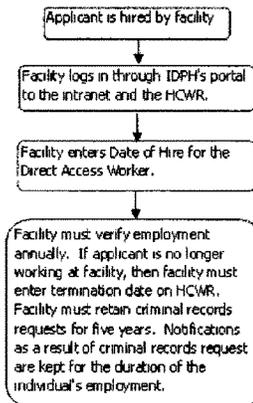
	<b>Population</b>
<b>Boone</b>	<b>41,786</b>
<b>Carroll</b>	<b>16,674</b>
<b>Jo Daviess</b>	<b>22,289</b>
<b>Lake</b>	<b>644,356</b>
<b>Lee</b>	<b>36,052</b>
<b>McHenry</b>	<b>260,077</b>
<b>Ogle</b>	<b>51,032</b>
<b>Stephenson</b>	<b>48,979</b>
<b>Whiteside</b>	<b>60,653</b>
<b>Winnebago</b>	<b>278,418</b>
<b>Total</b>	<b>1,460,316</b>

**Included border counties; metropolitan and rural areas.**

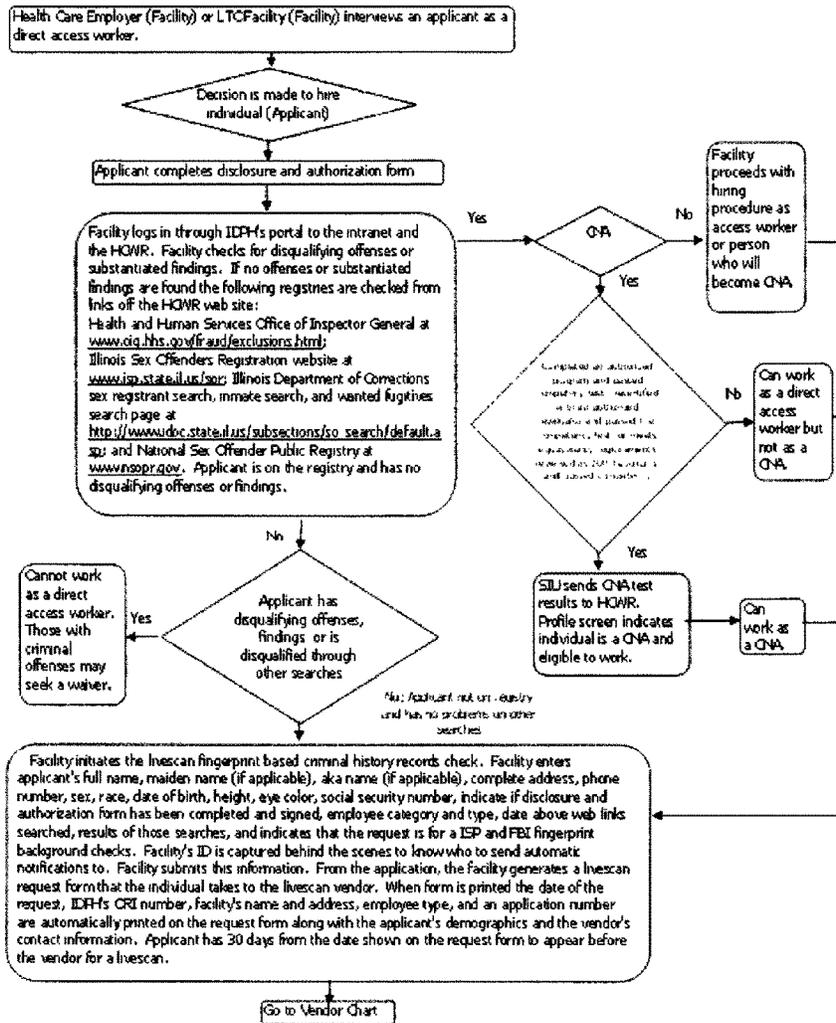
**Background Check Process Prior to the Pilot**

Prior to the pilot, the Act required name-based background checks through ISP on new hires that provided direct care. The Act applies only to non-licensed employees. Following are the requirements before amendments were made as a result of Illinois participating in the pilot.

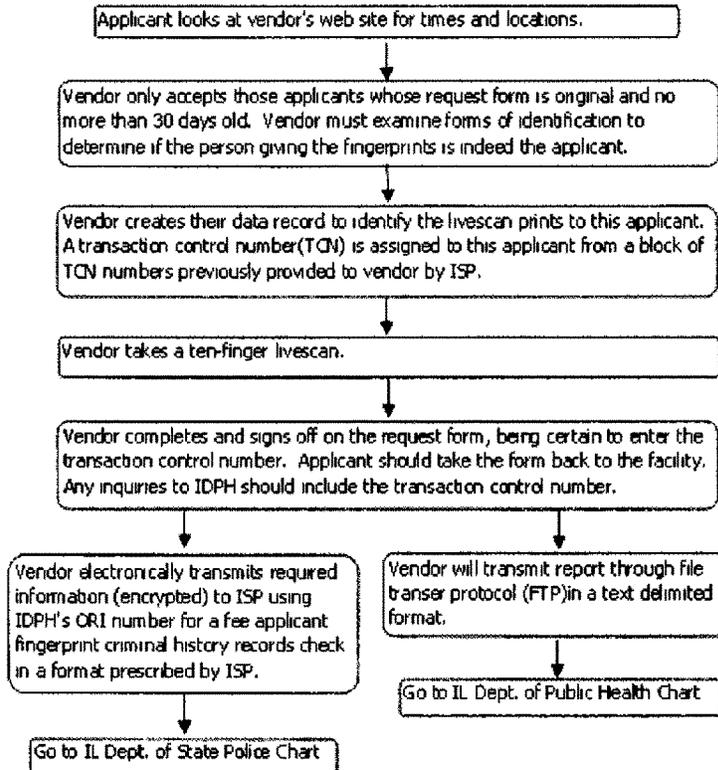
- Required a Uniform Conviction Information Act [20 ILCS 2635] (UCIA) name-based background check for a new hire if the record of their last background check on the NAR was more than a year old.
- Required a UCIA fingerprint background check if there were multiple common names that were retrieved from a name-based check. ISP has over 30 million names in the database which they search for name checks, so it is frequent that multiple common names are found.
- Required a UCIA fingerprint background check if the name-based check revealed disqualifying convictions.
- Required a UCIA fingerprint background check if the applicant challenged the results of a name-based check.
- Required a UCIA fingerprint background check to request a waiver.
- As long as a worker stayed at the same facility, no additional background check was ever required.
- Name-based checks could be submitted by form or, if set up to do encrypted email, by email to ISP. Forms took anywhere from two weeks to a month to process. Emailed requests took about a week, but to get set up to have encrypted email takes at least an intermediate computer skill level.
- UCIA fingerprint checks could be submitted by form (ink and role) or by livescan vendor (electronically). Forms took anywhere from two weeks to a month to process. Livescan checks are generally processed within 48 hours.
- All background checks were requested by the health care employer and the results of the check went back to the employers. The employer had to make the determination as to whether any convictions were disqualifying. The employer was responsible for mailing IDPH a copy of the results. IDPH had to manually enter each of the results into a computer system to be displayed in the on-line NAR.
- Each agency affected by the Act was responsible for processing waivers for the entities they license. Agencies did not always accept the waiver processed by another agency.
- There was no requirement to check any other registry than the NAR.

**Work Flowcharts****Direct Access Worker Checks the Internet to Verify Their Data on the Web Site****Facility Keeps HCWR Registry Updated**

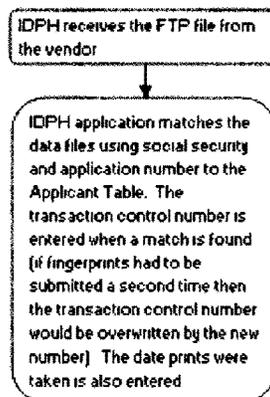
**Health Care Employer or LTC Facility Initiates Livescan Fingerprints**

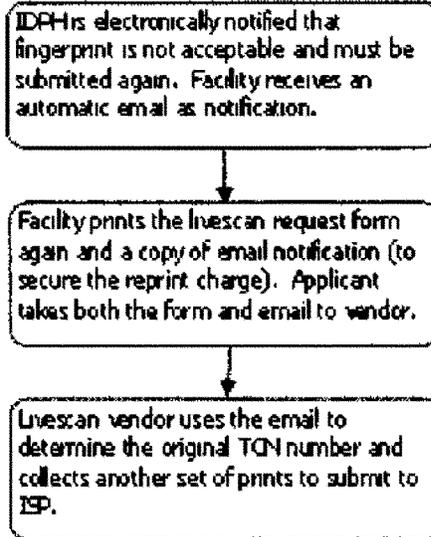


**Vendor Collects Livescan Fingerprints**

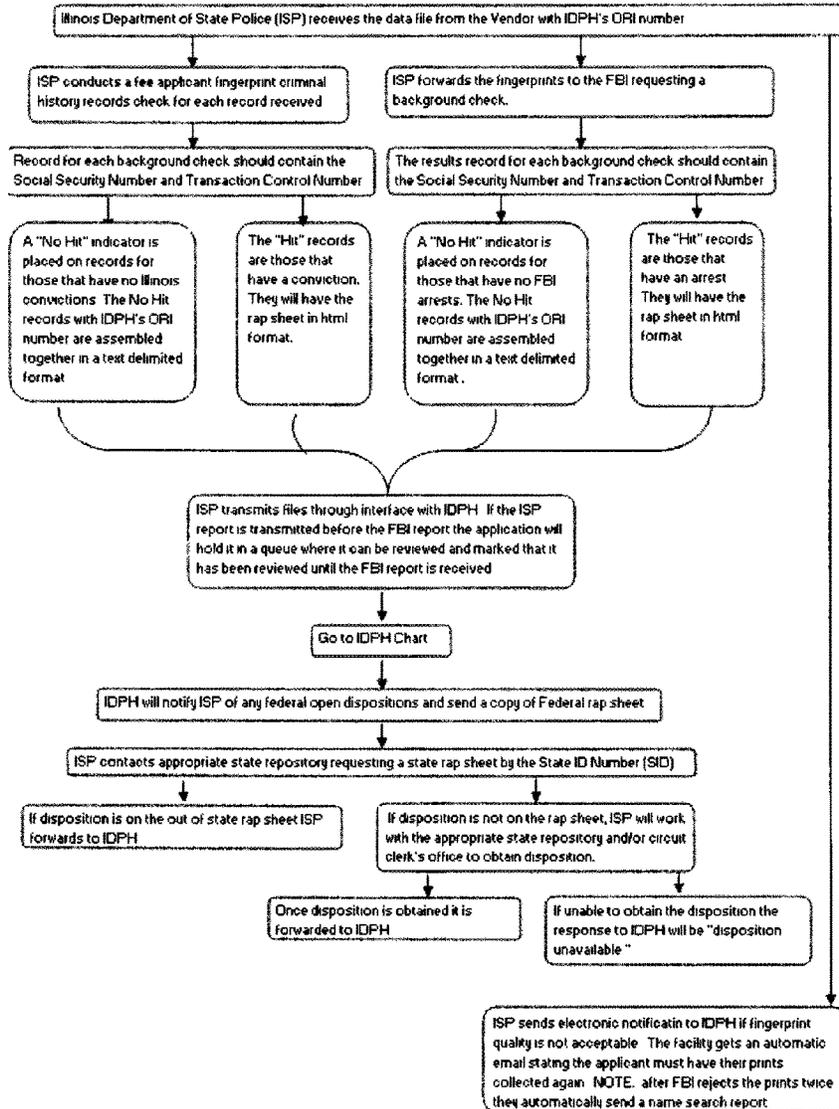


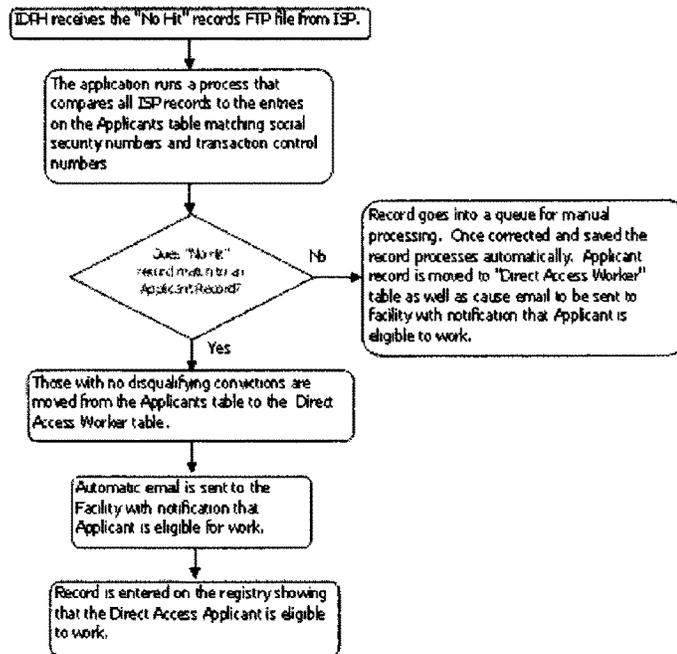
**Illinois Department of Public Health (IDPH) Receives Vendor Record**



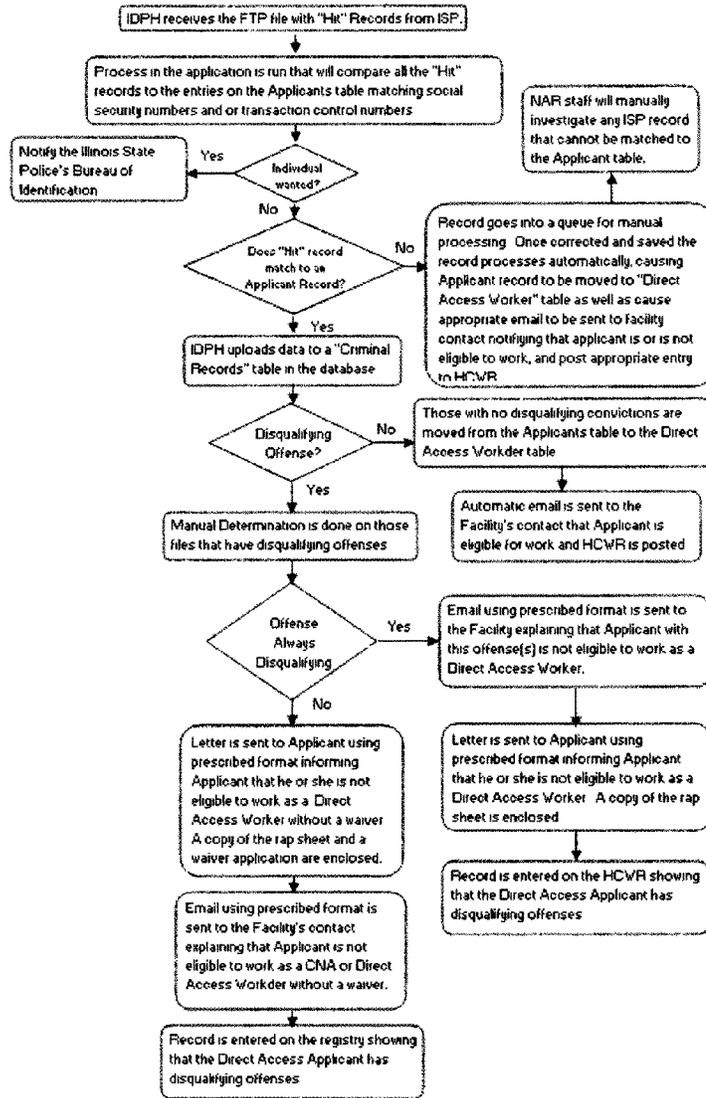
**Livescan Vendor Response to Non-Acceptable Livescan**

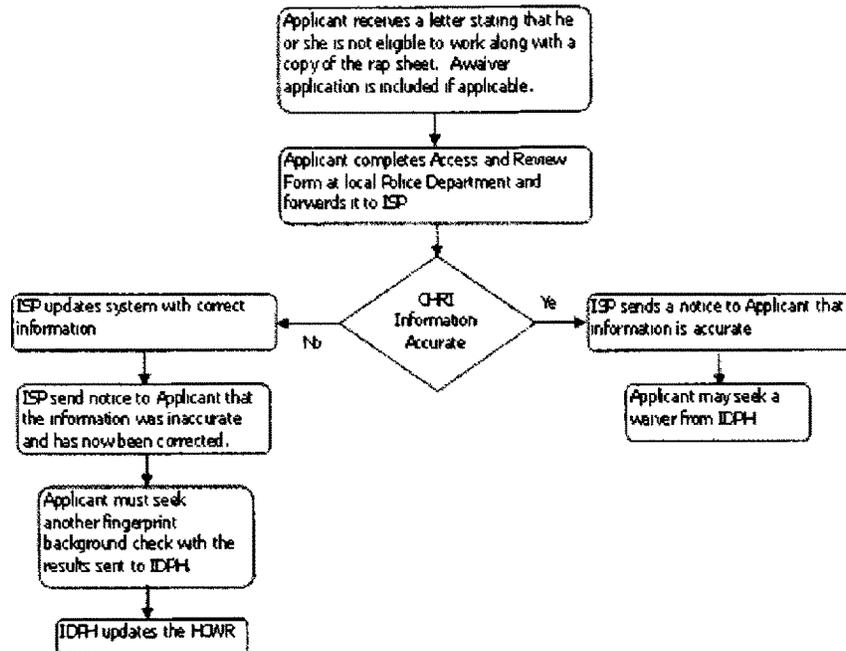
**Illinois Department of State Police (ISP) Processes Fingerprints and Forwards a Set to FBI**



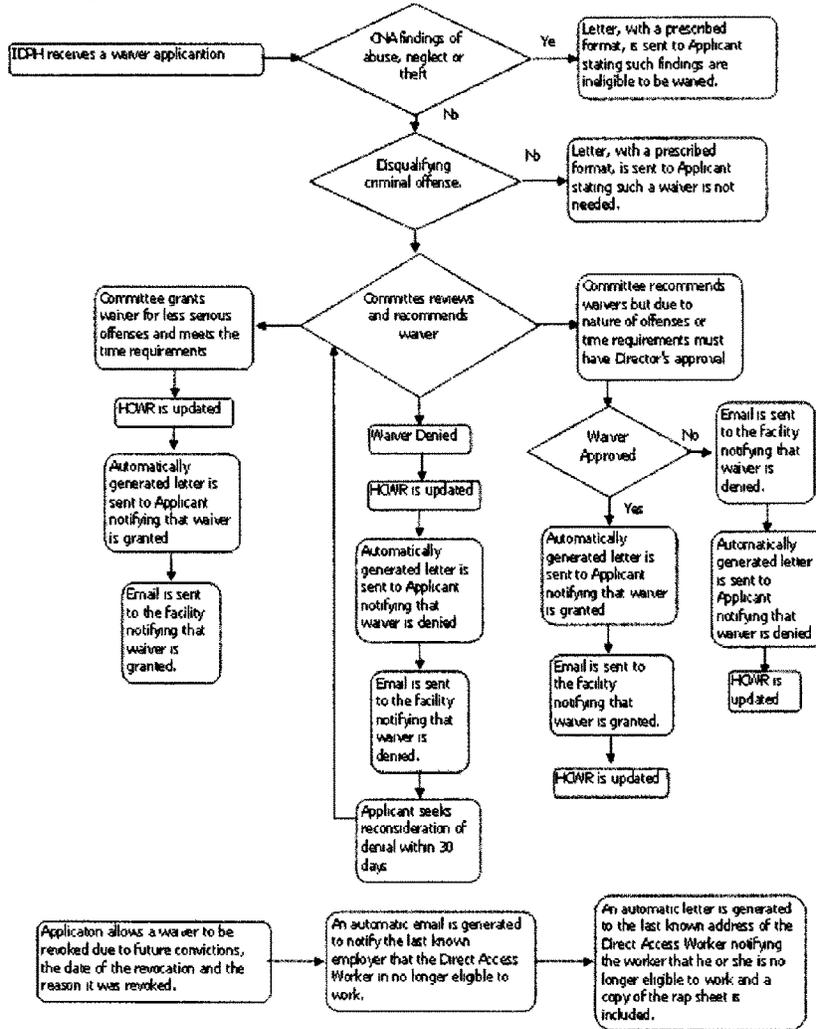
**Illinois Department of Public Health (IDPH) Processes "No Hit" ISP Records**

**Illinois Department of Public Health (IDPH) Processes "Hit" ISP records**

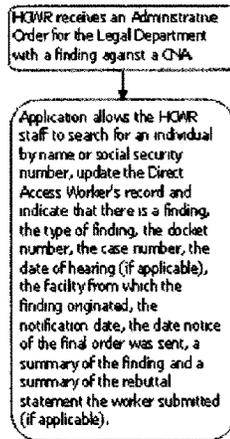


**Applicant Seeks an Appeal of Offenses**

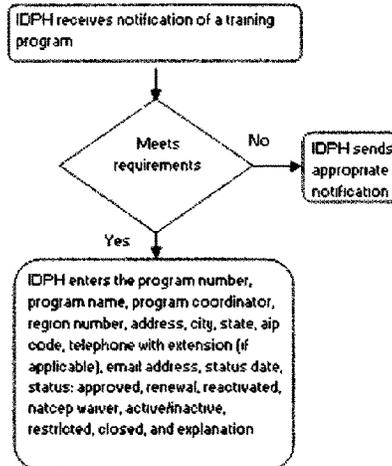
**Illinois Department of Public Health (IDPH) Receives a Waiver Application**



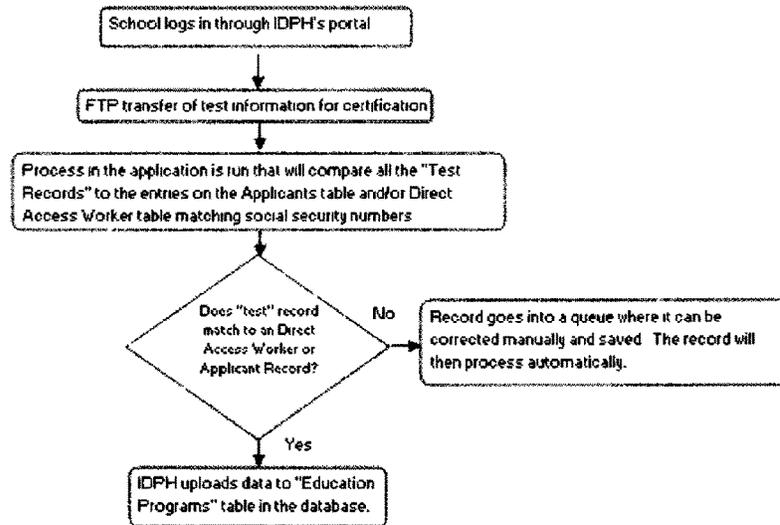
**Illinois Department of Public Health (IDPH) Receives Notice of Administrative Finding**



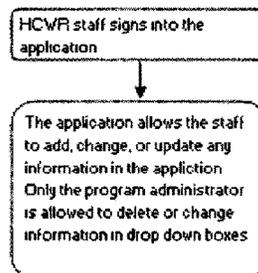
**Training Programs**



### Southern Illinois University (SIU) Submit CNA Test Results



### HCWR Staff Wants to Update a Stored Table



**Authorization and Disclosure Form**



**Illinois Department of Public Health**  
 Health Care Worker Registry, 525 W. Jefferson St., Springfield, IL 62761 Phone: (217) 785-5133  
**Health Care Worker Background Check**  
 Disclosure and Authorization for Criminal History Records Check

I hereby authorize the Illinois Department of Public Health (IDPH), IDPH's designee that train or test health care workers, staffing agency, or the health care employer to request a criminal history records check and I further authorize the Illinois State Police (ISP) to release information relative to the existence or non existence of any criminal record which it might have concerning me to the requestor solely to determine my suitability for employment or continued employment. I further authorize any agency which maintains records relating to me to provide same on request to the ISP or IDPH. I certify that the ISP and any agency, including IDPH, their employees or officers who furnish this information shall be held harmless from any and all liability which may be incurred as a result of releasing such information. I further acknowledge that a health care employer shall not be liable for the failure to hire or to retain an applicant or employee who has been convicted of committing or attempting to commit one or more of the offenses stated in the Health Care Worker Background Check Act (225 ILCS 46/25)

I understand that any false statements or deliberate omissions on this document may be grounds for disqualification from employment or, if discovered after employment begins, could result in discipline up to and including my termination of employment

I understand that the information requested below regarding sex, race, height, eye color, and date of birth is for the sole purpose of identification and the gathering of the above-mentioned information about me accurately, and that it will not be used to discriminate against me in violation of the law. I understand that the provision of my social security number is required by law. A facsimile or photographic copy of this authorization will be as valid as the original

First Name \_\_\_\_\_ Full Middle Name \_\_\_\_\_ Last Name \_\_\_\_\_

Mailing Address \_\_\_\_\_

Physical Address if different \_\_\_\_\_

Other Names Used \_\_\_\_\_ Telephone \_\_\_\_\_

States Where You Have Lived? \_\_\_\_\_

Male  Female Date of Birth \_\_\_\_\_ Height \_\_\_\_\_ Eye Color \_\_\_\_\_ Social Security Number \_\_\_\_\_

- Race
- A** Chinese, Japanese, Filipino, Korean, Polynesian, Indian, Indonesian, Asian Indian, Samoan, or any other Pacific Islander
  - B** Black or African American (Not Hispanic or Latino)
  - H** Hispanic or Latino (Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin)
  - I** American Indian, Eskimo, or Alaskan native, or a person having origins in any of the 48 contiguous states of the United States or Alaska who maintains cultural identification through tribal affiliation or community recognition
  - U** Of undeterminable race Of Untold mixture
  - W** Caucasian (not Hispanic or Latino)

Have you ever had an administrative finding of Abuse, Neglect, or Theft?  Yes  No If "Yes", give full details and state Continue on back if more space is needed

Have you ever been convicted of a criminal offense other than a minor traffic violation (do not include convictions that have been expunged, sealed or adjudicated delinquent)?  Yes  No If "Yes", give full details of each offense and the state in which convicted Continue on back if more space is needed

I certify that the above is true and correct and give my consent for my name to appear on IDPH's Health Care Worker Registry as a result of this criminal history records check

\_\_\_\_\_  
 (Signature) (Date)

As the parent or guardian of the above named individual, who is under the age of seventeen, I give my consent for this named individual to have a criminal history records check

\_\_\_\_\_  
 (Signature of Parent or Guardian when applicable) (Date)

**Livescan Request Form**

Application # \_\_\_\_\_ ORI # ILNHPP09Z Date of Request: \_\_\_\_\_

**Livescan Fingerprint Request**

**Illinois Department of Public Health**

**Health Care Worker Registry, 525 W. Jefferson St., 4<sup>th</sup> Fl., Springfield, IL 62761 Phone (217) 785-5133**

You received this form because you have applied for a position with a health care employer or have enrolled in a training program. To be eligible to work in that position you must have a fingerprint background check. The livescan vendor can only accept an original fingerprint request form (photocopies will not be accepted). The fingerprints are taken from a digital scan – no ink is involved.

**You have only ten working days from the time you signed the authorization form to have you fingerprints collected by the following contracted vendor:**

**Accurate Biometrics: 866-361-9944** (toll free number)  
**Website:** [www.accuratebiometrics.com](http://www.accuratebiometrics.com) (to check for schedules and locations)

Applicant \_\_\_\_\_ SSN \_\_\_\_\_  
Mailing Address \_\_\_\_\_ Telephone \_\_\_\_\_  
Mailing Address \_\_\_\_\_  
Date of Birth \_\_\_\_\_ Sex \_\_\_\_\_ Race \_\_\_\_\_ Height \_\_\_\_\_ Eyes \_\_\_\_\_  
Fingerprints to be submitted to:  State Police  
Employee Type \_\_\_\_\_

(If the worker is paying for this background check they need to have a money order in the correct amount or be able to pay with a credit card).

TCN \_\_\_\_\_ Facility ID: \_\_\_\_\_  
Requesting Facility: \_\_\_\_\_  
Address: \_\_\_\_\_

**Return this portion to the facility that gave you this request form.**

**Full Name** \_\_\_\_\_ **SSN:** \_\_\_\_\_

On: \_\_\_\_\_ In: \_\_\_\_\_ by Accurate Biometrics  
Date City, State

TCN: \_\_\_\_\_  
(Technician's signature)

**Comparison of Legislative Amendments**

<b>Prior to the CMS Pilot</b>	<b>Changes Made for the Pilot Period</b>	<b>Changes Made as a Result of Lessons Learned in the Pilot</b>
<p>Required health care provider to initiate a name-based background check through the ISP on unlicensed direct care workers who provided nursing care or assistance with feeding, dressing, movement, bathing, toileting, or other personal needs, if their background check on the registry for nurse aides was over a year old. The background check results came back to the health care employer for the employer to make a determination as to whether any convictions were disqualifying. The health care employer was then to mail a copy of the background check to IDPH so that the results of the report could be entered on the registry for nurse aides.</p>	<p>Required each new hire, licensed or unlicensed, seeking employment with a selected long-term care provider in a position having direct access to residents, patients, or clients was required to have his or her fingerprints submitted for a criminal history records check through the ISP and the FBI. Background check results came back from the ISP to the IDPH and were electronically entered into the HCWR. Any convictions went into a queue for a trained employee to make the determination as to whether any convictions were disqualifying. The results of the background check determinations were transmitted electronically to the health care employer that initiated the check.</p>	<p>Required each new unlicensed hire that provides direct care or in a long-term care setting has access to residents or the resident's living quarters, or the resident's financial, medical, or personal records to have a fingerprint-based criminal history record check submitted through the IDPH as a fee applicant submission. The background check is to be done through the ISP. Background check results came back from the ISP to the IDPH and were electronically entered into the HCWR. Any convictions went into a queue for a trained employee to make the determination as to whether any convictions were disqualifying. The results of the background check determinations were transmitted electronically to the health care employer that initiated the check.</p>
<p>Required the health care employer to notify the applicant that a background check is required, that the applicant has a right to a copy of his or her criminal records report, and if hired conditionally may be terminated if the criminal</p>	<p>Required the health care employer to notify the applicant that a background check is required, that the applicant has a right to a copy of his or her criminal records report, if hired conditionally may be terminated if the criminal records report</p>	<p>Required the health care employer to notify the applicant that a background check is required, that the applicant has a right to a copy of his or her criminal records report, if hired conditionally may be terminated if the criminal records report</p>

Prior to the CMS Pilot	Changes Made for the Pilot Period	Changes Made as a Result of Lessons Learned in the Pilot
records report indicates disqualifying convictions unless a fingerprint background check validates that he or she does not have a disqualifying conviction.	indicates disqualifying convictions and, if after originally determined not to have a disqualifying conviction, the employer is later notified of a disqualifying conviction, the employee will be terminated. An applicant has the right to challenge the accuracy of the criminal records report through an ISP established process of Access and Review.	indicates disqualifying convictions and, if after originally determined not to have a disqualifying conviction, the employer is later notified of a disqualifying conviction, the employee will be terminated. An applicant has the right to challenge the accuracy of the criminal records report through an ISP established process of Access and Review.
Required the health care employer to obtain an authorization from the applicant to conduct a criminal history records check. The employer devised their own authorization form.	Required the health care employer to obtain an authorization from the applicant for IDPH to conduct a criminal history records check. A standardized authorization form is printed from a web application. The form also requests applicant to make a full disclosure of convictions and administrative findings. The employer reviews the authorization and disclosure form for disqualifying convictions and checks specified web sites such as sex offender, etc. If the authorization and disclosure form disqualified the applicant or if the websites disqualified the applicant, the hiring process stopped at that point.	Required the health care employer to obtain an authorization from the applicant for IDPH to conduct a criminal history records check. A standardized authorization form is printed from a web application. The form also requests applicant to make a full disclosure of convictions and administrative findings. The employer reviews the authorization and disclosure form for disqualifying convictions and checks specified web sites such as sex offender, etc. If the authorization and disclosure form disqualified the applicant or if the websites disqualified the applicant, the hiring process stopped at that point.
Required the applicant to submit fingerprints for a criminal history records check, if the name-based background check revealed	Required the applicant to submit his or her fingerprints through a livescan vendor in a manner prescribed by the ISP. One Statewide contracted	Required the applicant to submit his or her fingerprints through a livescan vendor in a manner prescribed by the ISP. Requires one or more

Prior to the CMS Pilot	Changes Made for the Pilot Period	Changes Made as a Result of Lessons Learned in the Pilot
<p>disqualifying convictions or was unable to identify the individual because of several people with a similar name. The submission of prints could be electronic through a livescan vendor or could be on ink and rolled cards.</p>	<p>livescan vendor was used during the pilot. The contract with the vendor required that all ten fingerprints be submitted for the background check.</p>	<p>contracted livescan vendors to be used, which allows a daily file to be electronically transmitted to the IDPH as well as transmit the fingerprint requests electronically to the ISP daily. The contract with the vendor required that all ten fingerprints be submitted for the background check.</p>
<p>Required that no health care employer shall knowingly hire, employ, or retain any individual who has a disqualifying conviction in a position with duties involving direct care for clients, patients, or residents.</p>	<p>Required that no health care employer shall knowingly hire, employ, or retain any individual who has a disqualifying conviction in a position with duties involving direct care for clients, patients, or residents and no long-term care facility shall knowingly hire, employ, or retain any individual who has a disqualifying conviction in a position with duties that involve or may involve contact with residents or access to the living quarters or the financial, medical, or personal records of residents. This applied to licensed and unlicensed workers.</p>	<p>Required that no health care employer shall knowingly hire, employ, or retain any individual who has a disqualifying conviction in a position with duties involving direct care for clients, patients, or residents and no long-term care facility shall knowingly hire, employ, or retain any individual who has a disqualifying conviction in a position with duties that involve or may involve contact with residents or access to the living quarters or the financial, medical, or personal records of residents. This applied to unlicensed workers as the IDPH does not regulate the licensed workers.</p>
<p>Required immunity from liability. A health care employer shall not be liable for the failure to hire or to retain an applicant or employee who has been convicted of committing or attempting to commit any disqualifying offense.</p>	<p>Required immunity from liability. A health care employer shall not be liable for the failure to hire or to retain an applicant or employee who has been convicted of committing or attempting to commit any disqualifying offense.</p>	<p>Required the IDPH or an entity responsible for inspecting, licensing, certifying, or registering the health care employer or long-term care facility to be immune from liability for notices given based on the results of a fingerprint-based criminal history record check. A health care employer shall</p>

Prior to the CMS Pilot	Changes Made for the Pilot Period	Changes Made as a Result of Lessons Learned in the Pilot
		not be liable for the failure to hire or to retain an applicant or employee who has been convicted of committing or attempting to commit any disqualifying offense.
<p>Required a health care employer have the right to conditionally hire an applicant for up to three months pending the results of a background check.</p> <p>Found in the rules to another act - The selected health care employer shall provide supervision of the individual during the three-month period.</p>	<p>Required a health care employer have the right to conditionally hire an applicant for up to three months pending the results of a background check.</p> <p>Found in the rules to another act - The selected health care employer shall provide supervision of the individual during the three-month period.</p>	<p>Required a health care employer have the right to conditionally hire an applicant for up to three months pending the results of a background check. During this time the employee shall have adequate supervision, which is the type and frequency of supervision required to prevent the risk of abuse, neglect, or theft regarding patients, clients, or residents.</p>
	<p>During the grant, staffing agency workers had their background checks run by the health care provider.</p>	<p>Required staffing agencies of unlicensed health care workers to conduct the fingerprint background check submitter as a fee applicant request with the IDPH as the requestor. If the staffing agency or contracted entity is unable to have access to the fingerprint process established through the Act, the health care employer may initiate the fingerprint-based criminal history records check for the staffing agency or contracted entity. The health care employer may require that the staffing agency or contracted entity reimburse the health care employer for any fingerprinting and background check expenses</p>

Prior to the CMS Pilot	Changes Made for the Pilot Period	Changes Made as a Result of Lessons Learned in the Pilot
		incurred
Required a waiver process with certain convictions listed as always disqualifying and time limits on those that can be waived.	Required a waiver process with certain convictions listed as always disqualifying and time limits on those that can be waived.	Required a waiver process with certain convictions listed as always disqualifying and time limits on those that can be waived. Introduces an automatic waiver for convictions of a lesser crime and a required amount of time has passed.

Following is a summary of new requirements:

- Centralizes all the waiver processes into IDPH rather than each licensing entity processing their own waivers. A worker is not allowed to work with a disqualifying offense, unless a waiver has been granted. The worker cannot work while they are waiting on the waiver to be processed.
- The Act only requires non-licensed direct care and, in long-term care, the access workers to have the fingerprint background checks, but there is wording that states that the health care employer may use this process for any of its employees. Any student, applicant or employee that has a background check through this system will show up on the registry.
- The livescan vendor(s) is allowed to be the health care employer's designee for paying the ISP charge.
- The health care employer is required to enter the employment category, employment type and the date of hire within 30 days of hire; the termination date (separation date) within 30 days of terminating an employee; and a verification date annually, which is verifying that the employee is still working at that facility. This employment information is the way that IDPH will know where to send any notice of future convictions that are disqualifying. Entering this employment information is how a worker remains active on the registry.
- The amendment is introducing an automatic waiver. If an applicant meets certain criteria when the fingerprint background check is received at IDPH, a waiver may be granted at that time and not require the applicant to submit a waiver application. This will only apply to certain crimes and certain time limits.
- Schools, other than high schools, conducting training (such as a CNA class) will initiate a fingerprint background check prior to entry of an individual into the training program.
- If an individual is inactive on the Health Care Worker Registry, that individual is prohibited from being hired to work as a certified nurse aide if, since the individual's most recent completion of a competency test, there has been a period of 24 consecutive

months during which the individual has not provided nursing or nursing-related services for pay. However, if the individual can provide proof of having retained his or her certification by not having a 24 consecutive month break in service for pay, he or she may be hired as a certified nurse aide and the new hire date shall be entered into the Health Care Worker Registry.

- Fingerprints must be collected within 10 working days after the student, applicant, or employee signs the authorization and disclosure form.

MICHIGAN'S WORKFORCE BACKGROUND CHECK PROGRAM  
FINAL REPORT

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Michigan Department of Community Health

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The statements contained in this report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare & Medicaid Services. The awardee assumes responsibility for the accuracy and completeness of the information contained in this report.

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## **Executive Summary**

### ***Introduction***

In September 2005, the Michigan Department of Community Health was awarded a \$3,500,000 grant to implement a pilot program to require background checks for direct access workers in long-term care facilities. The pilot program ran from January 2005 through September 2007.

The pilot program requirements necessitated a change in existing Michigan background check statutes. In order to be in compliance with the pilot program provisions the statute needed to be changed to broaden the scope of the background checks to include hospices, hospitals with swing beds, psychiatric hospitals and home health agencies and to enhance the background check requirements to include a state and national fingerprint-based check on all prospective employees. In addition, the new legislation needed to create an appeals process to dispute incomplete or inaccurate criminal history records. The Michigan Legislature responded by enacting legislation contained in which was signed by Governor Granholm as Public Acts 27, 28 and 29 of 2006.

The long-term care community in Michigan responded to the call for collaborators with interest and enthusiasm. Active participants included state agencies and stakeholders represented by provider membership organizations, advocacy organizations, workers' unions and the research community. Their voices and expertise were instrumental in developing the proposal, developing and passing the legislation, spreading the word about the changes throughout the state, providing statewide informational trainings, and providing a watchful eye over the system and its effects.

Although the various players of the collaborative agreed with the goal of providing greater safeguards for Michigan's vulnerable adults in long-term care, they were not always in agreement about how this should be accomplished, to what degree and to what expense. Meetings were sometimes long, but when they ended consensus had been reached in the interest of moving forward and accomplishing necessary tasks.

The Michigan Workforce Background Check program consists of two major components: a Web-based application that allows employers to search available registries for potentially disqualifying information and a state and federal fingerprint-based criminal history search. The Web-based application, developed by MSU is a state of the art system that is designed to facilitate the background check process by providing a user-friendly interface with a "dashboard" design. The application allows employers to enter demographic information once for all registry checks and fingerprinting documents, which avoids redundant data entry errors. The Web application allows providers to access results, print forms, store and manage applicant records and in a secure environment that is accessible from any computer with Internet access. It provides a systematic process across the multiple health and human service agencies to conduct the checks, to disseminate findings, and to follow through on results.

**Efficiencies Gained**

Previous to the launch of the pilot system, complete background checks were not required of all employees with direct access to long-term care residents. Only applicants who had not lived in Michigan for the previous three years were required to have fingerprint checks. For those checks there was no systematic process across the multiple health and human service agencies to conduct the checks, to disseminate findings, or to follow through on results.

- Michigan laws were enhanced and improved to require all applicants for employment that would have direct access to undergo a background check.
- Additionally, all employees who were hired before the effective date of April 1, 2006, would need to be fingerprinted within 24 months of the enactment of the laws
- Prior to 2006, the background checks were less comprehensive and primarily included a “name-based” check of the Internet Criminal History Tool (ICHAT).
- There was no systematic process across the multiple health and human service agencies to conduct the checks, to disseminate findings, or to follow through on results.
- The scope of the checks was also enhanced to include hospice, psychiatric hospitals, and hospitals with swing beds, home health, and intermediate care facility/mental retardation (ICFs/MR).

**Efficiencies of the new system, not previously in place:**

- Long-term care facilities use the same Web-based program to process background checks on applicants.
- The same registries are checked in the same order for each applicant. Upon discovery of an exclusionary finding the process stops and fingerprints are not taken.
- All applicants who have no exclusionary findings in the registries must be fingerprinted, and the fingerprints checked against Michigan criminal history records and FBI records.
- Fingerprinting can be scheduled from within the system.
- One fingerprint scanning vendor services the entire state and the contract requires fingerprinting to occur within 10 days of making an appointment and the site must be within 50 miles of the applicant. Most people travel under 25 miles to be fingerprinted.
- All records of “hits” (rap sheets) are sent to the appropriate state agency unit (DCH or DHS) for review and determination of eligibility to work, based on Public Acts 27, 28, and 29.
- State licensing units have specific analysts to review findings, make eligibility determinations and communicate results to employers and applicants.

- Analysts receive appeals and investigate the situations to determine if there was an error in the records or the record was expunged. They accept or deny the appeal based on these criteria only.
- All notices of “no hits” are electronically relayed to the Web-based system which automatically and immediately notifies the employer.
- Employers indicate their final hiring decision on the Web-based system.
- All necessary forms (consent and disclosure forms, fingerprint request forms, and notification letters) are generated by the system.

Additional efficiencies include:

- The ability for the two state agencies to request rap sheets from MSP with the click of a button.
- The ability for MSP to indicate rap sheet dispositions with the click of a button
- Long-term care providers can tell the status of an applicant’s fingerprints by looking at the Web-based program.
- State agencies can view facilities’ records and monitor employers’ compliance with background check regulations.

**Statistics**

Total Fingerprints Taken = 115,651

Total Hits = 27,154 (23.5 percent of fingerprints taken)

<b>Total Exclusions - 5936</b>		
	<b>Number Excluded</b>	<b>Percent Excluded</b>
-Medicare OIG Exclusion List	449	0.22
-Offender Tracking Information System (OTIS)	972	0.47
-Public Sex Offender Registry (PSOR)	333	0.16
-Michigan Nurse Aide Registry (NAR)	372	0.18
-Internet Criminal History Access Tool (ICHAT)	3810	1.8

Total Hits = 27,154 Total FP taken = 115,651	Number Disqualified = 996	Percent of Total Hits	Percent of Total Fingerprints taken
State AFIS	499	1.8	0.4
FBI IAFIS	225	0.8	0.2
Both State and FBI	272	1.0	0.2

### ***Recommendations***

***Training must be ongoing.*** It is important to make training available online and to ensure that the most updated information is accessible. Conferences are useful for providing updates.

***Conducting background checks can be costly.*** Given the high turnover rate of direct access workers, multiple fingerprinting seems at times unreasonable and may inflate the cost of the program unnecessarily. Providing for a timeframe wherein facilities may share results or establishing alternative funding mechanisms is recommended to sustain the program.

***Plan to provide ongoing technical assistance.*** Do not underestimate the need or overestimate the computer skills and equipment of the users. As users became familiar with the system and procedures were ironed out, we were able to cut back to one helpline and one telephone assistant at a time.

***State and system people should meet regularly to ensure that all partners are informed and to keep lines of communication open.*** When a new system is being launched that requires the cooperation and coordination of multiple agencies, group meetings are imperative. After the system and processes are in place, meetings should continue on a regular basis. This practice will help maintain communication and keep everyone informed.

***Extra staff will need to be employed at the state level.*** The Michigan system requires that state analysts review criminal history records and make eligibility determinations based on the law. New positions had to be created and filled at MDHS and MDCH to meet the staffing needs of the project. The agency that serves as the central repository for criminal records will also need at least one full time employee to facilitate processing criminal history records in a timely manner.

*Using a Web-based system for conducting background checks* was a successful means by which to transform the background check process in Michigan. We see this as a promising means for use by other states who want to make sweeping changes. The Michigan online system has been successfully used by thousands of long-term care employers to conduct over one hundred thousand background checks on employment applicants throughout the state.

***One system can be used for multiple employer-types.*** The current system can easily be adapted to provide similar background check services to professional nurses, health care students, and contract agency employees. It can be adapted to allow for agencies that must pay for the service and for those who are covered by state funds.

***Contracting with one agency to provide fingerprinting services statewide provides consistency and simplifies communication and information sharing.*** When employers reported problems faced by their applicants trying to get fingerprinted, we knew the source of the problem and could call the vendor directly. The vendor, in turn, responded quickly to the request.

***Review of criminal records should only be done by state personnel.*** The interpretation of laws can be very complex and often requires the referral to state attorneys to make legal decisions. State experience with reviewing applicants' RAP sheets discovered that many records are missing dispositions and are significantly complex in contacting courts in many jurisdictions to determine the final disposition of cases.

***Healthcare students should be included and/or informed.*** Students routinely provide direct care to long-term patients on an on-going basis to meet requirements for certification in their respective programs. These students should be required to have background checks at the beginning of their respective programs or at least be informed of the potential disqualifying factors prior to beginning a program in which they could possibly be refused employment.

***Staffing and contract agencies should be included.*** Many facilities utilize temporary workers, or even outsource entire segments of their workforce to staffing or contract agencies. These companies need access to the background checks system in order to run the checks on prospective employees that are providing clinical services to patients in long-term care facilities.

***An appeal process is needed.*** The laws can be too restrictive for minor infractions and people should be allowed to prove that they have been rehabilitated. A review board should be established that could grant a waiver. The Michigan Workforce Background Check system is being modified to incorporate and track the appeal process.

***FBI criminal history check is needed.*** During the first year of implementation, results of the state and federal background checks indicated that 25-30 percent of the exclusions come from FBI criminal histories only. Further, state criminal history record information in Michigan is sometimes incomplete; approximately 29 percent of all disqualifying information from Michigan convictions is found on the FBI record only. Although this is contrary to general statistics which show that state records are more complete than federal records, analysts

confirmed disqualifying convictions resulting from Michigan arrests that were reported only on the FBI criminal record. According to MSP, this results from a breakdown in the process for reporting arrests to the Law Enforcement Information Network (LEIN) system. In the past, local law enforcement agencies were instructed to obtain two sets of fingerprints upon arrest and forward both sets to MSP. MSP would then send one set to the FBI for inclusion in the AFIS. Some agencies sent a set of fingerprints directly to the FBI, but did not send prints or information to MSP. MSP is addressing this problem by developing software that compares local records with the LEIN system records and automatically includes information that was missing from the LEIN system. Until that process is completed, continued checks of the FBI system is necessary in order to receive the most comprehensive criminal history information.

***Re-fingerprinting applicants at each change of employment is too expensive.*** Michigan has implemented a State Police RAP back process and is formulating a strategy to allow background checks to be valid for a specified period of time to avoid the extensive cost of re-fingerprinting this very transient workforce at the end of the Federal pilot. The process will only require a re-check of registries in the system and a re-fingerprinting after the time period has elapsed. The time-period would be shorter until the FBI RAP back is deployed, afterwards it could be extended to a greater time period.

***State police must be allocated money to upgrade AFIS and related systems.*** Michigan State Police AFIS and related systems are running as much as 40 percent over capacity with the demands of the long-term care background checks and other competing background check initiatives. Money should be allocated and time for upgrades planned to support the needs of the additional background checks on the State Police system resources.

***Home-Help agencies should be included.*** Current program legislation did not address non-Medicare certified home health or home help agencies that are providing services to the long-term care community outside of licensed facilities. The agencies provide services in the patient's home prior to being placed in managed care settings and can be the most dangerous location in the continuum of care from the standpoint of vulnerable adults.

***Process should be employer/provider based, NOT employee/applicant based.*** Experience has shown that having the access and ability to utilize the system and process at the employer level is a challenge. It would be extremely difficult to educate and support applicants to use the system statewide. Further, state analysts who are trained and devoted full time to conducting background checks have built a rapport with local courts and law enforcement. This relationship is instrumental in the flow of critical information between the departments and local law enforcement and courts that is crucial in the background check process.

## Introduction

In response to a growing concern for the safety of vulnerable adults in long-term care facilities, Congress authorized a pilot program to determine efficient, effective and economical methods of conducting background checks on employees of long-term care facilities and providers. Section 307 of the Medicare Prescription Drug Improvement and Modernization Act of 2003 (Pub. L. 108-173), hereinafter MMA, provided \$25 million for a three year pilot program for state and national background checks for employees of nursing homes; home health agencies, providers of hospice care, providers of personal care services, residential long-term care providers; and intermediate care facilities for the mentally retarded. Seven states were selected to participate in the pilot program: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin. The pilot program ran from January 2005 through September 2007.

The Michigan Department of Community Health (MDCH) was awarded a \$3,500,000 grant to develop a statewide system of conducting background checks on its prospective direct access employees in long-term care facilities. In partnership with Michigan State University (MSU), MDCH agreed to enact supporting legislation, develop a Web-based application that integrated registry databases and implement a background check program in accordance with Section 307 of the MMA.

The pilot program requirements necessitated a change in existing Michigan background check statutes. The old law, Public Act 303 of 2002 (MCL §333.20173), required a name-based state background check on all prospective employees of nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities who provide direct services to patients or residents. If the prospective employee had not resided in Michigan for more than three years, a fingerprint-based national criminal history check was mandated. The statute provided for provisional employment and provided immunity from liability for facilities conducting background checks under the Act, but facilities were permitted to share results of the state background check if the results were less than 24 months old. The cost of background checks under the existing law was borne by the health facility or agency.

In order to be in compliance with the pilot program provisions the statute needed to be changed to broaden the scope of the background checks to include hospices, hospitals with swing beds, psychiatric hospitals and home health agencies and to enhance the background check requirements to include a state and national fingerprint-based check on all prospective employees. In addition, the new legislation needed to create an appeals process to dispute incomplete or inaccurate criminal history records.

The Michigan Legislature responded by enacting the supporting legislation contained in H.B. 4558, S.B. 621 and S.B. 622 of 2005, which were signed by Governor Granholm as Public Act 27 (psychiatric hospitals and ICF/MRs), Public Act 28 (nursing homes, county medical care facilities, homes for the aged, hospitals that provide swing beds, hospices, home health agencies) & Public Act 29 (adult foster care facilities) of 2006. The successful enactment of the supporting legislation was due in large part to the support and activism of a broad based group of stakeholders that included provider advocacy groups and associations, labor unions,

state agencies, legislators and others who comprise the long-term care community in Michigan. While the new legislation did not contain a formal appeals board, the laws allowed for a tiered system of exclusionary time periods based on the severity of an offense, and included a process for appeal and reconsideration due to an inaccurate record, an expunction of the record, or a conviction that was set aside. Funding the program was a major obstacle to passage in the Republican controlled Senate. The final legislation stated that neither health facilities or agencies nor prospective employees could be charged for the cost of conducting background checks. During the pilot phase of the program, grant funds were used to subsidize the cost of background checks in addition to Medicaid match funds. Since the legislation extended the program and made it permanent in Michigan, securing funding to sustain the program is an ongoing issue.

The Michigan Workforce Background Check program consists of two major components: a Web-based application that allows employers to search available registries for potentially disqualifying information and a state and federal fingerprint-based criminal history search. The Web-based application, developed by MSU is a state of the art system that is designed to facilitate the background check process by providing a user-friendly interface with a "dashboard" design. The application allows employers to enter demographic information once for all registry checks and fingerprinting documents, which avoids redundant data entry errors. The Web application allows providers to access results, print forms, store and manage applicant records and in a secure environment that is accessible from any computer with Internet access. It provides a systematic process across the multiple health and human service agencies to conduct the checks, to disseminate findings, and to follow through on results.

Michigan implemented a comprehensive statewide program requiring a full fingerprint-based state and FBI background check for prospective direct access employees in facilities and agencies in all of Michigan's 83 counties. The scope of Michigan's program presented unique challenges. Access to fingerprinting sites was a major consideration given Michigan's demographics. According to the 2000 U.S. Census, Michigan is ranked the eighth most populous state, with 75 percent of Michigan's population resides in metropolitan or urban areas, while 25 percent resides in non-metropolitan, rural areas. The Michigan Center for Rural Health identifies 57 Michigan counties as rural and 26 counties as urban (when micro is considered rural), with most of the urban counties located in the southern lower peninsula. The attached Appendix A is a map of Michigan's rural and urban counties. The economic impact of the background check program on the workforce, especially in rural areas, was also a concern.

## **Legislation**

The pilot program requirements necessitated a change in existing Michigan background check statutes. The goals defined in Michigan's work plan were to enact legislation that broadens the scope of the background check requirement to long-term care workers in additional provider settings, provides immunity to facilities and agencies that rely on criminal history information in making hiring decisions, protects individuals from the unauthorized use of background check information, and provides for a fair appeal process for individuals who are adversely affected.

The political climate in Michigan was favorable to expanding and strengthening the background check laws. Governor Granholm recognized the importance of preparing for the projected increase in the demand for long-term care services and designated the protection of vulnerable adults as a priority for her administration. The Governor's Elder Abuse and Neglect Task Force was established in May 2005 to offer recommendations on ways to ensure that Michigan's senior citizens are protected from abuse, fraud, neglect, and financial exploitation. The responsibility for implementing recommendations of the task force resides with the Director of the Department of Community Health, Janet Olszewski, whose support of the Governor's strategy and for the pilot program fostered optimism and enthusiasm for the legislative effort.

## ***Challenges***

Three initial challenges were identified by the legislative team. Under the existing law, health facilities and agencies paid for the cost of the background check, which consisted of a state name-based criminal history check. Fingerprinting was required only if an individual had resided in Michigan for less than three years. The cost of the name-based check was \$10.00 per search and the fee was waived for non-profit facilities. The new law would have to include a state and federal fingerprint-based check at a cost of \$70.00 per applicant. The facility types covered under the new law included many small adult foster care homes and home health agencies, as well as large facilities with thousands of employees. The cost of fingerprint-based checks was a concern for large and medium facilities, but it was perceived as being overly burdensome and prohibitive for some small facility types.

Although the political climate in Michigan was favorable to expanding the background checks for long-term care workers, the economic climate was not ideal for proposing new or increased fees to generate revenue to fund the program. The legislative team anticipated that fiscal conservatives in the House and Senate would object to an appropriations provision to fund the program and that provider associations would strongly object to having facilities pay for the cost of conducting fingerprint-based background checks, especially given the high turnover rate for direct care workers in long-term care.

Because the new law would expand the scope of facility types and would expand the basis for exclusion, labor unions and provider associations expressed concerns about the potential adverse affect the program may have on the long-term care workforce. Hiring and

retaining qualified workers for long-term care was already challenging given the shortage of health care professionals and direct care workers in Michigan and the projected increase in the need for these workers. Labor unions were specifically concerned about how the new law may change the terms and conditions of employment for existing employees.

### ***Legislative Strategy***

The legislative team at the MDCH served as the lead for the legislative initiative. They recognized that the scope of the proposed background check program would require cooperation from multiple state agencies and would require broad-based support from stakeholders in the long-term care community. The legislative strategy began with consultation with the Governor's office, whose previous initiatives in the long-term care and elder abuse prevention identified key stakeholders and had developed a coalition of stakeholders in the long-term care community. The legislative team called upon key legislators in the House and Senate who had interest and enthusiasm for the pilot program and a strong commitment to protecting vulnerable citizens in Michigan. There was growing support among legislators to require background checks for pilots, commercial truckers, day care providers, educators and a legislative initiative to require background checks for vulnerable adults was gaining support in light of several high profile cases of abuse or neglect by caregivers.

### **Collaboration with stakeholders was critical**

The long-term care community in Michigan responded to the call for collaborators with interest and enthusiasm. Active participants included state agencies and stakeholders represented by provider membership organizations, advocacy organizations, workers' unions and the research community. Their voices and expertise were instrumental in developing the proposal, developing and passing the legislation, spreading the word about the changes throughout the state, providing statewide informational trainings, and providing a watchful eye over the system and its effects. In addition, long-term care providers were instrumental in the development of the background check interface. They participated in focus groups and in one-on-one tests of the system interface to provide design feedback, usability and web accessibility input. They truly reflect one of the measurable outcomes of the Michigan Program for Background Checks, "an engaged and representative workgroup of stakeholders, consumers, providers, and state staff." Listed below are the collaborators that worked to develop the proposal and work plan, and remained involved throughout the project.

- Michigan Department of Community Health (lead agency)
  - Bureau of Health Systems
  - Bureau of Health Professionals
- Michigan Department of Human Services
- Michigan State University
- Office of Services to the Aging
- Michigan State Police
- Michigan Association of Homes and Services to the Aging
- AARP Michigan
- Michigan Council for Assisted Living
- Michigan Quality Care Council

- Michigan Assisted Living Association
- Michigan County Medical Care Facilities Council
- Michigan Home Health Association
- Michigan American Federation of State, County and Municipal Employees
- Paraprofessional Healthcare Institute, Office of Michigan Policy
- American Federation of State, County and Municipal Employees (AFSCME)
- Service Employees International Union
- Michigan Office of Long-term Care Ombudsman

An Advisory Board was established to provide guidance and contacts for implementing the proposed changes. Members included people from the original workgroup that was comprised of representatives from state agencies and the Michigan Direct Care Workforce Initiative, a coalition of long-term care providers, provider associations, government representatives, consumer and advocacy organizations, worker organizations, workforce and education agencies, researchers, and interested members of the public.

The following subcommittees were formed to address the goals and tasks of the project:

***Legislative Committee*** – This working group was comprised of individuals representing the long-term care community: labor union representatives, advocacy groups, and state licensing agencies (including legislative liaisons.) The work of this committee began in February 2005 and was led by the legislative office of MDCH.

***Appeals Committee*** – Members of this committee worked on creating rules to govern the proposed appeals process once the legislation was passed. Unfortunately, the appeals process was drastically changed by the legislature in the final bills. The bases for appeal were limited to inaccuracies in the record and proof that a conviction had been expunged or set aside. Furthermore, State agencies were not authorized to promulgate rules for the appeals process. The committee disbanded in January 2006.

***Research Committee*** – Principal investigator Dr. Lori Post, and Co-investigators Dr. James Oehmke and Dr. Sarah Swierenga led the work of gathering statewide data on abuse, neglect and exploitation of residents in long-term care. This proved to be a difficult task, since there was no central data gathering mechanism or data storage. Other members of the committee met to express interest in the data that would be generated from the project. Funding for research within the project was denied by CMS, as Congress mandated the completion of an independent evaluator of the pilot, so other funds were obtained for this purpose. As a result, the committee was dissolved.

***Public Information Committee*** – Communication methods were established for the work group. All participating members had access to Email, so Listservs and an interactive website were used for communicating and sharing information, which committee members disseminated regularly to their respective organizations. Status reports on the progress of the legislation were disseminated by the Governor's office through a press conference and press releases were sent from both the Governor's office and the Department of Community Health.

**Collaboration Challenges**

Although the various players of the collaborative agreed with the goal of providing greater safeguards for Michigan's vulnerable adults in long-term care, they were not always in agreement about how this should be accomplished, to what degree and to what expense. Meetings were sometimes long, but when they ended consensus had been reached in the interest of moving forward and accomplishing necessary tasks.

The existing law, Public Act 303 of 2002 (MCL §333.20173), required a name-based state background check on prospective employees who provide direct services or have direct access to patients or residents of nursing homes, county medical care facilities, and homes for the aged. A new law needed to add hospices, hospitals with swing beds, psychiatric hospitals and home health agencies as covered facilities. While the owners, administrators and licensees of these facility types were in agreement with the overall goal of protecting vulnerable adults, each group presented unique challenges in meeting the requirements for the pilot program.

Regulations that govern the conditions under which hospice organizations can participate under the Medicare hospice benefit are contained in the U.S. Code of Federal Regulations<sup>1</sup>. Under Part 418.70, a hospice facility must maintain a volunteer staff equal to 5 percent of the total of all patient care hours of all paid hospice employees and contract staff and must use volunteers in administrative or direct patient care roles. Because the pilot program specifically excludes volunteers, there were many discussions about how facilities would be authorized to conduct background checks on these individuals under a law that covered employees, independent contractors and those granted clinical privileges.

The inclusion of hospitals that provide swing beds presented a problem of identifying which individuals were required to undergo a background check under the new law. The source of the problem is that swing beds are not usually in a defined area, especially in smaller hospitals. All hospital staff may be called upon to provide services to patients occupying swing beds. A similar problem exists in determining which hospital employees have direct access to patients in long-term care units or psychiatric units in smaller hospitals. If the prospective employee had not resided in Michigan for more than three years, a fingerprint-based national criminal history check was mandated. The statute provided for provisional employment and provided immunity from liability for facilities conducting background checks under the Act, but facilities were permitted to share results of the state background check if the results were less than 24 months old.

The Michigan Legislature responded by enacting the supporting legislation contained in H.B. 4558, S.B. 621 and S.B. 622 of 2005, which were signed by Governor Granholm as Public Act 27 (psychiatric hospitals and ICF/MRs), Public Act 28 (nursing homes, county medical care facilities, homes for the aged, hospitals that provide swing beds, hospices, home health agencies) & Public Act 29 (adult foster care facilities) of 2006.

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<sup>1</sup> See 42 CFR 418 70 (2000). Hospice Care - Use of volunteers

The successful enactment of the supporting legislation was due in large part to the support and activism of a broad based group of stakeholders that included provider advocacy groups and associations, labor unions, state agencies, legislators and others who comprise the long-term care community in Michigan. While the new legislation did not contain a formal appeals board, the laws allowed for a tiered system of exclusionary time periods based on the severity of an offense, and included a process for appeal and reconsideration due to an inaccurate record, an expunction of the record, or a conviction that was set aside. The final legislation stated that neither health facilities or agencies nor prospective employees could be charged for the cost of conducting background checks. During the pilot phase of the program, grant funds were used to subsidize the cost of background checks in addition to Medicaid match funds. Since the legislation extended the program and made it permanent in Michigan, securing funding to sustain the program is an ongoing issue.

**Program Discussion**

***Description of the background check program***

Michigan’s Workforce Background Check program is authorized by Public Acts 27, 28 and 29 of 2006 (MCL §§ 330.1147, 333.20173a, and 400.734b, respectively ) These statutes prohibit health facilities or agencies from employing, contracting with, or granting clinical privileges<sup>2</sup> to an individual who provides direct services to or has direct access to patients or residents and has been convicted of certain offenses listed in the Acts by the Michigan Legislature.

Legislative Authority	Facility Types Covered
<b>Public Act 27 of 2006</b> (Sec. 330.1134a of the Mental Health Act 258 of 1974, as amended)	Psychiatric hospitals and intermediate care facilities for people with mental retardation
<b>Public Act 28 of 2006</b> (Sec. 20173a of the Public Health Code-PA 368 of 1978, as amended)	Nursing homes, county medical care facilities, hospices, hospitals that provide swing bed services, homes for the aged, and home health agencies
<b>Public Act 29 of 2006</b> (Section 400.734b of the Adult Foster Care Licensing Act 218 of 1979, as amended)	Adult foster care facilities

**Table 1: Facility Types Covered by PA 27, 28 & 29**

The Michigan Department of Community Health is the licensing and regulatory agency for facilities covered under Public Acts 27 and 28, and the Department of Human Services licenses and regulates adult foster care facilities and homes for the aged. Cooperation and

<sup>2</sup> “Granting clinical privileges” is not applicable to adult foster care facilities.

collaboration between the two departments was essential in order to implement the legislation in an efficient and consistent manner. The Michigan Department of Community Health served as the lead agency during the pilot program and in collaboration with the Department of Human Services participated in the legislative process, developed procedures and forms and advised on the design of the Web-based application.

The legislation requires that health facilities or agencies conduct a full background check on prospective direct access employees, independent contractors or individuals granted clinical privileges. The full background check consists of a check of available registries and a state and federal fingerprint-based criminal history check. The following registries and databases are routinely checked under Michigan's program:

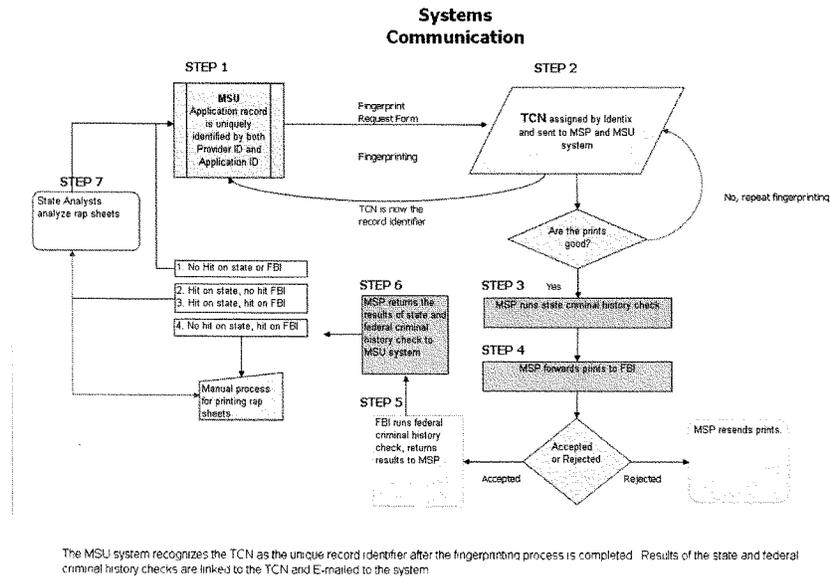
- Office of Inspector General Medicare Exclusion Database
- Michigan Nurse Aide Registry
- Michigan Public Sex Offender Registry
- Offender Tracking and Information System
- Internet Criminal Access Tool

A major goal of the pilot program was to provide a systematic process for checking available registries. This was accomplished by integrating the registries and databases through the development of a Web-based application. Michigan State University designed the application in cooperation with the Michigan State Police and the Michigan Department of Information Technology to provide direct access to state criminal history records and to integrate the OIG Exclusion database and Michigan Nurse Aide Registry information. One advantage of the design is that providers initially enter the applicant demographic information and the information is automatically sent as each registry or database is checked. This eliminates data entry errors and increases the efficiency of the registry check component. Results from a check of each registry are displayed immediately within the Web application—there is no need to go outside the system. The results are recorded as “exclusionary” or “not exclusionary” by the provider. An exclusionary finding ends the process, saving the cost of unnecessary fingerprinting.

One of the successes of the program directly relates to utilizing the services of a single fingerprint vendor. IBT™ (formerly Identix® Identification Services) coordinated the collection of fingerprints throughout Michigan and worked closely with MSU and MSP to systematically transmit confirmation of fingerprinting to MSU and digital fingerprint images to MSP. During the pilot program, IBT™ closely monitored the demand for fingerprinting services and responded to the need for reasonable access to fingerprinting by dispatching technicians with mobile Live-Scan devices in rural and heavy traffic areas. In addition, MSU developers provided a link within the Web application to facilitate scheduling of fingerprint services. In cases where there the images or confirmation were not communicated, having one vendor made it easy to track the transmissions and resolve issues in a timely manner.

The following flow chart describes the Michigan Workforce Background Check system. The process begins with fingerprinting the prospective employee. IBT captures digital fingerprints and assigns a Transaction Control Number. This is the primary key that uniquely identifies each applicant record. Digital fingerprints are sent to MSP who forwards the images

to the FBI. The results of the national background check are received by MSP. A notification of a “hit” or “no-hit” is sent by MSP to the Web application at MSU. If there is no hit, a message is automatically generated by the Web application and immediately sent to the employer. If a criminal record is located, the results are printed and sent via interdepartmental mail to the appropriate state agency. Analysts review the criminal history record and make an employability decision pursuant to the Michigan statutes.



**Figure 1: System Communication**

The results of the state and federal criminal history check are received by MSP and a message is sent via email to the Web application indicating whether a criminal history record was found. If no record was found, the Web application automatically notifies the provider and generates a form letter indicating same. If a criminal record was found, the application indicates that the results are pending analysis. A copy of the record is printed by MSP and sent to analysts at the respective department. The analysts review the record and make an employability decision pursuant to the statutes.

Michigan’s program incorporates a rapback system whereby all fingerprints submitted are stored by MSP in a database. Fingerprinting as a result of a subsequent arrest is compared against the long-term care database and the department is notified immediately via Email of a change in the criminal history record. An update to the record includes an arrest, arraignment

or final disposition. Analysts review the updated record and notify the provider when the new information changes employability or if the new information constitutes a felony arrest or arraignment, or a conviction for a relevant crime.

All communication regarding an applicant record is done through the Web application and the results of the background check can be viewed within minutes of the analyst's decision.

### ***Program implementation issues***

Distinct facets of the Michigan Program for Background Checks were implemented concurrently within separate state agencies and MSU. The Michigan Department of Community Health (MDCH) and the Michigan Department of Human Services (MDHS) worked to prepare for the system launch by developing policies, writing official documents for the system to generate, hiring analysts, and preparing the data that would be fed to the system. Michigan State Police (MSP) contracted with a fingerprint vendor to service the entire state, upgraded the AFIS system and prepared the Integrated Criminal History Tool (ICHAT) to link with the Web-based system MSU was developing.

The MSU technology development team worked on building the system, assisting state IT people with preparing for data integration, creating a user's instruction module, and testing the system.

### **Administrative Structure**

#### **Michigan Department of Community Health**

As the lead agency, the MDCH coordinated with partner agencies and contractors to develop the framework for implementing the background check program for long-term care workers. Orlene Christie, Director of the Legislative & Statutory Compliance Office assumed primary responsibility for the overall success of the program, succeeding Jan Christensen in July of 2006.

The background check staff was initially comprised of an operations manager, a grant manager and a legal analyst. The duties of the operations manager were to direct the activities of subcontractors and develop a background check training program for providers. In addition, the operations manager served as a department analyst and, in consultation with the legal analyst, processed the results of the criminal background search for DCH licensees while department analyst positions were in the process of being created and approved. The grant manager was primarily responsible for communicating with the federal project officer concerning program requirements and budgetary issues as well as coordinating with Michigan State University to develop forms and supporting documentation for the Web based application. These positions were subsequently combined into one program manager position that is responsible for the operational strategy of the program, while the fiscal management responsibilities were assumed by the Director.

In September, 2006 two department analysts were hired to process the criminal history records for applicants of DCH licensed/certified facilities and provide support for system users. These positions were created as part of the initial operational protocol as required by the terms of participation in the pilot program.

Department analysts review all criminal history records returned by the MSP and federal searches, contact local courts and law enforcement agencies, determine the employability of applicants, respond to providers and applicants regarding program related issues, participate in statewide training events, and advise on system usability issues.

#### **Michigan State University**

Michigan State University subcontracted with the MDCH to develop, build and maintain the Web-based system for conducting and tracking background checks initiated by long-term care providers. In addition, MSU was a partner in writing the proposal and operating the Michigan Program for Background Checks.

The lead Principal Investigator is Dr. Lori Post, Co-Principal Investigators are Dr. James Oehmke and Dr. Sarah Swierenga. They are ultimately responsible to the Department of Community Health and CMS for carrying out the goals and objectives related to building and operating the online system.

The project manager at MSU has been with the project from its inception and is responsible to the principal investigator. Duties: organize, schedule and document all committee meetings; communicate with committee members; document project meetings; provide regular status reports on project operations at MSU; provide quarterly reports to MDCH; provide documentation of MSU activities for reports to CMS and for evaluation purposes. The project manager was lead author of the operational protocol guide submitted to CMS, and worked with state agency staff to develop documents to be generated by the Web-based system. Prior to and after the system was launched, the project manager scheduled, documented and provided statewide trainings as co-presenter with various committee members. Other duties include hiring, scheduling, and supervising help desk staff, providing a staff person to assist the state police with fingerprint and rap sheet processing; assist the system development team by editing messages and communications to system users.

The Chief Technology Officer (CTO) is responsible to the principal investigator. The CTO supervised the IT development team, worked with project staff, state and federal government agencies, and computer hardware and software companies. He networked with state and federal agencies and translated requirements into application design for the development team. He developed new process requirements and documentation standards to ensure compliance with state and federal laws. The CTO provided oversight and leadership to the development team in standards and coding and data structures. He monitored the technical environments for integrating state agencies' systems, and informed partner organizations, government agencies, academic groups and others concerning processes and plans for the MPBC. He provided data to support policy decisions and to determine impact and outcomes of the Web-based background check system.

The technology development team is responsible to the CTO. The team consists of a lead programmer and two programmers. The original team members have been with the project since September 2006. Under the direction of the CTO, they designed the Workforce Background Check website and system for processing applications. They have monitored

system operations and adapted functionalities as the pilot project progressed and new needs were identified.

Help Desk personnel provide technical assistance to providers and are responsible to the project manager. Assistance is provided via telephone and email. The Help Desk is currently staffed during business hours by one technician.

### **Staffing Issues**

#### **Michigan Departments of Community Health and Human Services**

Initially, the additional staffing requirements for MDCH and MDHS were projected to include two department analysts for each agency who would review criminal history records and determine the employability of applicants. Due to the unexpectedly high number of criminal history records received by MDCH, two additional support staff were added to perform clerical functions, maintain a log of calls from providers and applicants, and manage the data relating to appeals and rap backs that were not integrated into the Web-based application during the pilot phase.

MDCH, through Michigan State University continues to provide a staff member to the Michigan State Police to process criminal history records and resolve technical issues. MSP does not have the bandwidth to dedicate a staff person to the long-term care background check program due to the concurrent background check requirements for other workforce populations. Having a staff person at MSP dedicated to this program helps to keep lines of communication open and provides a direct contact for the technology team when needed.

#### **Michigan State University**

It was imperative to hire a chief technology officer experienced in developing a system that is networked across state agencies. MSU was fortunate to find a person with the experience and contacts needed to garner cooperation from the State IT people in charge of important databases and registries. The CTO also had the experience necessary to create a technology development team with the skills required to develop the system within a compressed timeframe.

At the time of launch, a response team leader and three technical assistance staff were hired to handle the system help desk calls. The high volume of calls and emails continued for the first three months after launch. After that, fewer staff were needed to provide technical assistance, but it was apparent that a technical assistance helpline would be necessary for the duration of the pilot.

### **Operations**

As the grantee, MDCH is responsible to ensure the project is in compliance with CMS requirements.

MDCH and their legislative staff led the Background Check Legislative Committee in their work to enact new laws to expand the category of workers in long-term care who are required to be fingerprinted and have background checks conducted.

MDCH and MDHS worked within their departments to include all levels of administration in preparing for and managing the changes that came about with the new legislation. This includes state surveyors who monitor long-term care licensees. MDHS licensees include adult foster care homes and homes for the aged. MDCH licensees include skilled nursing facilities, long-term care hospitals, intermediate care facilities (ICF/MRs), psychiatric hospitals, hospices, and home health agencies. Both state agencies have hired two analysts to process rap sheets and appeals of long-term care job applicants.

The online background check system and technical assistance help desk are based at MSU. Having the system and the system help desk in close proximity has two advantages:

- 1) Help desk staff can receive quick answers to inquiries that relate to the technology. The technology team can determine whether the difficulty is on the user's end, the system's end, or involves one of the state agencies. In most cases it has been a problem with the user, or the user's computer program.
- 2) Help desk staff having quick access to the programmers, means they will be notified as soon as a communication is sent out statewide that will result in calls for assistance. This provides an opportunity for staff to request clarifications and fully understand the change before calls are received.

#### **Efficiencies Gained**

Previous to the launch of the pilot system, complete background checks were not required of all employees with direct access to long-term care residents. Only applicants who had not lived in Michigan for the previous three years were required to have fingerprint checks. For those checks there was no systematic process across the multiple health and human service agencies to conduct the checks, to disseminate findings, or to follow through on results.

Through the passage of Public Acts 27 and 28 of 2006, Michigan laws were enhanced and improved to require all applicants for employment that would have direct access to our most vulnerable populations – the elderly and disabled - to undergo a background check. Additionally, all employees who were hired before the effective date of April 1, 2006, would need to be fingerprinted within 24 months of the enactment of the laws.

Before the new laws were passed, only employees providing direct services to patients or residents in nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities were required to undergo some type of background check. Prior to 2006, the background checks were less comprehensive and primarily included a "name-based" check of the Internet Criminal History Tool (ICHAT). The FBI fingerprint check was only required for employees residing in Michigan for less than three (3) years. The previous law also did not require all employees with direct access to residents in long-term care facilities to undergo a background check. Further, for those persons who were subject to a background check, there was no systematic process across the multiple health and human service agencies to conduct the checks, to disseminate findings, or to follow through on results.

With Michigan's expansion of the laws, all individuals with direct access to residents' personal information, financial information, medical records, treatment information or any other identifying information are now also required to be part of Michigan's Workforce

Background Check Program in addition to individuals providing direct services to patients. The scope of the checks was also enhanced to include hospice, psychiatric hospitals, and hospitals with swing beds, home health, and intermediate care facility/mental retardation (ICFs/MR).

**Efficiencies of the new system, not previously in place:**

- Long-term care facilities use the same Web-based program to process background checks on applicants
- The same registries are checked in the same order for each applicant. Upon discovery of an exclusionary finding the process stops and fingerprints are not taken.
- All applicants who have no exclusionary findings in the registries must be fingerprinted, and the fingerprints checked against Michigan criminal history records and FBI records.
- Fingerprinting can be scheduled from within the system.
- One fingerprint scanning vendor services the entire state and the contract requires fingerprinting to occur within 10 days of making an appointment and the site must be within 50 miles of the applicant. Most people travel under 25 miles to be fingerprinted.
- All records of “hits” (rap sheets) are sent to the appropriate state agency unit (DCH or DHS) for review and determination of eligibility to work, based on Public Acts 27, 28, and 29.
- State licensing units have specific analysts to review findings, make eligibility determinations and communicate results to employers and applicants.
- Analysts receive appeals and investigate the situations to determine if there was an error in the records or the record was expunged. They accept or deny the appeal based on these criteria only.
- All notices of “no hits” are electronically relayed to the Web-based system which automatically and immediately notifies the employer.
- Employers indicate their final hiring decision on the Web-based system.
- All necessary forms (consent and disclosure forms, fingerprint request forms, and notification letters) are generated by the system.

Additional efficiencies include:

- The ability for the two state agencies to request rap sheets from MSP with the click of a button.
- The ability for MSP to indicate rap sheet dispositions with the click of a button
- Long-term care providers can tell the status of an applicant’s fingerprints by looking at the Web-based program.

- State agencies can view facilities' records and monitor employers' compliance with background check regulations.

The system of prescreening applicants using the registry check process within the Web-based system has led to cost savings by preventing the employer from going beyond the point of registry checks to fingerprinting, if the applicant's record shows exclusionary findings.

The online system has provided information about the hiring practices of long-term care providers that was not clear in the past. It has been reported that there is a high staff turnover in long-term care facilities. The total number of people who have been fingerprinted and hired in the past year may be a reflection of this fact. A total of 4,452 licensed facilities are included in the system via data feeds from both departments. Administrators must log-in at least once to designate a staff person to use the system or to use it themselves. Only 2,687 administrators have logged-in to the system and yet 125,795 applications have been processed online.

MDHS expressed concern that some of the small facilities (those with less than 6 beds) would not have computers or sufficient computer skills to use the Web-based system. To address this concern, the system was designed to allow MDHS analysts to conduct background checks on a proxy basis for those who requested it. As it turned out, very few of the facilities have requested this service. We are unsure if this is because the MDHS licensees who have not logged-in are the ones without computers or if they have just not hired an employee since 4-1-06. All notices sent to MDHS licensees are sent electronically and by United States mail, so they have all been informed of the new laws, the new system and the new processes.

## The Background Check System

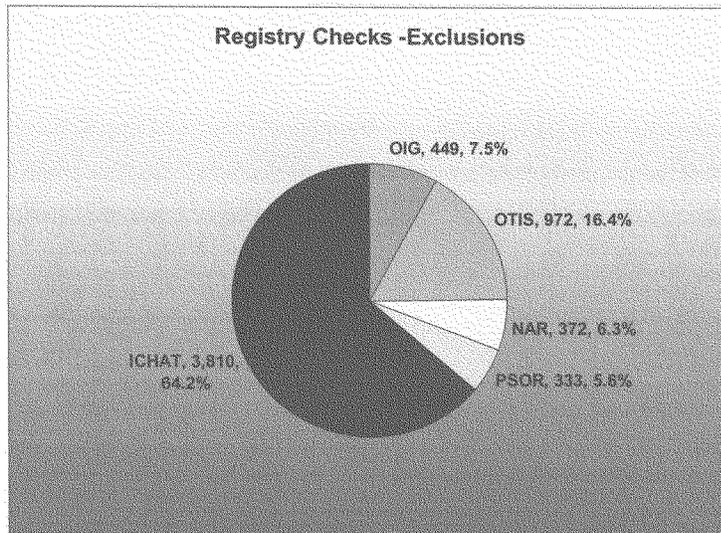
*Statistics (April 1, 2006 through September 30, 2007)*

Applications started		208,672
		percent of Total Applications
Withdrawn prior to fingerprinting		17.9
By Applicant	10,998	5.3
By Provider	26,358	12.6
Withdrawn after fingerprinting		1.9
By Applicant	1,631	0.8
By Provider	2,238	1.1

**Table 2: Applications Withdrawn**

Total Exclusions - 5936		
	Number Excluded	Percent Excluded
-Medicare OIG Exclusion List	449	0.22
-Offender Tracking Information System (OTIS)	972	0.47
-Public Sex Offender Registry (PSOR)	333	0.16
-Michigan Nurse Aide Registry (NAR)	372	0.18
-Internet Criminal History Access Tool (ICHAT)	3810	1.8

**Table 3: Applicants Excluded by Registry Checks**



**Figure 2: percent Exclusions by Each Registry**

Total Fingerprints Taken = 115,651

Total Hits = 27,154 (23.5 percent of fingerprints taken)

	Number	percent Total Applications	percent Total Hits
State AFIS	10,574	5	9
FBI IAFIS	12,084	5.8	10.4
Both State and FBI	7,618	3.7	6.6

Table 4: Source of Criminal Record "Hits"

Total Hits = 27,154 Total FP taken = 115,651	Number Disqualified = 996	Percent of Total Hits	Percent of Total Fingerprints taken
State AFIS	499	1.8	0.4
FBI IAFIS	225	0.8	0.2
Both State and FBI	272	1.0	0.2

Table 5: Source of Exclusions

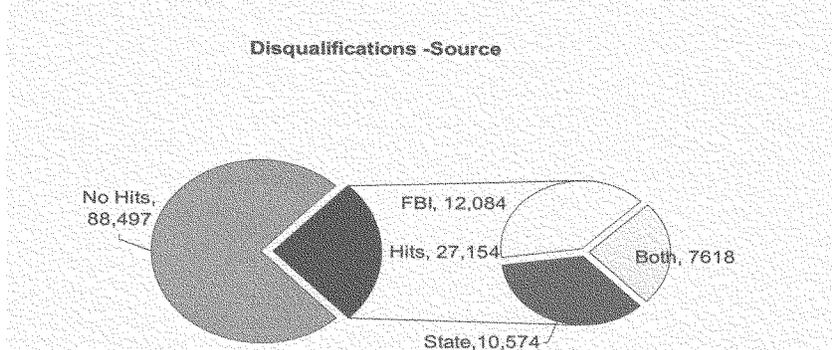


Figure 3: Overview of Disqualifications- Source

***Information Technology (IT) enhancements*****Efficiencies Gained**

Michigan's Workforce Background Check application was developed through a partnership between the State of Michigan and Michigan State University. The result was a state of the art application for managing the background check process for long-term care providers and state personnel. The Web-based system provides a cohesive integrated process that saves time and money through incremental screening processes and automated workflow management of the background check process.

The Workforce Background Check system incorporates automated provider data feeds from two different state licensing departments, Department of Community Health (DCH) and Department of Human Services (DHS) through a private secure data link. The data feed program automatically creates new provider profiles in the system and generates letters with user login and passwords for those providers. Additionally, the import program edits existing licensee and facility information and inactivates licensees when they are no longer licensed by the state. This process is run periodically and is being completely automated to reduce the time and expense of maintaining the system.

Michigan addressed the challenge of some long-term care providers not being able to utilize the on-line system by creating a "Proxy" module. This Proxy module enables the appropriate State analyst (DCH or DHS) to act as the employer/licensee and conduct the background checks using the documentation mailed or faxed to them by the licensee. The creation of the proxy module addressed the need for having a cohesive process and database to track all background check applicants, while still providing an alternative for technologically challenged people and regions.

The system automatically integrates with five registries: U.S. HHS OIG exclusion list, Michigan Nurse Aide Abuse Registry, Michigan Public Sex Offender Registry (PSOR), Michigan Department of Corrections (OTIS) system, and Michigan Internet Criminal History Access Tool (ICHAT). The registries are incorporated so that a user running background check only enters the applicant demographics data once on the Michigan Workforce Background Check system. When the search is initiated by the user, the system automatically sends an applicant's search criteria to the registry and displays the results in a new window. The integration facilitates the registry search process allowing providers a "one-stop" searching of all available registries, and uncovering exclusionary findings that may not be available through criminal histories searches alone. In the first year of operations, approximately 5 percent of all applications initiated were found to have disqualifying offenses on registry searches. These disqualifications resulted in significant savings by reducing the number of applicants that required fingerprints. Additionally, long-term care providers may also see a reduction of expenses by avoiding the hiring and training costs associated with conditionally hiring employees awaiting criminal history searches and subsequently having to discharge them and start the process over again.

The Michigan Workforce Background Check is synchronized with the fingerprint scheduling system of L1-Identity Solutions Integrated Biometric Technology (IBT). This is the vendor that contracts with the state to conduct Digital Livescan™ fingerprinting. The Michigan Workforce Background Check allows applicant data to be passed through the on-line scheduling tool within the application, or allows the Integrated Biometric Technology (IBT) phone operators to pull data from the system real-time for those applicants that call the 800-number to schedule an appointment. IBT provides daily data feeds to the Michigan Workforce Background Check system indicating which applicants have been printed and the transaction control number (TCN). The TCN number allows for keying the criminal history search results when returned to the system from the FBI and MSP. The integration of the two systems reduces the possibility of data entry errors, and reduces the time to schedule and collect fingerprints.

The Michigan State Police (MSP) Automated Fingerprint Identification System (AFIS) receives digital fingerprints nightly from IBT's computer system and processes them automatically. The AFIS system searches MSP criminal history repositories and transmits prints automatically to the FBI IAFIS system. Results from the FBI are returned automatically to the MSP system and the combined results, 1) notify the Michigan Workforce Background Check system of criminal findings hits/no-hits and, 2) rapsheets are printed and sent via internal state mail to the appropriate state agency (DCH or DHS). The automatic digital fingerprint transmission and notifications to the Michigan Workforce Background Check system result in the majority of criminal history searches being completed within 48 hours of fingerprinting.

Applicant records in the Michigan Workforce Background Check system are automatically moved to the state analyst module of the system when the MSP data is received by the Michigan Workforce Background Check system indicating an applicant has a criminal record. The system tracks which analyst is working on an applicant record and provides the means for the analyst to indicate whether a crime is exclusionary or non-exclusionary, and from which source the exclusion came (MSP or FBI).

Applicant records in the Michigan Workforce Background Check system are automatically moved to the licensee screen when MSP data is received indicating an applicant has no criminal record. System findings in the first complete year of implementation reveal that approximately 85 percent of applicants have no criminal record. The automatic processes built into the system means that no manual intervention is required resulting in significant personnel time savings. The automated management and criminal record updating by the system makes the entire application process more efficient.

The Michigan Workforce Background Check licensee/employer module allows the provider to manage applications that are waiting final hire decisions. Licensee's designated user may view the final fitness determination received from the state via an electronic letter and indicate whether they intend to hire the applicant, or withdraw the person from the process. This process has led to significant savings by the state by not sending hard copies for the approximately 85 percent of applicants that do not have a criminal record. Hard copies are only necessary for those applicants who are determined to be unemployable.

Collaboration and support among multiple State and Federal IT departments was crucial to program success. A coalition of representative personnel with support from top-level leadership was critical in order to ensure success of the program. Integration had to be completed with multiple systems crossing state departmental boundaries throughout the planning and development of the Michigan Workforce Background Check system. Additionally, personnel time for IT support and modifications to state data system needs to be aligned to support development of the Michigan Workforce Background Check system.

Electronic digital fingerprinting was a key success factor in the system. The digital scan dramatically speeded up the processing of prints and ensured a much higher accuracy rate.

Michigan deployed a RAP back process during the first year of development that is being incorporated into the Michigan Workforce Background Check system. The RAP back provides immediate notification to the state within hours of arrest or arraignment of individuals that have had their prints taken as long-term care job applicants. State analysts review RAP back notifications and make determinations as to the possibilities of exclusionary crimes. The analyst then notifies the applicable providers.

#### **Unexpected Outcomes**

Estimates during the planning stage were that only 7-8 percent of applicants would have criminal history findings that required review for employability by a state analyst. After one-year of implementation Michigan has experienced approximately double (15 percent) the anticipated applicants with criminal history findings. The number of RAP sheets that have crimes with missing dispositions resulted in a significant workload for analysts.

Multiple fingerprinting of individuals has proven to be very costly. Legislation needs to allow for individuals background checks to be carried over to multiple employers for a specified time-period to reduce the time and expense of processing repeated checks on one individual.

Variances in computer skills, access to Internet, and technology created a significant workload for the help-desk personnel in supporting basic computer questions. Many of the questions and support needs were not in regard to the system design, but more to general computer usage (e.g., firewall settings, printing documents, browser version, driver updates.) Anticipating the user support needed during initial program launch and peak periods can be challenging.

Staffing and contract agencies and their employees that provide services on a regular basis in covered facilities do not have access to the system. These agencies are not regulated and do not have access to run their employees through the system. Additionally the contract/staffing employees may provide services in multiple facilities over time and background checks need to be conducted by a particular facility in order to provide services and this must be repeated for each provider that is not under the same owner.

**Program costs and use of funds**

Michigan's pilot program is a statewide program that utilizes a unique mechanism for payment of the cost of background checks. Pursuant to Public Acts 27, 28 and 29 of 2006 the department may not charge employees or employers for fees associated with a criminal history check implemented through MDCH and MDHS. As a result, MDCH utilized grant funds to subsidize a portion of the cost of conducting background checks in addition to Medicaid match funds and State general funds. Financial details of the program are included as Attachment B.

The total cost of the pilot program was \$9,665,633, exceeding the grant award of \$3,500,000, which includes administrative costs (agency staff, system development and project management), and fees associated with the registry checks and the fingerprint-based background check. The majority of the cost of the program was due to the cost of background checks, which accounted for 73 percent of the total.

Administration	\$ 2,678,520	27 %
Payroll	\$ 673,980	7 %
CSS&M/Travel	\$ 102,388	1 %
FY05	\$ 246,932	3 %
*System Development	\$ 1,655,220	17 %
<b>Cost of Background Checks</b>	<b>\$ 6,881,445</b>	<b>73 %</b>
Registries	\$ 306,345	3 %
State	\$ 2,817,900	29 %
FBI	\$ 2,254,320	23 %
Fingerprinting	\$ 1,502,880	16 %

**Table 6: Cost of Pilot Program**

Most of the registry databases are accessed at no charge, including the OIG Exclusions database, the Michigan Nurse Aide Registry, the Michigan Public Sex Offender Registry and the Offender Tracking Information System. The entire cost of registry checks results from the inclusion of a state name-based check of the Law Enforcement Information Network (LEIN). Michigan State Police maintains this database and grants public access for a fee of \$10.00 per search. Access is given at no charge to non-profit facilities and MSP has agreed to charge MDCH for only 30 percent of all search conducted as part of the workforce background check program. This database contains much of the same information available through a fingerprint-based search, and allows providers to review most Michigan convictions for disqualifying information before proceeding to the fingerprint-based search. The inclusion of this database creates a cost savings to the program by eliminating unnecessary fingerprinting and fingerprint-based searches.

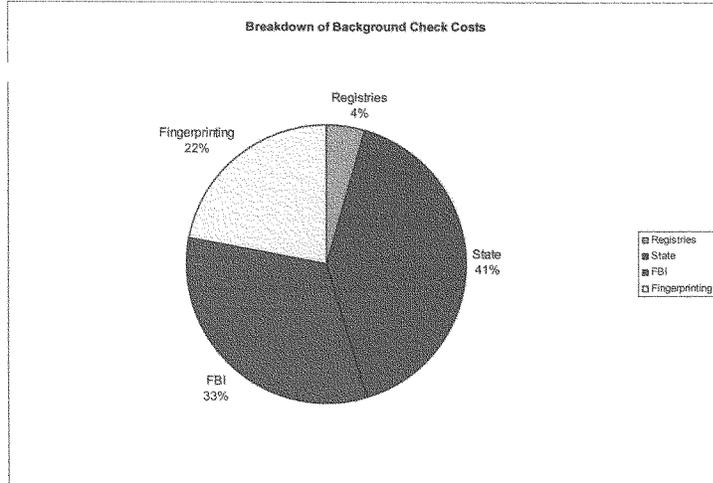


Figure 4: Breakdown of Background Check Cost

The fees charged for fingerprinting and conducting the state and federal background check are shown in Table 7 below.

IBT LiveScan™ Fingerprinting	MSP-AFIS	FBI-IAFIS	Total Cost of FP Checks
\$16.00	\$30.00	\$24.00	\$70.00

Table 7: Cost of Fingerprint-based Search

The MSP fee is legislatively mandated and therefore non-negotiable. As of October 1, 2007, the FBI fee was reduced to \$19.25 for electronic submissions.

Over the course of the pilot program, approximately 50 percent of all background check requests were from nursing homes. Adult foster care facilities accounted for 26 percent, homes for the aged initiated 8 percent of all background checks while home health agencies accounted for almost 9 percent of the total.

***Actions to sustain background check program***

The Michigan laws made the program for background checks for long-term and hospice workers a permanent statute. Efforts to secure funding for the program are ongoing and include considerations to share the cost of the background check with facilities and agencies, as well as securing other general fund resources. Changes to the current legislation will be necessary in order to share the costs with providers, but may be feasible if the cost of conducting background checks remains as a reimbursable Medicaid expense.

## RECOMMENDATIONS

***Training must be ongoing.*** It is important to make training available online and to ensure that the most updated information is accessible. Conferences are useful for providing updates.

***Conducting background checks can be costly.*** Michigan's current legislation requires a new background check each time an individual transfers to a facility under different ownership. Given the high turnover rate of direct access workers, multiple fingerprinting seems at times unreasonable and may inflate the cost of the program unnecessarily. Providing for a timeframe wherein facilities may share results or establishing alternative funding mechanisms is recommended to sustain the program.

***Plan to provide technical assistance for the long haul.*** Do not underestimate the need or overestimate the computer skills and equipment of the users. There will be increased phone and email activity when changes in policy or operations occur. When the system was launched extra help and a second phone line was needed to handle the unanticipated calls received. Errors in notification letters sent by the State caused confusion that could not have been predicted. This is an eventuality that must be expected with any new system. As users became familiar with the system and procedures were ironed out, we were able to cut back to one helpline and one telephone assistant at a time.

***State and system people should meet regularly to ensure that all partners are informed and to keep lines of communication open.*** When a new system is being launched that requires the cooperation and coordination of multiple agencies, group meetings are imperative. After the system and processes are in place, meetings should continue on a regular basis. This practice will help maintain communication and keep everyone informed.

***Keep in mind that the success of the process is the goal.*** Personality conflicts and changes in personnel must not derail the work of the partnership. If procedures for communication are set up at the beginning, the work of the partnership should continue to move forward.

***Extra staff will need to be employed at the state level.*** The Michigan system requires that state analysts review criminal history records and make eligibility determinations based on the law. New positions had to be created and filled at MDHS and MDCH to meet the staffing needs of the project. The volume of criminal history records requiring a review was greater than anticipated due in part to the high turnover rate in the long-term care workforce. States must have sufficient funds to staff the program appropriately in order to avoid delays in processing criminal background check results. The agency that serves as the central repository for criminal records will also need at least one full time employee to facilitate processing criminal history records in a timely manner.

***Using a Web-based system for conducting background checks*** was a successful means by which to transform the background check process in Michigan. We see this as a promising means for use by other states who want to make sweeping changes. The Michigan online system has been successfully used by thousands of long-term care employers to conduct over one hundred thousand background checks on employment applicants throughout the state.

***One system can be used for multiple employer-types.*** The current system can easily be adapted to provide similar background check services to professional nurses, health care students, and contract agency employees. It can be adapted to allow for agencies that must pay for the service and for those who are covered by state funds.

***Contracting with one agency to provide fingerprinting services statewide provides consistency and simplifies communication and information sharing.*** When employers reported problems faced by their applicants trying to get fingerprinted, we knew the source of the problem and could call the vendor directly. The vendor, in turn, responded quickly to the request.

***Review of criminal records should only be done by state personnel.*** The interpretation of laws can be very complex and often requires the referral to state attorneys to make legal decisions. State experience with reviewing applicants' RAP sheets discovered that many records are missing dispositions and are significantly complex in contacting courts in many jurisdictions to determine the final disposition of cases.

***Healthcare students should be included and/or informed.*** Students routinely provide direct care to long-term patients on an on-going basis to meet requirements for certification in their respective programs. These students should be required to have background checks at the beginning of their respective programs or at least be informed of the potential disqualifying factors prior to beginning a program in which they could possibly be refused employment.

***Staffing and contract agencies should be included.*** Many facilities utilize temporary workers, or even outsource entire segments of their workforce to staffing or contract agencies. These companies need access to the background checks system in order to run the checks on prospective employees that are providing clinical services to patients in long-term care facilities.

***An appeal process is needed.*** The laws can be too restrictive for minor infractions and people should be allowed to prove that they have been rehabilitated. A review board should be established that could grant a waiver. The Michigan Workforce Background Check system is being modified to incorporate and track the appeal process.

***FBI criminal history check is needed.*** During the first year of implementation, results of the state and federal background checks indicated that 25-30 percent of the exclusions come from FBI criminal histories only. Further, state criminal history record information in Michigan is sometimes incomplete; approximately 29 percent of all disqualifying information from Michigan convictions is found on the FBI record only. Although this is contrary to general statistics which show that state records are more complete than federal records, analysts

confirmed disqualifying convictions resulting from Michigan arrests that were reported only on the FBI criminal record. According to MSP, this results from a breakdown in the process for reporting arrests to the Law Enforcement Information Network (LEIN) system. In the past, local law enforcement agencies were instructed to obtain two sets of fingerprints upon arrest and forward both sets to MSP. MSP would then send one set to the FBI for inclusion in the AFIS. Some agencies sent a set of fingerprints directly to the FBI, but did not send prints or information to MSP. MSP is addressing this problem by developing software that compares local records with the LEIN system records and automatically includes information that was missing from the LEIN system. Until that process is completed, continued checks of the FBI system is necessary in order to receive the most comprehensive criminal history information.

***Re-fingerprinting applicants at each change of employment is too expensive.*** Michigan has implemented a State Police RAP back process and is formulating a strategy to allow background checks to be valid for a specified period of time to avoid the extensive cost of re-fingerprinting this very transient workforce at the end of the Federal pilot. The process will only require a re-check of registries in the system and a re-fingerprinting after the time period has elapsed. The time-period would be shorter until the FBI RAP back is deployed, afterwards it could be extended to a greater time period.

***State police must be allocated money to upgrade AFIS and related systems.*** Michigan State Police AFIS and related systems are running as much as 40 percent over capacity with the demands of the long-term care background checks and other competing background check initiatives. Money should be allocated and time for upgrades planned to support the needs of the additional background checks on the State Police system resources.

***Home-Help agencies should be included.*** Current program legislation did not address non-Medicare certified home health or home help agencies that are providing services to the long-term care community outside of licensed facilities. The agencies provide services in the patient's home prior to being placed in managed care settings and can be the most dangerous location in the continuum of care from the standpoint of vulnerable adults.

***Process should be employer/provider based, like Michigan's, NOT employee/applicant based.*** Experience has shown that having the access and ability to utilize the system and process at the employer level is a challenge. It would be extremely difficult to educate and support applicants to use the system statewide. Further, state analysts who are trained and devoted full time to conducting background checks have built a rapport with local courts and law enforcement. This relationship is instrumental in the flow of critical information between the departments and local law enforcement and courts that is crucial in the background check process.



## Appendix B- Public Act 27 of 2006

### STATE OF MICHIGAN 93RD LEGISLATURE REGULAR SESSION OF 2006

Introduced by Reps. Vander Veen, Green, Zelenko, Anderson, Stewart, Kolb, Lipsy, Kooiman, Meyer, Newell, Williams, Farrah, LaJoy, Hopgood, Brandenburg, Clack, Accavitti, Gleason, Shaffer, Nofs, Ward, Byrum, Sak, Stahl, Moolenaar, Palsrok, Gillard, Ball, Booher, Byrnes, Caul, Cushingberry, Espinoza, Gonzales, Hansen, Hildenbrand, Jones, Kahn, David Law, Lemmons, III, Lemmons, Jr., Marleau, Mayes, Mortimer, Pearce, Polidori, Proos, Rocca and Murphy

## ENROLLED HOUSE BILL No. 5448

AN ACT to amend 1974 PA 258, entitled "An act to codify, revise, consolidate, and classify the laws relating to mental health; to prescribe the powers and duties of certain state and local agencies and officials and certain private agencies and individuals; to regulate certain agencies and facilities providing mental health services; to provide for certain charges and fees; to establish civil admission procedures for individuals with mental illness or developmental disability; to establish guardianship procedures for individuals with developmental disability; to establish procedures regarding individuals with mental illness or developmental disability who are in the criminal justice system; to provide for penalties and remedies; and to repeal acts and parts of acts," by amending section 147 (MCL 330.1147), as amended by 1991 PA 40, and by adding section 134a.

*The People of the State of Michigan enact*

Sec. 134a. (1) Except as otherwise provided in subsection (2), a psychiatric facility or intermediate care facility for people with mental retardation shall not employ, independently contract with, or grant clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the psychiatric facility or intermediate care facility for people with mental retardation after the effective date of this section if the individual satisfies 1 or more of the following:

- (a) Has been convicted of a relevant crime described under 42 USC 1320a-7.
- (b) Has been convicted of any of the following felonies, an attempt or conspiracy to commit any of those felonies, or any other state or federal crime that is similar to the felonies described in this subdivision, other than a felony for a relevant crime described under 42 USC 1320a-7, unless 15 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or clinical privileges or the date of the execution of the independent contract:
  - (i) A felony that involves the intent to cause death or serious impairment of a body function, that results in death or serious impairment of a body function, that involves the use of force or violence, or that involves the threat of the use of force or violence.
  - (ii) A felony involving cruelty or torture.
  - (iii) A felony under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.
  - (iv) A felony involving criminal sexual conduct
  - (v) A felony involving abuse or neglect.

(18)

Act No. 27

Public Acts of 2006

Approved by the Governor

February 16, 2006

Filed with the Secretary of State

February 17, 2006

EFFECTIVE DATE: See act for multiple effective dates

- (vi) A felony involving the use of a firearm or dangerous weapon.
- (vii) A felony involving the diversion or adulteration of a prescription drug or other medications.
- (c) Has been convicted of a felony or an attempt or conspiracy to commit a felony, other than a felony for a relevant crime described under 42 USC 1320a-7 or a felony described under subdivision (b), unless 10 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or clinical privileges or the date of the execution of the independent contract
- (d) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime

described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 10 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

(i) A misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or a misdemeanor involving the use of force or violence or the threat of the use of force or violence.

(ii) A misdemeanor under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.

(iii) A misdemeanor involving criminal sexual conduct.

(iv) A misdemeanor involving cruelty or torture unless otherwise provided under subdivision (e).

(v) A misdemeanor involving abuse or neglect.

(e) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 5 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

(i) A misdemeanor involving cruelty if committed by an individual who is less than 16 years of age.

(ii) A misdemeanor involving home invasion.

(iii) A misdemeanor involving embezzlement.

(iv) A misdemeanor involving negligent homicide.

(v) A misdemeanor involving larceny unless otherwise provided under subdivision (g).

(vi) A misdemeanor of retail fraud in the second degree unless otherwise provided under subdivision (g).

(vii) Any other misdemeanor involving assault, fraud, theft, or the possession or delivery of a controlled substance unless otherwise provided under subdivision (d), (f), or (g).

(f) Has been convicted of any of the following misdemeanors other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 3 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

(i) A misdemeanor for assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury.

(ii) A misdemeanor of retail fraud in the third degree unless otherwise provided under subdivision (g).

(iii) A misdemeanor under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461, unless otherwise provided under subdivision (g).

(g) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the year immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

(i) A misdemeanor under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461, if the individual, at the time of conviction, is under the age of 18.

(ii) A misdemeanor for larceny or retail fraud in the second or third degree if the individual, at the time of conviction, is under the age of 16.

(h) Is the subject of an order or disposition under section 16b of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769 16b.

(i) Has been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency pursuant to an investigation conducted in accordance with 42 USC 1395i-3 or 1396r.

(2) Except as otherwise provided in subsection (5), a psychiatric facility or intermediate care facility for people with mental retardation shall not employ, independently contract with, or grant privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the psychiatric facility or intermediate care facility

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for people with mental retardation after the effective date of this section until the psychiatric facility or intermediate care facility for people with mental retardation conducts a criminal history check in compliance with subsection (4). This subsection and subsection (1) do not apply to any of the following:

(a) An individual who is employed by, under independent contract to, or granted clinical privileges in a psychiatric facility or intermediate care facility for people with mental retardation before the effective date of this section. Within 24 months after the effective date of this section, an individual who is exempt under this subdivision shall provide the department of state police with a set of fingerprints and the department of state police shall input those fingerprints into the automated fingerprint identification system database established under subsection (12). An individual who is exempt under this subdivision is not limited to working within the psychiatric facility or intermediate care facility for people with mental retardation with which he or she is employed by, under independent contract to, or granted clinical privileges on the effective date of this section. That individual may transfer to another psychiatric facility or intermediate care facility for people with mental retardation that is under the same ownership with which he or she was employed, under contract, or granted privileges. If that individual wishes to transfer to another psychiatric facility or intermediate care facility for people with mental retardation that is not under the same ownership, he or she may do so provided that a criminal history check is conducted by the new psychiatric facility or intermediate care facility for

people with mental retardation in accordance with subsection (4). If an individual who is exempt under this subdivision is subsequently convicted of a crime described under subsection (1)(a) through (g) or found to be the subject of a substantiated finding described under subsection (1)(i) or an order or disposition described under subsection (1)(h), or is found to have been convicted of a relevant crime described under subsection (1)(a), then he or she is no longer exempt and shall be terminated from employment or denied employment.

(b) An individual who is an independent contractor with a psychiatric facility or intermediate care facility for people with mental retardation if the services for which he or she is contracted is not directly related to the provision of services to a patient or resident or if the services for which he or she is contracted allows for direct access to the patients or residents but is not performed on an ongoing basis. This exception includes, but is not limited to, an individual who independently contracts with the psychiatric facility or intermediate care facility for people with mental retardation to provide utility, maintenance, construction, or communications services.

(3) An individual who applies for employment either as an employee or as an independent contractor or for clinical privileges with a psychiatric facility or intermediate care facility for people with mental retardation and has received a good faith offer of employment, an independent contract, or clinical privileges from the psychiatric facility or intermediate care facility for people with mental retardation shall give written consent at the time of application for the department of state police to conduct an initial criminal history check under this section, along with identification acceptable to the department of state police.

(4) Upon receipt of the written consent and identification required under subsection (3), a psychiatric facility or intermediate care facility for people with mental retardation that has made a good faith offer of employment or an independent contract or clinical privileges to the applicant shall make a request to the department of state police to conduct a criminal history check on the applicant, to input the applicant's fingerprints into the automated fingerprint identification system database, and to forward the applicant's fingerprints to the federal bureau of investigation. The department of state police shall request the federal bureau of investigation to make a determination of the existence of any national criminal history pertaining to the applicant. The applicant shall provide the department of state police with a set of fingerprints. The request shall be made in a manner prescribed by the department of state police. The psychiatric facility or intermediate care facility for people with mental retardation shall make the written consent and identification available to the department of state police. The psychiatric facility or intermediate care facility for people with mental retardation shall make a request to the relevant licensing or regulatory department to conduct a check of all relevant registries established pursuant to federal and state law and regulations for any substantiated findings of abuse, neglect, or misappropriation of property. If the department of state police or the federal bureau of investigation charges a fee for conducting the initial criminal history check, the charge shall be paid by or reimbursed by the department with federal funds as provided to implement a pilot program for national and state background checks on direct patient access employees of long-term care facilities or providers in accordance with section 307 of the Medicare prescription drug, improvement, and modernization act of 2003, Public Law 108-173. The psychiatric facility or intermediate care facility for people with mental retardation shall not seek reimbursement for a charge imposed by the department of state police or the federal bureau of investigation from the individual who is the subject of the initial criminal history check. A psychiatric facility or intermediate care facility for people with mental retardation, a prospective employee, or a prospective independent contractor covered under this section may not be charged for the cost of an initial criminal history check required under this section. The department of state police shall conduct a criminal history check on the applicant named in the request. The department of state police shall provide the department with a written report of the criminal history check conducted under this subsection if the criminal history check contains any criminal history record information. The report shall contain any criminal history record information on the applicant maintained by the department of state police. The department of state police shall provide the results of the federal bureau of investigation determination to the department within 30 days after the request is made. If the requesting psychiatric facility or intermediate care facility for people with mental retardation is not a state department

or agency and if a criminal conviction is disclosed on the written report of the criminal history check or the federal bureau of investigation determination, the department shall notify the psychiatric facility or intermediate care facility for people with mental retardation and the applicant in writing of the type of crime disclosed on the written report of the criminal history check or the federal bureau of investigation determination without disclosing the details of the crime. Any charges imposed by the department of state police or the federal bureau of investigation for conducting an initial criminal history check or making a determination under this subsection shall be paid in the manner required under this subsection. The notice shall include a statement that the applicant has a right to appeal a decision made by the psychiatric facility or intermediate care facility for people with mental retardation regarding his or her employment eligibility based on the criminal background check. The notice shall also include information regarding where to file and describing the appellate procedures established under section 20173b of the public health code, 1978 PA 368, MCL 333.20173b.

(5) If a psychiatric facility or intermediate care facility for people with mental retardation determines it necessary to employ or grant clinical privileges to an applicant before receiving the results of the applicant's criminal history check under this section, the psychiatric facility or intermediate care facility for people with mental retardation may conditionally employ or grant conditional clinical privileges to the individual if all of the following apply:

(a) The psychiatric facility or intermediate care facility for people with mental retardation requests the criminal

history check under this section upon conditionally employing or conditionally granting clinical privileges to the individual.

(b) The individual signs a statement in writing that indicates all of the following:

(i) That he or she has not been convicted of 1 or more of the crimes that are described in subsection (1)(a) through (g) within the applicable time period prescribed by each subdivision respectively.

(ii) That he or she is not the subject of an order or disposition described in subsection (1)(h).

(iii) That he or she has not been the subject of a substantiated finding as described in subsection (1)(i).

(iv) The individual agrees that, if the information in the criminal history check conducted under this section does not confirm the individual's statements under subparagraphs (i) through (iii), his or her employment or clinical privileges will be terminated by the psychiatric facility or intermediate care facility for people with mental retardation as required under subsection (1) unless and until the individual appeals and can prove that the information is incorrect.

(v) That he or she understands the conditions described in subparagraphs (i) through (iv) that result in the termination of his or her employment or clinical privileges and that those conditions are good cause for termination.

(6) The department shall develop and distribute a model form for the statement required under subsection (5)(b).

The department shall make the model form available to psychiatric facilities or intermediate care facilities for people with mental retardation subject to this section upon request at no charge.

(7) If an individual is employed as a conditional employee or is granted conditional clinical privileges under subsection (5), and the report described in subsection (4) does not confirm the individual's statement under subsection (5)(b)(i) through (iii), the psychiatric facility or intermediate care facility for people with mental retardation shall terminate the individual's employment or clinical privileges as required by subsection (1).

(8) An individual who knowingly provides false information regarding his or her identity, criminal convictions, or substantiated findings on a statement described in subsection (5)(b)(i) through (iii) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

(9) A psychiatric facility or intermediate care facility for people with mental retardation shall use criminal history record information obtained under subsection (4) only for the purpose of evaluating an applicant's qualifications for employment, an independent contract, or clinical privileges in the position for which he or she has applied and for the purposes of subsections (5) and (7). A psychiatric facility or intermediate care facility for people with mental retardation or an employee of the psychiatric facility or intermediate care facility for people with mental retardation shall not disclose criminal history record information obtained under subsection (4) to a person who is not directly involved in evaluating the applicant's qualifications for employment, an independent contract, or clinical privileges. An individual who knowingly uses or disseminates the criminal history record information obtained under subsection (4) in violation of this subsection is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both. Upon written request from another psychiatric facility or intermediate care facility for people with mental retardation, health facility or agency, or adult foster care facility that is considering employing, independently contracting with, or granting clinical privileges to an individual, a psychiatric facility or intermediate care facility for people with mental retardation that has obtained criminal history record information under this section on that individual shall, with the consent of the applicant, share the information with the requesting psychiatric facility or intermediate care facility for people with mental retardation, health facility or agency, or adult foster care facility. Except for a knowing or intentional release of false information, a psychiatric facility or intermediate care facility for people with mental retardation has no liability in connection with a criminal background check conducted under this section or the release of criminal history record information under this subsection.

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(10) As a condition of continued employment, each employee, independent contractor, or individual granted clinical privileges shall do each of the following:

(a) Agree in writing to report to the psychiatric facility or intermediate care facility for people with mental retardation immediately upon being arraigned for 1 or more of the criminal offenses listed in subsection (1)(a) through (g), upon being convicted of 1 or more of the criminal offenses listed in subsection (1)(a) through (g), upon becoming the subject of an order or disposition described under subsection (1)(h), and upon being the subject of a substantiated finding of neglect, abuse, or misappropriation of property as described in subsection (1)(i). Reporting of an arraignment under this subdivision is not cause for termination or denial of employment.

(b) If a set of fingerprints is not already on file with the department of state police, provide the department of state police with a set of fingerprints.

(11) In addition to sanctions set forth in this act, a licensee, owner, administrator, or operator of a psychiatric facility or intermediate care facility for people with mental retardation who knowingly and willfully fails to conduct the criminal history checks as required under this section is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$5,000.00, or both.

(12) In collaboration with the department of state police, the department of information technology shall establish an automated fingerprint identification system database that would allow the department of state police to store and maintain all fingerprints submitted under this section and would provide for an automatic notification if and when a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints previously submitted in accordance with this section. Upon such notification, the department of state police shall immediately notify the department and the department shall immediately contact the respective psychiatric facility or intermediate

care facility for people with mental retardation with which that individual is associated. Information in the database established under this subsection is confidential, is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person except for purposes of this act or for law enforcement purposes.

(13) Within 1 year after the effective date of the amendatory act that added this section, the department shall submit a written report to the legislature regarding each of the following:

- (a) The impact and effectiveness of this amendatory act.
- (b) The feasibility of implementing criminal history checks on volunteers who work in those psychiatric facilities or intermediate care facilities for people with mental retardation and on state agency employees who are involved in the licensing of those psychiatric facilities or intermediate care facilities for people with mental retardation and regulation of those employees.
- (c) The amount of federal funds provided to implement a pilot program for national and state background checks on direct access employees of long-term care facilities or providers, the amount of those funds expended to date, and the amount of those funds remaining.

(14) Within 3 years after the effective date of this section, the department shall submit a written report to the legislature outlining a plan to cover the costs of the criminal history checks required under this section if federal funding is no longer available or is inadequate to cover those costs.

(15) By March 1, 2007, the department and the department of state police shall develop and implement an electronic web-based system to assist those psychiatric facilities or intermediate care facilities for people with mental retardation required to check relevant registries and conduct criminal history checks of its employees and independent contractors and to provide for an automated notice to those psychiatric facilities or intermediate care facilities for people with mental retardation for those individuals inputted in the system who, since the initial check, have been convicted of a disqualifying offense or have been the subject of a substantiated finding of abuse, neglect, or misappropriation of property.

(16) As used in this section:

- (a) "Adult foster care facility" means an adult foster care facility licensed under the adult foster care facility licensing act, 1979 PA 218, MCL 400.701 to 400.737.
- (b) "Direct access" means access to a patient or resident or to a patient's or resident's property, financial information, medical records, treatment information, or any other identifying information.
- (c) "Health facility or agency" means a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency and licensed as required under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.
- (d) "Home health agency" means a person certified by Medicare whose business is to provide to individuals in their places of residence other than in a hospital, nursing home, or county medical care facility 1 or more of the following services: nursing services, therapeutic services, social work services, homemaker services, home health aide services, or other related services.
- (e) "Independent contract" means a contract entered into by a health facility or agency with an individual who provides the contracted services independently or a contract entered into by a health facility or agency with an organization or agency that employs or contracts with an individual after complying with the requirements of this section to provide the contracted services to the health facility or agency on behalf of the organization or agency.
- (f) "Medicare" means benefits under the federal Medicare program established under title XVIII of the social security act, 42 USC 1395 to 1395ggg.

Sec. 147. Except as otherwise provided in sections 134a and 149b, psychiatric hospitals or units operated by the state or federal government are exempt from sections 134 through 150.

Enacting section 1. Section 134a of the mental health code, 1974 PA 258, MCL 330.1134a, as added by this amendatory act, takes effect April 1, 2006, since the department has secured the necessary federal approval to utilize federal funds to reimburse those facilities for the costs incurred for requesting a national criminal history check to be conducted by the federal bureau of investigation and the department has filed written notice of that approval with the secretary of state.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 93rd Legislature are enacted into law:

- (a) Senate Bill No. 621.
- (b) Senate Bill No. 622.
- (c) House Bill No. 5168

This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved Governor

**Appendix C- Public Act 28 of 2006**

Act No. 28

Public Acts of 2006

Approved by the Governor

February 16, 2006

Filed with the Secretary of State

February 17, 2006

EFFECTIVE DATE: See act for multiple effective dates

STATE OF MICHIGAN

93RD LEGISLATURE

REGULAR SESSION OF 2006

Introduced by Senators Birkholz, Cropsey, Gilbert, Patterson, Stamas, Toy and Allen

**ENROLLED SENATE BILL No. 621**

AN ACT to amend 1978 PA 368, entitled "An act to protect and promote the public health; to codify, revise, consolidate, classify, and add to the laws relating to public health; to provide for the prevention and control of diseases and disabilities; to provide for the classification, administration, regulation, financing, and maintenance of personal, environmental, and other health services and activities; to create or continue, and prescribe the powers and duties of, departments, boards, commissions, councils, committees, task forces, and other agencies; to prescribe the powers and duties of governmental entities and officials; to regulate occupations, facilities, and agencies affecting the public health; to regulate health maintenance organizations and certain third party administrators and insurers; to provide for the imposition of a regulatory fee; to provide for the levy of taxes against certain health facilities or agencies; to promote the efficient and economical delivery of health care services, to provide for the appropriate utilization of health care facilities and services, and to provide for the closure of hospitals or consolidation of hospitals or services, to provide for the collection and use of data and information; to provide for the transfer of property; to provide certain immunity from liability; to regulate and prohibit the sale and offering for sale of drug paraphernalia under certain circumstances; to provide for the implementation of federal law; to provide for penalties and remedies; to provide for sanctions for violations of this act and local ordinances; to provide for an appropriation and supplements; to repeal certain acts and parts of acts; to repeal certain parts of this act; and to repeal certain parts of this act on specific dates," (MCL 333.1101 to 333.25211) by adding sections 20173a and 20173b; and to repeal acts and parts of acts.

The People of the State of Michigan enact:

Sec. 20173a. (1) Except as otherwise provided in subsection (2), a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency shall not employ, independently contract with, or grant clinical privileges to an individual who regularly

has direct access to or provides direct services to patients or residents in the health facility or agency after the effective date of this section if the individual satisfies 1 or more of the following:

- (a) Has been convicted of a relevant crime described under 42 USC 1320a-7.
- (b) Has been convicted of any of the following felonies, an attempt or conspiracy to commit any of those felonies, or any other state or federal crime that is similar to the felonies described in this subdivision, other than a felony for a relevant crime described under 42 USC 1320a-7, unless 15 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or clinical privileges or the date of the execution of the independent contract:
  - (i) A felony that involves the intent to cause death or serious impairment of a body function, that results in death or serious impairment of a body function that involves the use of force or violence, or that involves the threat of the use of force or violence.
  - (ii) A felony involving cruelty or torture.
  - (iii) A felony under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.
  - (iv) A felony involving criminal sexual conduct.
  - (v) A felony involving abuse or neglect.
  - (vi) A felony involving the use of a firearm or dangerous weapon.
  - (vii) A felony involving the diversion or adulteration of a prescription drug or other medications.
- (c) Has been convicted of a felony or an attempt or conspiracy to commit a felony, other than a felony for a relevant crime described under 42 USC 1320a-7 or a felony described under subdivision (b), unless 10 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or clinical privileges or the date of the execution of the independent contract.
- (d) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 10 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:
  - (i) A misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or a misdemeanor involving the use of force or violence or the threat of the use of force or violence.
  - (ii) A misdemeanor under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.
  - (iii) A misdemeanor involving criminal sexual conduct.
  - (iv) A misdemeanor involving cruelty or torture unless otherwise provided under subdivision (e).
  - (v) A misdemeanor involving abuse or neglect.
- (e) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors

described in this subdivision, within the 5 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

- (i) A misdemeanor involving cruelty if committed by an individual who is less than 16 years of age.
- (ii) A misdemeanor involving home invasion.
- (iii) A misdemeanor involving embezzlement.
- (iv) A misdemeanor involving negligent homicide.
- (v) A misdemeanor involving larceny unless otherwise provided under subdivision (g).
- (vi) A misdemeanor of retail fraud in the second degree unless otherwise provided under subdivision (g).
- (vii) Any other misdemeanor involving assault, fraud, theft, or the possession or delivery of a controlled substance unless otherwise provided under subdivision (d), (f), or (g).

(f) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 3 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

- (i) A misdemeanor for assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury.
- (ii) A misdemeanor of retail fraud in the third degree unless otherwise provided under subdivision (g).
- (iii) A misdemeanor under part 74 unless otherwise provided under subdivision (g).

(g) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the year immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract:

- (i) A misdemeanor under part 74 if the individual, at the time of conviction, is under the age of 18.
- (ii) A misdemeanor for larceny or retail fraud in the second or third degree if the individual, at the time of conviction, is under the age of 16.
- (h) Is the subject of an order or disposition under section 16b of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.16b.
- (i) Has been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency pursuant to an investigation conducted in accordance with 42 USC 1395i-3 or 1396r.

(2) Except as otherwise provided in subsection (5), a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency shall not employ, independently contract with, or grant privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the health facility or agency after the effective date of this section until the health facility or agency conducts a criminal history check in compliance with subsection (4). This subsection and subsection (1) do not apply to any of the following:

(a) An individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date of this section. Within 24 months after the effective date of this section, an individual who is exempt under this subdivision shall provide the department of state police with a set of fingerprints and the department of state police shall input those fingerprints into the automated fingerprint identification system database established under subsection (12). An individual who is exempt under this subdivision is not limited to working within the health facility or agency with which he or she is employed by, under independent contract to, or granted clinical privileges on the effective date of this section. That individual may transfer to another health facility or agency that is under the same ownership with which he or she was employed, under contract, or granted privileges. If that individual wishes to transfer to another health facility or agency that is not under the same ownership, he or she may do so provided that a criminal history check is conducted by the new health facility or agency in accordance with subsection (4). If an individual who is exempt under this subdivision is subsequently convicted of a crime described under subsection (1)(a) through (g) or found to be the subject of a substantiated finding described under subsection (1)(i) or an order or disposition described under subsection (1)(h), or is found to have been convicted of a relevant crime described under subsection (1)(a), then he or she is no longer exempt and shall be terminated from employment or denied employment.

(b) An individual who is an independent contractor with a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency if the services for which he or she is contracted is not directly related to the provision of services to a patient or resident or if the services for which he or she is contracted allows for direct access to the patients or residents but is not performed on an ongoing basis. This exception includes, but is not limited to, an individual who independently contracts with the health facility or agency to provide utility, maintenance, construction, or communications services.

(3) An individual who applies for employment either as an employee or as an independent contractor or for clinical privileges with a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency and has received a good faith offer of employment, an independent contract, or clinical privileges from the health facility or agency shall give written consent at the time of application for the department of state police to conduct an initial criminal history check under this section, along with identification acceptable to the department of state police.

(4) Upon receipt of the written consent and identification required under subsection (3), a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency that has made a good faith offer of employment or an independent contract or clinical privileges to the applicant shall make a request to the department of state police to conduct a criminal history check on the applicant, to input the applicant's fingerprints into the automated fingerprint identification system database, and to forward the applicant's fingerprints to the federal bureau of investigation. The department of state police shall request the federal bureau of investigation to make a determination of the existence of any national criminal history pertaining to the applicant. The applicant shall provide the department of state police with a set of fingerprints. The request shall be made in a manner prescribed by the department of state police. The health facility or agency shall make the written consent and identification available to the department of state police. The health facility or agency shall make a request to the relevant licensing or regulatory department to conduct a check of all relevant registries established pursuant to federal and state law and regulations for any substantiated findings of abuse, neglect, or misappropriation of property. If the department of state police or the federal bureau of investigation charges a fee for conducting the initial criminal history check, the charge shall be paid by or reimbursed by the department with federal funds as provided to implement a pilot program for national and state background checks on direct patient access employees of long-term care facilities or providers in accordance with section 307 of the Medicare prescription drug, improvement, and modernization act of 2003, Public Law 108-173. The health facility or agency shall not seek reimbursement for a charge imposed by the department of state police or the federal bureau of investigation from the individual who is the subject of the initial criminal history check. A health facility or agency, a prospective employee, or a prospective independent contractor covered under this section may not be charged for the cost of an initial criminal history check required under this section. The department of state police shall conduct a criminal history check on the applicant named in the request. The department of state police shall provide the department with a written report of the criminal history check conducted under this subsection if the criminal history check contains any criminal history record

information. The report shall contain any criminal history record information on the applicant maintained by the department of state police. The department of state police shall provide the results of the federal bureau of investigation determination to the department within 30 days after the request is made. If the requesting health facility or agency is not a state department or agency and if a criminal conviction is disclosed on the written report of the criminal history check or the federal bureau of investigation determination, the department shall notify the health facility or agency and the applicant in writing of the type of crime disclosed on the written report of the criminal history check or the federal bureau of investigation determination without disclosing the details of the crime. Any charges imposed by the department of state police or the federal bureau of investigation for conducting an initial criminal history check or making a determination under this subsection shall be paid in the manner required under this subsection. The notice shall include a statement that the applicant has a right to appeal a decision made by the health facility or agency regarding his or her employment eligibility based on the criminal background check. The notice shall also include information regarding where to file and describing the appellate procedures established under section 20173b.

(5) If a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency determines it necessary to employ or grant clinical privileges to an applicant before receiving the results of the applicant's criminal history check under this section, the health facility or agency may conditionally employ or grant conditional clinical privileges to the individual if all of the following apply:

(a) The health facility or agency requests the criminal history check under this section upon conditionally employing or conditionally granting clinical privileges to the individual.

(b) The individual signs a statement in writing that indicates all of the following:

(i) That he or she has not been convicted of 1 or more of the crimes that are described in subsection (1)(a) through (g) within the applicable time period prescribed by each subdivision respectively.

(ii) That he or she is not the subject of an order or disposition described in subsection (1)(h).

(iii) That he or she has not been the subject of a substantiated finding as described in subsection (1)(i).

(iv) The individual agrees that, if the information in the criminal history check conducted under this section does not confirm the individual's statements under subparagraphs (i) through (iii), his or her employment or clinical privileges will be terminated by the health facility or agency as required under subsection (1) unless and until the individual appeals and can prove that the information is incorrect.

(v) That he or she understands the conditions described in subparagraphs (i) through (iv) that result in the termination of his or her employment or clinical privileges and that those conditions are good cause for termination.

(6) The department shall develop and distribute a model form for the statement required under subsection (5)(b). The department shall make the model form available to health facilities or agencies subject to this section upon request at no charge.

(7) If an individual is employed as a conditional employee or is granted conditional clinical privileges under subsection (5), and the report described in subsection (4) does not confirm the individual's statement under subsection (5)(b)(i) through (iii), the health facility or agency shall terminate the individual's employment or clinical privileges as required by subsection (1).

(8) An individual who knowingly provides false information regarding his or her identity, criminal convictions, or substantiated findings on a statement described in subsection (5)(b)(i) through (iii) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

(9) A health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency shall use criminal history record information obtained under subsection (4) only for the purpose of evaluating an applicant's qualifications for employment, an independent contract, or clinical privileges in the position for which he or she has applied and for the purposes of subsections (5) and (7). A health facility or agency or an employee of the health facility or agency shall not disclose criminal history record information obtained under subsection (4) to a person who is not directly involved in evaluating the applicant's qualifications for employment, an independent contract, or clinical privileges. An individual who knowingly uses or disseminates the criminal history record information obtained under subsection (4) in violation of this subsection is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both. Upon written request from another health facility or agency, psychiatric facility or intermediate care facility for people with mental retardation, or adult foster care facility that is considering employing, independently contracting with, or granting clinical privileges to an individual, a health facility or agency that has obtained criminal history record information under this section on that individual shall, with the consent of the applicant, share the information with the requesting health facility or agency, psychiatric facility or intermediate care facility for people with mental retardation, or adult foster care facility. Except for a knowing or intentional release of false information, a health facility or agency has no liability in connection with a criminal background check conducted under this section or the release of criminal history record information under this subsection.

(10) As a condition of continued employment, each employee, independent contractor, or individual granted clinical privileges shall do each of the following:

(a) Agree in writing to report to the health facility or agency immediately upon being arraigned for 1 or more of the criminal offenses listed in subsection (1)(a) through (g), upon being convicted of 1 or more of the criminal offenses listed in subsection (1)(a) through (g), upon becoming the subject of an order or disposition described under subsection (1)(h), and upon being the subject of a substantiated finding of neglect, abuse, or misappropriation of property as described in subsection (1)(i). Reporting of an arraignment under this subdivision is not cause for termination or denial of employment.

(b) If a set of fingerprints is not already on file with the department of state police, provide the department of state police with a set of fingerprints.

(11) In addition to sanctions set forth in section 20165, a licensee, owner, administrator, or operator of a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency who knowingly and willfully fails to conduct the criminal history checks as required under this section is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$5,000.00, or both.

(12) In collaboration with the department of state police, the department of information technology shall establish an automated fingerprint identification system database that would allow the department of state police to store and maintain all fingerprints submitted under this section and would provide for an automatic notification if and when a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints previously submitted in accordance with this section. Upon such notification, the department of state police shall immediately notify the department and the department shall immediately contact the respective health facility or agency with which that individual is associated. Information in the database established under this subsection is confidential, is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person except for purposes of this act or for law enforcement purposes.

(13) Within 1 year after the effective date of the amendatory act that added this section, the department shall submit a written report to the legislature regarding each of the following:

(a) The impact and effectiveness of this amendatory act.

(b) The feasibility of implementing criminal history checks on volunteers who work in those health facilities or agencies and on state agency employees who are involved in the licensing of those health facilities or agencies and regulation of those employees.

(c) The amount of federal funds provided to implement a pilot program for national and state background checks on direct access employees of long-term care facilities or providers, the amount of those funds expended to date, and the amount of those funds remaining.

(14) Within 3 years after the effective date of this section, the department shall submit a written report to the legislature outlining a plan to cover the costs of the criminal history checks required under this section if federal funding is no longer available or is inadequate to cover those costs.

(15) By March 1, 2007, the department and the department of state police shall develop and implement an electronic web-based system to assist those health facilities and agencies required to check relevant registries and conduct criminal history checks of its employees and independent contractors and to provide for an automated notice to those health facilities or agencies for those individuals inputted in the system who, since the initial check, have been convicted of a disqualifying offense or have been the subject of a substantiated finding of abuse, neglect, or misappropriation of property.

(16) As used in this section:

(a) "Adult foster care facility" means an adult foster care facility licensed under the adult foster care facility licensing act, 1979 PA 218, MCL 400.701 to 400.737.

(b) "Direct access" means access to a patient or resident or to a patient's or resident's property, financial information, medical records, treatment information, or any other identifying information.

(c) "Home health agency" means a person certified by Medicare whose business is to provide to individuals in their places of residence other than in a hospital, nursing home, or county medical care facility 1 or more of the following services: nursing services, therapeutic services, social work services, homemaker services, home health aide services, or other related services.

(d) "Independent contract" means a contract entered into by a health facility or agency with an individual who provides the contracted services independently or a contract entered into by a health facility or agency with an organization or agency that employs or contracts with an individual after complying with the requirements of this section to provide the contracted services to the health facility or agency on behalf of the organization or agency.

(e) "Medicare" means benefits under the federal Medicare program established under title XVIII of the social security act, 42 USC 1395 to 1395ggg.

Sec. 20173b. (1) An individual who has been disqualified from or denied employment by a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency or by a psychiatric facility or intermediate care facility for people with mental retardation based on a criminal history check conducted pursuant to section 20173 or 20173a or pursuant to section 134a of the mental health code, 1974 PA 258, MCL 330.1134a, respectively, may appeal to the department if he or she believes that the criminal history report is inaccurate, and the appeal shall be conducted as a contested case hearing pursuant to the administrative procedures act of 1969. The individual shall file the appeal with the director of the department within 15 business days after receiving the written report of the criminal history check unless the conviction contained in the criminal history report is one that may be expunged or set aside. If an individual has been disqualified or denied employment based on a conviction that may be expunged or set aside, then he or she shall file the appeal on a form provided by the department within 15 business days after a court order granting or denying his or her application to expunge or set aside that conviction is granted. If the order is granted and the conviction is expunged or set aside, then the individual shall not be disqualified or denied

employment based solely on that conviction. The director shall review the appeal and issue a written decision within 30 business days after receiving the appeal. The decision of the director is final.

(2) One year after the effective date of this section and each year thereafter for the next 3 years, the department shall provide the legislature with a written report regarding the appeals process implemented under this section for employees subject to criminal history checks. The report shall include, but is not limited to, for the immediately preceding year the number of applications for appeal received, the number of inaccuracies found and appeals granted with regard to the criminal history checks conducted under section 20173a, the average number of days necessary to complete the appeals process for each appeal, and the number of appeals rejected without a hearing and a brief explanation of the denial.

(3) As used in this section, "business day" means a day other than a Saturday, Sunday, or any legal holiday.

Enacting section 1. (1) Section 20173 of the public health code, 1978 PA 368, MCL 333.20173, is repealed effective April 1, 2006.

(2) Section 20173a of the public health code, 1978 PA 368, MCL 333.20173a, as added by this amendatory act, takes effect April 1, 2006, since the department has secured the necessary federal approval to utilize federal funds to reimburse those facilities for the costs incurred for requesting a national criminal history check to be conducted by the federal bureau of investigation and the department has filed written notice of that approval with the secretary of state. The department shall issue a Medicaid policy bulletin regarding the payment and reimbursement for the criminal history checks by April 1, 2006.

(3) Section 20173b of the public health code, 1978 PA 368, MCL 333.20173b, as added by this amendatory act, takes effect the date this amendatory act is enacted.

Enacting section 2. This amendatory act does not take effect unless all of the following bills of the 93rd Legislature are enacted into law:

- (a) Senate Bill No. 622.
- (b) House Bill No. 5168.
- (c) House Bill No. 5448.

This act is ordered to take immediate effect.

Secretary of the Senate

Clerk of the House of Representatives

Approved

Governor

**Appendix D- Public Act 29 of 2006**

Act No. 29

Public Acts of 2006

Approved by the Governor

February 16, 2006

Filed with the Secretary of State

February 17, 2006

EFFECTIVE DATE: See act for multiple effective dates

STATE OF MICHIGAN

93RD LEGISLATURE

REGULAR SESSION OF 2006

Introduced by Senators Stamas, Cropsey, Birkholz, Gilbert, Patterson, Toy and Allen

**ENROLLED SENATE BILL No. 622**

AN ACT to amend 1979 PA 218, entitled "An act to provide for the licensing and regulation of adult foster care facilities; to provide for the establishment of standards of care for adult foster care facilities; to prescribe powers and duties of the department of social services and other departments; to prescribe certain fees; to prescribe penalties; and to repeal certain acts and parts of acts," (MCL 400.701 to 400.737) by adding sections 34b and 34c; and to repeal acts and parts of acts.

The People of the State of Michigan enact:

Sec. 34b. (1) In addition to the restrictions prescribed in sections 13, 22, and 31, and except as otherwise provided in subsection (2), an adult foster care facility shall not employ or independently contract with an individual who regularly has direct access to or provides direct services to residents of the adult foster care facility after the effective date of this section if the individual satisfies 1 or more of the following:

(a) Has been convicted of a relevant crime described under 42 USC 1320a-7.

(b) Has been convicted of any of the following felonies, an attempt or conspiracy to commit any of those felonies, or any other state or federal crime that is similar to the felonies described in this subdivision, other than a felony for a relevant crime described under 42 USC 1320a-7, unless 15 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or the date of the execution of the independent contract:

(i) A felony that involves the intent to cause death or serious impairment of a body function, that results in death or serious impairment of a body function that involves the use of force or violence, or that involves the threat of the use of force or violence.

(ii) A felony involving cruelty or torture.

(iii) A felony under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.

(iv) A felony involving criminal sexual conduct.

(v) A felony involving abuse or neglect.

(vi) A felony involving the use of a firearm or dangerous weapon.

(vii) A felony involving the diversion or adulteration of a prescription drug or other medications.

(c) Has been convicted of a felony or an attempt or conspiracy to commit a felony, other than a felony for a relevant crime described under 42 USC 1320a-7 or a felony described under subdivision (b), unless 10 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or the date of the execution of the independent contract.

(d) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 10 years immediately preceding the date of application for employment or the date of the execution of the independent contract:

(i) A misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or a misdemeanor involving the use of force or violence or the threat of the use of force or violence.

(ii) A misdemeanor under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.

(iii) A misdemeanor involving criminal sexual conduct.

(iv) A misdemeanor involving cruelty or torture unless otherwise provided under subdivision (e).

(v) A misdemeanor involving abuse or neglect.

(e) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 5 years immediately preceding the date of application for employment or the date of the execution of the independent contract.

(i) A misdemeanor involving cruelty if committed by an individual who is less than 16 years of age.

(ii) A misdemeanor involving home invasion.

(iii) A misdemeanor involving embezzlement.

(iv) A misdemeanor involving negligent homicide.

- (v) A misdemeanor involving larceny unless otherwise provided under subdivision (g).
- (vi) A misdemeanor of retail fraud in the second degree unless otherwise provided under subdivision (g).
- (vii) Any other misdemeanor involving assault, fraud, theft, or the possession or delivery of a controlled substance unless otherwise provided under subdivision (d), (f), or (g).
- (f) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 3 years immediately preceding the date of application for employment or the date of the execution of the independent contract
  - (i) A misdemeanor for assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury.
  - (ii) A misdemeanor of retail fraud in the third degree unless otherwise provided under subdivision (g).
  - (iii) A misdemeanor under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461, unless otherwise provided under subdivision (g).
  - (g) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the year immediately preceding the date of application for employment or the date of the execution of the independent contract:
    - (i) A misdemeanor under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461, if the individual, at the time of conviction, is under the age of 18.
    - (ii) A misdemeanor for larceny or retail fraud in the second or third degree if the individual, at the time of conviction, is under the age of 16.
    - (h) Is the subject of an order or disposition under section 16b of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.16b.
    - (i) Has been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency pursuant to an investigation conducted in accordance with 42 USC 1395i-3 or 1396r.
- (2) Except as otherwise provided in subsection (6), an adult foster care facility shall not employ or independently contract with an individual who has direct access to residents after the effective date of this section until the adult foster care facility conducts a criminal history check in compliance with subsections (4) and (5). This subsection and subsection(1) do not apply to an individual who is employed by or under contract to an adult foster care facility before the effective date of this section. Within 24 months after the effective date of this section, an individual who is exempt under this subsection shall provide the department of state police a set of fingerprints and the department of state police shall input those fingerprints into the automated fingerprint identification system database established under subsection (12). An individual who is exempt under this subsection is not limited to working within the adult foster care facility with which he or she is employed by or under independent contract with on the effective date of this section. That individual may transfer to another adult foster care facility that is under the same ownership with which he or she was employed or under contract. If that individual wishes to transfer to an adult foster care facility that is not under the same ownership, he or she may do so provided that a criminal history check is conducted by the new facility in accordance with subsection (4). If an individual who is exempt under this subsection is subsequently convicted of a crime or offense described under subsection (1)(a) through (g) or found to be the subject of a substantiated finding described under subsection (1)(i) or an order or disposition described under subsection (1)(h), or is found to have been convicted of a relevant crime described

under subsection (1)(a), he or she is no longer exempt and shall be terminated from employment or denied employment.

(3) An individual who applies for employment either as an employee or as an independent contractor with an adult foster care facility and has received a good faith offer of employment or independent contract from the adult foster care facility shall give written consent at the time of application for the department of state police to conduct an initial criminal history check under this section. The individual, at the time of initial application, shall provide identification acceptable to the department of state police.

(4) Upon receipt of the written consent and identification required under subsection (3), the adult foster care facility that has made a good faith offer of employment or independent contract shall make a request to the department of state police to conduct a criminal history check on the individual and input the individual's fingerprints into the automated fingerprint identification system database, and shall make a request to the relevant licensing or regulatory department to perform a check of all relevant registries established pursuant to federal and state law and regulations for any substantiated findings of abuse, neglect, or misappropriation of property. The request shall be made in a manner prescribed by the department of state police and the relevant licensing or regulatory department or agency. The adult foster care facility shall make the written consent and identification available to the department of state police and the relevant licensing or regulatory department or agency. If the department of state police or the federal bureau of investigation charges a fee for conducting the initial criminal history check, the charge shall be paid by or reimbursed by the department with federal funds as provided to implement a pilot program for national and state background checks on direct patient access employees of long-term care facilities or providers in accordance with section 307 of the Medicare prescription drug, improvement, and modernization act of 2003, Public Law 108-173. The adult foster care facility shall not seek reimbursement for a charge imposed by the department of state police or the federal bureau of investigation from the individual who is the subject of the initial criminal history check. The department of state police shall conduct an initial criminal history check on the individual named in the request. The department of state police shall provide the department with a written report of the criminal history check conducted under this subsection that contains a criminal record. The report shall contain any criminal history record information on the individual maintained by the department of state police.

(5) Upon receipt of the written consent and identification required under subsection (3), if the individual has applied for employment either as an employee or as an independent contractor with an adult foster care facility, the adult foster care facility that has made a good faith offer of employment or independent contract shall comply with subsection (4) and shall make a request to the department of state police to forward the individual's fingerprints to the federal bureau of investigation. The department of state police shall request the federal bureau of investigation to make a determination of the existence of any national criminal history pertaining to the individual. An individual described in this subsection shall provide the department of state police with a set of fingerprints. The department of state police shall complete the criminal history check under subsection (4) and, except as otherwise provided in this subsection, provide the results of its determination under subsection (4) and the results of the federal bureau of investigation determination to the department within 30 days after the request is made. If the requesting adult foster care facility is not a state department or agency and if a criminal conviction is disclosed on the written report of the criminal history check obtained under subsection (4) or the federal bureau of investigation determination, the department shall notify the adult foster care facility and the individual in writing of the type of crime disclosed on the written report of the criminal history check obtained under subsection (4) or the federal bureau of investigation determination without disclosing the details of the crime. The notification shall inform the facility or agency and the applicant regarding the appeal process in section 34c. Any charges imposed by the department of state police or the federal bureau of investigation for conducting an initial criminal history check or making a determination under this subsection shall be paid in the manner required under subsection (4).

(6) If an adult foster care facility determines it necessary to employ or independently contract with an individual before receiving the results of the individual's criminal history check required under this section, the adult foster care facility may conditionally employ the individual if both of the following apply:

(a) The adult foster care facility requests the criminal history check required under this section, upon conditionally employing the individual.

(b) The individual signs a written statement indicating all of the following:

(i) That he or she has not been convicted of 1 or more of the crimes that are described in subsection (1)(a) to (g) within the applicable time period prescribed by subsection (1)(a) to (g).

(ii) That he or she is not the subject of an order or disposition described in subsection (1)(h).

(iii) That he or she has not been the subject of a substantiated finding as described in subsection (1)(i).

(iv) The individual agrees that, if the information in the criminal history check conducted under this section does not confirm the individual's statement under subparagraphs (i) to (iii), his or her employment will be terminated by the adult foster care facility as required under subsection (1) unless and until the individual can prove that the information is incorrect.

(v) That he or she understands the conditions described in subparagraphs (i) to (iv) that result in the termination of his or her employment and that those conditions are good cause for termination.

(7) The department shall develop and distribute the model form for the statement required under subsection (6)(b). The department shall make the model form available to adult foster care facilities upon request at no charge.

(8) If an individual is conditionally employed under subsection (6), and the report described in subsection (4) or (5), if applicable, does not confirm the individual's statement under subsection (6)(b)(i) to (iii), the adult foster care facility shall terminate the individual's employment as required by subsection (1).

(9) An individual who knowingly provides false information regarding his or her identity, criminal convictions, or substantiated findings on a statement described in subsection (6)(b)(i) to (iii) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

(10) An adult foster care facility shall use criminal history record information obtained under subsection (4) or (5) only for the purpose of evaluating an individual's qualifications for employment in the position for which he or she has applied and for the purposes of subsections (6) and (8). An adult foster care facility or an employee of the adult foster care facility shall not disclose criminal history record information obtained under this section to a person who is not directly involved in evaluating the individual's qualifications for employment or independent contract. An individual who knowingly uses or disseminates the criminal history record information obtained under subsection (4) or (5) in violation of this subsection is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both. Upon written request from another adult foster care facility, psychiatric facility or intermediate care facility for people with mental retardation, or health facility or agency that is considering employing or independently contracting with an individual, an adult foster care facility that has obtained criminal history record information under this section on that individual shall, with the consent of the applicant, share the information with the requesting adult foster care facility, psychiatric facility or intermediate care facility for people with mental retardation, or health facility or agency. Except for a knowing or intentional release of false information, an adult foster care facility has no liability in connection with a background check conducted under this section or the release of criminal history record information under this subsection.

(11) As a condition of continued employment, each employee or independent contractor shall do both of the following:

(a) Agree in writing to report to the adult foster care facility immediately upon being arraigned on 1 or more of the criminal offenses listed in subsection (1)(a) to (g), upon being convicted of 1 or more of the criminal offenses listed in subsection (1)(a) to (g), upon becoming the subject of an order or disposition described under subsection (1)(h), and upon becoming the subject of a substantiated finding described under subsection (1)(i). Reporting of an arraignment under this subdivision is not cause for termination or denial of employment.

(b) If a set of fingerprints is not already on file with the department of state police, provide the department of state police with a set of fingerprints.

(12) In addition to sanctions set forth in this act, a licensee, owner, administrator, or operator of an adult foster care facility who knowingly and willfully fails to conduct the criminal history checks as required under this section is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$5,000.00, or both.

(13) In collaboration with the department of state police, the department of information technology shall establish an automated fingerprint identification system database that would allow the department of state police to store and maintain all fingerprints submitted under this section and would provide for an automatic notification at the time a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints previously submitted in accordance with this section. Upon such notification, the department of state police shall immediately notify the department and the department shall immediately contact the respective adult foster care facility with which that individual is associated. Information in the database established under this subsection is confidential. is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person except for purposes of this act or for law enforcement purposes.

(14) If an individual independently contracts with an adult foster care facility, subsections (1) and (2) do not apply if the contractual work performed by the individual is not directly related to the clinical, health care, or personal services delivered by the adult foster care facility or if the individual's duties are not performed on an ongoing basis with direct access to residents. This exception includes, but is not limited to, an individual who independently contracts with the adult foster care facility to provide utility, maintenance, construction, or communication services.

(15) Within 1 year after the effective date of the amendatory act that added this section, the department shall submit a written report to the legislature regarding each of the following:

(a) The impact and effectiveness of this amendatory act.

(b) The feasibility of implementing criminal history checks on volunteers who work in the adult foster care facilities and on state agency employees who are involved in the licensing of the adult foster care facilities and regulation of the employees.

(c) The amount of federal funds provided to implement a pilot program for national and state criminal history checks on direct access employees of long-term care facilities or providers, the amount of those funds expended to date, and the amount of those funds remaining.

(16) By March 1, 2007, the department and the department of state police shall develop and implement an electronic web-based system to assist the adult foster care facilities required to check relevant registries and conduct criminal history checks of its employees and independent contractors and to provide for an automated notice to the adult foster care facilities for the individuals entered in the system who, since the initial check, have been convicted of a disqualifying offense or have been the subject of a substantiated finding of abuse, neglect, or misappropriation of property.

(17) The department shall submit to the legislature not later than 3 years after the effective date of the amendatory act that added this subsection a written report regarding the department's plan to continue performing criminal history checks if adequate federal funding is not available to continue performing future criminal history checks.

(18) An adult foster care facility or a prospective employee covered under this section may not be charged for the cost of an initial criminal history check required under this act.

(19) As used in this section:

(a) "Direct access" means access to a resident or resident's property, financial information, medical records, treatment information, or any other identifying information

(b) "Health facility or agency" means a health facility or agency as defined in section 20106 of the public health code, 1978 PA 368, MCL 333.20106.

(c) "Independent contract" means a contract entered into by an adult foster care facility with an individual who provides the contracted services independently or a contract entered into by an adult foster care facility with an organization or agency that employs or contracts with an individual after complying with the requirements of this section to provide the contracted services to the adult foster care facility on behalf of the organization or agency.

(d) "Title XIX" means title XIX of the social security act, 42 USC 1396 to 1396r-6 and 1396r-8 to 1396v.

Sec. 34c. (1) An individual who has been disqualified from or denied employment by an adult foster care facility based on a criminal history check conducted pursuant to section 34a or 34b may appeal to the department if he or she believes that the criminal history report is inaccurate, and the appeal shall be conducted as a contested case hearing conducted pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The individual shall file the appeal with the director of the department within 15 business days after receiving the written report of the criminal history check unless the conviction contained in the criminal history report is one that may be expunged or set aside. If an individual has been disqualified or denied employment based on a conviction that may be expunged or set aside, then he or she shall file the appeal within 15 business days after a court order granting or denying his or her application to expunge or set aside that conviction is granted. If the order is granted and the conviction is expunged or set aside, then the individual shall not be disqualified or denied employment based solely on that conviction. The director shall review the appeal and issue a written decision within 30 business days after receiving the appeal. The decision of the director is final.

(2) One year after the effective date of this section and each year thereafter for the next 3 years, the department shall provide the legislature with a written report regarding the appeals process implemented under this section for employees subject to criminal history checks. The report shall include, but is not limited to, for the immediately preceding year the number of applications for appeal received, the number of inaccuracies found and appeals granted with regard to the criminal history checks conducted under section 34b, the average number of days necessary to complete the appeals process for each appeal, and the number of appeals rejected without a hearing and a brief explanation of the denial.

(3) As used in this section, "business day" means a day other than a Saturday, Sunday, or any legal holiday.

Enacting section 1. Section 34a of the adult foster care facility licensing act, 1979 PA 218, MCL 400.734a, is repealed effective April 1, 2006.

Enacting section 2. Sections 34b and 34c of the adult foster care facility licensing act, 1979 PA 218, MCL 400.734b, as added by this amendatory act, take effect April 1, 2006, since the department has secured the necessary federal approval to utilize federal funds to reimburse those facilities for the costs incurred for requesting a national criminal history check to be conducted by the federal bureau of investigation and the department has filed written notice of that approval with the secretary of state. The department shall issue a Medicaid policy bulletin regarding the payment and reimbursement for the criminal history checks by April 1, 2006.

Enacting section 3. This amendatory act does not take effect unless all of the following bills of the 93rd Legislature are enacted into law:

(a) Senate Bill No. 621.

(b) House Bill No. 5168.

(c) House Bill No. 5448.

This act is ordered to take immediate effect.

Secretary of the Senate

Clerk of the House of Representatives

Approved

Governor

NEVADA  
CRIMINAL HISTORY BACKGROUND CHECK  
PILOT PROGRAM

By Kerry K. McKinney, Program Director,  
Jennifer M. Dunaway, Health Facility Surveyor IV

Federal Project Officer: Cindy R. Melanson

Nevada State Health Division  
Bureau of Licensure and Certification

CMS Grant No. 11-P-93035-9/04

December 2007

The statements contained in this report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare & Medicaid Services. The awardee assumes responsibility for the accuracy and completeness of the information contained in this report.

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## EXECUTIVE SUMMARY

Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003 directed the U.S. Secretary of Health and Human Services, in consultation with the U. S. Attorney General, to establish a pilot program to identify efficient, effective, and economical procedures to conduct background checks on prospective long-term care direct patient access employees.

Nevada was one of seven states selected by the Centers for Medicare & Medicaid Services (CMS) to participate in the CMS Criminal History Background Check Pilot Program to improve the efficiency of its fingerprint-based background check process for workers in long-term care facilities. Specifically, Nevada's program was able to:

- Create 37 new fingerprint locations where civil applicants will be able to submit fingerprints electronically.
- Improve the infrastructure at Nevada's Department of Public Safety to allow for electronic submission of civil applicant fingerprints from law enforcement, state agencies, private and commercial fingerprint sites.
- Reduce the incidence of health care job-hoppers, who previously had been able to move from employer to employer about every three months, staying one step ahead of their disqualifying criminal history report. Average background check processing times declined from about 80 days to less than 20 days during the course of the program.
- Reduce the fingerprint rejection rate to less than 4 percent in 2007 from a high of 16 percent in 2005.
- Determine that about 10 percent of facilities subject to the background checks were not conducting those checks on their employees and independent contractors.
- Identify specific statutory changes that might be considered in the next legislative session.

About 1 to 3 percent of applicants are disqualified by the Department of Public Safety under Nevada's statute, a figure that may reflect effective screening by employers prior to the submission of fingerprints or the increased awareness of the statutory prohibitions in this state among potential applicants who are thereby discouraged from applying.

Because Nevada's background check process has been in place since 1997, and the state looks forward to the formal analysis of the data from the seven states participating in the pilot program to determine whether these background checks actually improve the quality of health care in long-term care facilities.

## DISCUSSION

### Introduction

Section 207 of the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003 directed the U.S. Secretary of Health and Human Services, in consultation with the U.S. Attorney General, to establish a pilot program to identify efficient, effective, and economical procedures to conduct background checks on prospective long-term care direct patient access employees. CMS selected seven states to participate in the pilot: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin. Nevada was awarded grant funds in the amount of \$1,891,018 to cover the costs of the pilot for the period of January 2005 through September 30, 2007.

Nevada has conducted fingerprint-based state and national criminal history background checks on workers in long-term health care facilities since 1997, before the Centers for Medicare & Medicaid Services (CMS) Background Check Pilot Program was initiated, so the state's primary objective in participating in the program was to explore methods to make the on-going program more efficient and effective. The state accomplished this objective primarily through technology improvements, but also by improving procedures and communication flows.

### Nevada Authorizing Legislation

The relevant statutory sections are Nevada Revised Statutes (NRS) 449.176 through 449.188, which are available online at <http://leg.state.nv.us/NRS/NRS-449.html>.

Since 1997, chapter 449 of the Nevada Revised Statutes (NRS 449) has prohibited certain licensed health care entities from employing individuals whose fingerprint-based criminal history background checks revealed convictions for specific offenses, requiring those entities to submit fingerprints for such checks at the time of hiring and at least every five years thereafter.

In 1999, independent contractors employed by those entities became subject to the background check requirements of NRS 449.179. At the same time, specific crimes against the elderly were added to the list of disqualifying criminal convictions in NRS 449.188.

In 2005, agencies to provide personal care services in the home were added to the list of entities required by NRS 449.179 to conduct background checks.

In 2007, specific Medicare and Medicaid convictions were added to the list of disqualifying criminal convictions in NRS 449.188.

Table 1 (below) summarizes the statutory provisions.

Appendix A addresses specific statutory considerations that may be evaluated in the next legislative session in 2009.

**Table 1. Summary of Background Check Provisions of Nevada Revised Statute 449**

NRS	Provisions
449.176	<p>Requires background check of applicant for license to operate:</p> <ul style="list-style-type: none"> <li>• Facility for intermediate care,</li> <li>• Facility for skilled nursing, or</li> <li>• Residential facility for groups.</li> </ul>
449.179	<p>Applies to the provider, namely the administrator of or the person licensed to operate:</p> <ul style="list-style-type: none"> <li>• Agency to provide personal care services in the home,</li> <li>• Agency to provide nursing in the home,</li> <li>• Facility for intermediate care,</li> <li>• Facility for skilled nursing, or</li> <li>• Residential facility for groups</li> </ul>
	<p>Requires administrator or licensed operator, within 10 days of hiring an employee or independent contractor, to</p> <ol style="list-style-type: none"> <li>1. Obtain a written statement indicating whether the individual has been convicted of any crime in NRS 449.188.</li> <li>2. Obtain oral and written confirmation of that statement.</li> <li>3. Obtain two sets of fingerprints and authorization from the individual for submission of the prints to the Central Repository for Nevada Records of Criminal History and to the Federal Bureau of Investigation.</li> <li>4. Submit those fingerprints for the background check.</li> <li>5. Repeat this process at least once every five years.</li> </ol>
	<p>Allows individuals to avoid this process if they can demonstrate that such a background check was conducted within the preceding six months showing no disqualifying convictions.</p>
	<p>Requires the Central Repository (at the Department of Public Safety) to determine whether the individual has been convicted of a crime listed in NRS 449.188 and immediately notify the Health Division (Bureau of Licensure and Certification) as well as the administrator or licensed operator whether the individual has such a conviction.</p>
	<p>Allows the Central Repository to charge a fee to the provider that submitted the prints. Allows the provider to recover up to half of that cost from the individual, and if it so chooses, the provider must allow periodic payments from the individual.</p>
449.182	<p>Providers must maintain records of the information collected under NRS 449.179:</p> <ul style="list-style-type: none"> <li>• The signed criminal history attestation from the individual</li> <li>• A copy of the fingerprints submitted and proof of that submission</li> <li>• A copy of the response from the Department of Public Safety</li> </ul> <p>These records must be made available for inspection by the Health Division (Bureau of Licensure and Certification).</p>

NRS	Provisions
449.185	<p>The provider shall terminate the employment of any individual if the provider learns from the Central Repository or any other source that the individual has been convicted of an offense listed in NRS 449.188. If the individual believes that the information used by the Central Repository to disqualify the individual is incorrect and so informs the provider, then the provider must allow the individual at least 30 days to correct the information. Provides for limited criminal and civil liability for the provider.</p>
449.188	<p>Disqualifying criminal convictions, whether misdemeanor or felony, include:</p> <p>A conviction at any time for:</p> <ol style="list-style-type: none"> <li>(1) Murder, voluntary manslaughter or mayhem;</li> <li>(2) Assault with intent to kill or to commit sexual assault or mayhem;</li> <li>(3) Sexual assault, statutory sexual seduction, incest, lewdness, indecent exposure or any other sexually related crime;</li> <li>(4) Abuse or neglect of a child or contributory delinquency;</li> <li>(5) Abuse, neglect, exploitation or isolation of older persons or vulnerable persons, including, without limitation, a violation of any provision of NRS 200.5091 to 200.50995, inclusive (<a href="http://leg.state.nv.us/NRS/NRS-200.html#NRS200Sec5091">http://leg.state.nv.us/NRS/NRS-200.html#NRS200Sec5091</a>), or a law of any other jurisdiction that prohibits the same or similar conduct;</li> <li>(6) A violation of any provision of NRS 422.450 to 422.590, inclusive (<a href="http://leg.state.nv.us/NRS/NRS-422.html#NRS422Sec450">http://leg.state.nv.us/NRS/NRS-422.html#NRS422Sec450</a>), which address Nevada Medicaid program requirements);</li> </ol> <p>A conviction, within the immediately preceding 7 years for:</p> <ol style="list-style-type: none"> <li>(7) A violation of any federal or state law regulating the possession, distribution or use of any controlled substance or any dangerous drug as defined in chapter 454 of NRS (<a href="http://leg.state.nv.us/NRS/NRS-454.html#NRS454">http://leg.state.nv.us/NRS/NRS-454.html#NRS454</a>);</li> <li>(8) A violation of any provision of law relating to the State Plan for Medicaid or a law of any other jurisdiction that prohibits the same or similar conduct;</li> <li>(9) A criminal offense under the laws governing Medicaid or Medicare, within the immediately preceding 7 years;</li> <li>(10) Any offense involving fraud, theft, embezzlement, burglary, robbery, fraudulent conversion or misappropriation of property; or</li> <li>(11) Any other felony involving the use of a firearm or other deadly weapon.</li> </ol> <p>The Health Division (BLC) may deny a license to operate or may suspend or revoke the existing license if an employee or independent contractor has any of these convictions or if the provider continues to employ such an individual.</p>

For complete text of the statutory provisions, see <http://leg.state.nv.us/NRS/NRS-449.html>.

## Collaboration

The Nevada State Health Division's Bureau of Licensure and Certification (BLC), part of Nevada's Department of Health and Human Services, is the agency that licenses and regulates health care facilities and other agencies, and was the awardee of the grant. Working in collaboration with other state agencies, the bureau successfully improved several processes to increase the efficiency of Nevada's background check process. Table 2 (below) summarizes that collaboration.

**Table 2. Primary Collaboration**

Agency	Description
Nevada State Health Division, Bureau of Licensure and Certification	CMS program awardee
Nevada Department of Public Safety, Records and Identification Division	Houses the Central Repository. Determines and reports employment status based on criminal history records
Nevada State Board of Nursing	Licenses Certified Nurse Aides and others who represent many of the employees at long-term care facilities
Nevada Department of Health Care Financing and Policy	Nevada Medicaid. Current Federal background check regulations apply to personal care assistants also covered by NRS 449.
Program participants	Installed live scan fingerprint equipment for civil applicants. See Appendix B for complete list
Steering committee	Provided community and other agency input to the program See Appendix C for complete list

BLC worked closely with the **Nevada Department of Public Safety (DPS)**, whose Records and Technology Division houses the Central Repository and which conducts the criminal history background checks. This collaboration resulted in information reporting that was both more comprehensive and more efficient than prior efforts. The program also subsidized technology infrastructure improvements to allow for civil applicant fingerprints to be submitted electronically.

BLC also coordinated with the **Division of Health Care Financing and Policy (DHCFP)** and the Board of Nursing. DHCFP manages the Nevada Medicaid program, and BLC wanted to ensure consistency between Nevada statutory requirements for background checks with the Federal Medicaid requirements for such checks. BLC worked with the Nursing Board to address the issue of job-hopping, where an individual who may be licensed by the board, moves from facility to facility every ninety days or so, staying one step ahead of a disqualifying criminal history report.

BLC collaborated with **law enforcement agencies** throughout the state, as well as several state and private agencies, to establish new fingerprint sites throughout the state. A list of program participants is included in Appendix B.

BLC established a **steering committee** to provide industry and community input to the program. In addition to the state agencies cited above, participants on the committee included representatives of trade associations, long-term care providers, community service groups, and fingerprint agencies. A list of participating agencies is included in Appendix C.

### **Nevada's Background Check Program**

Nevada's background check program addressed specific limitations of its existing process and was able to overcome many of these limitations by applying technology and modifying some procedures.

#### ***Nevada's Background Check Process***

Under Nevada statute, the health care provider (the employer) is required to ensure completion of the background check for each employee and independent contractor and to maintain records of those background checks. The provider submits the fingerprints to DPS who conducts the background check search, evaluates the criminal history and notifies the provider and BLC whether the individual is:

- Negative – the individual's criminal history record shows no disqualifying convictions,
- Positive – the individual's criminal history record shows a disqualifying conviction, or
- Undecided – the individual's criminal history record shows an arrest for a crime that will disqualify the individual if, when the case is adjudicated, the individual is found guilty.

BLC sends a compliance notice to the employer for each Positive response, requiring the provider to confirm the employment status of the disqualified individual. BLC also ensures compliance when it conducts periodic inspections of each licensed facility by examining employment records which are required to include a copy of the criminal history attestation by the individual, a copy of the fingerprints submitted to DPS and a copy of the response from DPS.

A comprehensive description of this process is available on the BLC website at [www.health.nv.gov](http://www.health.nv.gov). Click on Bureau of Licensure and Certification, then Criminal History Background Check.

Prior to the CMS Background Check Pilot Program, DPS notified BLC only of the Positive responses. During the course of the pilot program, BLC and DPS cooperated to provide reporting of all background checks conducted on health care workers. This change now allows BLC to track which agencies are submitting fingerprints, which prints are rejected and not re-submitted, and system processing times.

### ***System Limitations***

In applying for the CMS Background Check Pilot Program, Nevada sought to address several functional limitations in its then-current system: processing time, job-hopping, confusing statutory and regulatory requirements, and system integration.

- **Processing time:** Paper and ink fingerprinting, used for nearly all civil applicants prior to the pilot, significantly increased the processing time for background checks, because hard cards required additional scanning processing for input into the Western Identification Network Automated Fingerprint Identification System (WINAFIS) used by the Nevada Department of Public Safety, and FBI cards were mailed to the FBI's West Virginia facility for processing into the Integrated Automated Fingerprint Identification System (IAFIS). Processing times of 90 to 120 days or more were not unusual.

Fingerprints rejected for poor quality, not uncommon for paper and ink prints, significantly increased this processing time as notices were sent to providers to have individuals re-fingerprinted.

- **Job-hopping:** individuals could take advantage of the lengthy processing time to move from employer to employer one step ahead of a disqualifying criminal history report.
- **Confusing statutory and regulatory requirements:** licensing boards for health care professionals maintain separate regulations which allow them to issue a license to an individual whose criminal history may prevent that individual's employment at the long-term care facilities subject to the statutory prohibitions. Many providers mistakenly believe that an individual's professional license implies that the individual is not disqualified from employment under NRS 449.
- **System integration:** To the extent that civil applicants could use live scan equipment at third party fingerprinters, such devices were not fully integrated to allow for electronic submission directly into the WINAFIS and IAFIS databases.

The CMS grant funds allowed Nevada to provide significant technology improvements that helped to overcome most of these system limitations.

### ***Program Objectives***

To address those functional limitations, Nevada's grant application identified four key objectives<sup>1</sup>:

1. Develop electronic fingerprint capture and transmission for prospective employees of long-term care facilities through an internal network of agencies within the Nevada Department of Health and Human Services.<sup>2</sup>

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<sup>1</sup> From Nevada's original grant application.

2. Expand electronic fingerprint capture and transmission for prospective employees of long-term care facilities through an external network of healthcare providers.
3. Develop a statewide database of disqualified prospective employees and develop a process to address incomplete background checks to determine appropriate follow-up.
4. Promote stakeholder involvement to recommend background check process improvement and to address required legislative action for statutory changes, as needed.

### ***Live Scan Site Program Results***

Objectives 1 and 2 were met by establishing subgrants with a variety of agencies to install live scan fingerprint equipment. Nevada's program was budgeted for a total of 21 installations, but through careful use of program funds, a total of 37 new live scan sites were established. A complete list of these sites is available in Appendix B Program Participants, which includes:

- Four county agency sites.
- Eleven law enforcement agencies, which added live scan stations for civil applicants. Prior to this program, only criminal bookings had access to live scan equipment. This program provided machines for additional stations for civil applicant fingerprinting.
- Twelve private agencies, including one provider.
- Nine state agency sites.
- One site on tribal lands.

Table 3 (below) ranks Nevada's counties by population and number of health care facilities subject to the background check statutes, and it shows how the number of new live scan fingerprint sites created in each county closely tracks those figures, except in Clark County. All but two of the new private agency sites were created in Clark County. The table does not include pre-existing sites.

Eleven of Nevada's 17 counties participated in the live scan subgrant program. Of those that did not, three had already installed live scan equipment for civil applicants, and the other three had no healthcare facilities subject to the statute or insufficient population to justify the equipment. Pershing County received a subgrant because although there are no facilities licensed as agencies subject to the statute, their licensed general hospital has a wing devoted to long-term care, whose employees are subject to the background check requirements.

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<sup>2</sup> The Nevada Department of Health and Human Services was named the Department of Human Resources at the time of the grant application.

**Table 3. New Live Scan Installations by County**

Rank	County	Population	percent Total	Facilities*	percent Total	New Sites	percent Total
1	Clark	1,874,837	71%	390	76%	14	38%
2	Washoe	409,085	16%	82	16%	6	16%
3	Carson City	57,701	2%	11	2%	6	16%
4	Lyon	54,031	2%	5	1%	3	8%
5	Douglas	51,770	2%	5	1%	2	5%
6	Elko	48,339	2%	10	2%	1	3%
7	Nye	44,795	2%	3	1%	1	3%
8	Churchill	27,371	1%	3	1%	0	0%
9	Humboldt	17,751	1%	2	0%	1	3%
10	White Pine	9,542	0%	1	0%	0	0%
11	Pershing	6,955	0%	0	0%	1	3%
12	Lander	5,655	0%	1	0%	1	3%
13	Mineral	4,399	0%	1	0%	0	0%
14	Storey	4,110	0%	0	0%	0	0%
15	Lincoln	3,987	0%	1	0%	1	3%
16	Eureka	1,460	0%	0	0%	0	0%
17	Esmeralda	1,262	0%	0	0%	0	0%
<b>TOTAL</b>		<b>2,623,050</b>	<b>100.00%</b>	<b>515*</b>	<b>100.00%</b>	<b>37</b>	<b>100%</b>

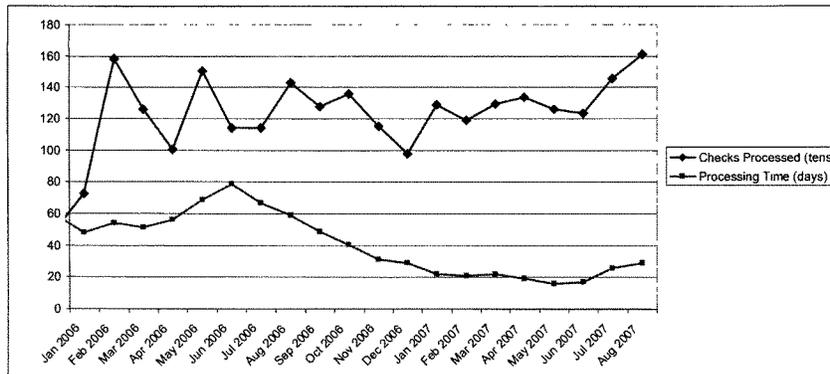
\*Does not include approximately 150 agencies to provide personal care services in the home, which are subject to the background check statute but not yet licensed by the state.

Objective 3 was abandoned in favor of improving processing time for background checks. The original grant application anticipated that a disqualified applicant database, accessible by prospective employers might address the issue of the lengthy processing times for background checks. Since a background check is correct only at the moment it is completed, a database of disqualified applicants was determined to be not effective. Furthermore, because Nevada's statutes only authorize issuing the results of the check to the employer, such a database would have required statutory change.

Nevada's background check pilot program instead focused on the underlying problem of that lengthy processing time, by improving the electronic infrastructure at the Department of Public Safety to accept and process live scan civil applicant fingerprints. At the same time, DPS was able to improve internal procedures to improve the processing time of hard card submissions as shown in Figure 1 (below).

Despite the average monthly volume of prospective health care worker background checks remaining relatively constant at about 1,200 to 1,400 per month, DPS was able to reduce the average processing time from about 60 to 80 days when the program began to an average of 20 days at the end.

Live scan submissions are processed even more quickly, averaging only 12.75 days.

**Figure 1. Reduction in background check processing time**

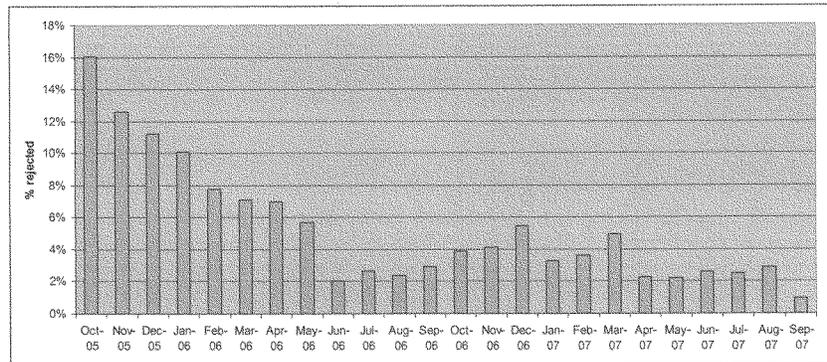
This improved processing time substantially reduces the cost associated with employees hired provisionally, who subsequently must be terminated when their background check results prove Positive.

This faster processing time significantly reduces the opportunity for job-hopping. The most egregious example of a job hopper was one certified nurse aide who had worked for 15 different providers over a period of three years, from 1993 through 1996, changing jobs about every 90 days to stay ahead of his disqualifying criminal history report.

In 2006, we identified six individuals operating in a similar pattern, but as processing times improved, we saw fewer incidents of this practice. In 2007, we observed no such cases.

Another factor influencing processing times was fingerprints rejections. Because Nevada allows a provider to employ an individual until the background check is complete, the time it takes to re-fingerprint individuals whose original submission was rejected can significantly increase the delay in identifying unqualified candidates.

We saw substantial progress in reducing these rejections from over 16 percent when the program began to less than 1 percent at the end, as shown in Figure 2, below.

**Figure 2. Reduction in percentage of fingerprints rejected****Implementation Issues**

Nevada's initial grant proposal included a plan to install 21 live scan machines throughout the state to include one in each county plus four additional machines in Washoe and Clark Counties, which together represent 87 percent of the state's population. The plan also included funding for staff to operate these machines. Several questions arose as we started up the program:

- On what basis should the state select a vendor? Would a single machine configuration meet differing local conditions?
- Who would operate the equipment after the termination of the program?
- Should the goal of providing at least one machine to every county take priority over more adequately serving Clark County where 71 percent of the state's population resides and where over 75 percent of the health care providers subject to the statutory background checks are located?
- Could the state justify entering into direct competition with existing commercial fingerprint agencies?

Nevada quickly decided that the best implementation plan was to let the communities being served decide these issues, and modified its program to provide for program rebates to any entity that wanted to install its own live scan fingerprint equipment. In exchange for that subsidy, program participants agreed to provide free fingerprint capture services to the prospective health care workers who were subject to the background checks during the pilot period, that is, through September, 2007. The Department of Public Safety already had in place security regulations that would apply to non-law enforcement

entities wishing to take and submit fingerprints, and the program required participant compliance.

As a result of this program change to use rebates, a total of 37 new civil applicant fingerprint sites were established. There was sufficient funding to provide rebates to all entities who agreed to the specific terms of the subgrants. Participants were able to choose the live scan machine of their choice, so long as it conformed to DPS standards, and receive a rebate of up to \$15,800. About half of the participants actually spent more than that for their equipment, to include specific features that they wanted.

The primary advantages of this rebate approach were:

- More sites were created than originally anticipated: 37 instead of 21.
- New sites were created where they were needed most, as determined by local conditions, including five new commercial enterprises that had not previously existed.
- New sites continue to operate after the end of the program.

The program avoided the issue of entering into direct competition with commercial agencies by avoiding setting up state agencies specifically for the purpose of fingerprinting. At the time that the program began, there were three commercial fingerprint sites in Nevada. Two of the three participated in the program. The third was prohibited due to circumstances stemming from a state investigation into misappropriation of state property. State agencies that participated needed fingerprint equipment for their own employees, but agreed to fingerprint long-term care workers as a condition of their subsidy, as a convenience to the community.

By providing rebates to entities setting up as new businesses, the state relied on those individuals to evaluate the current need in their own communities. That evaluation was bolstered by knowing that those entities were investing their own funds to establish or expand their businesses and complete the purchase of their equipment.

#### Key Pilot Data Results

During the pilot program, Nevada tracked the results shown in Table 4.

**Table 4. Nevada Background Check Results**

(1)	Data collection period	1/1/2006 – 9/30/2007
(2)	Total applicants screened	27,875
(3)	Excluded by registry checks	n/a
(4)	Excluded by state name-based and/or fingerprint check only	0
(5)	Excluded by FBI fingerprint check only	217
(6)	Excluded by both state and FBI checks	132
(7)	Total excluded by name- and fingerprint checks (state and FBI combined)	349
(8)	Total excluded by all checks (registries, state, and FBI criminal history checks)	349

NOTE: The shaded area on the above table (items 4, 5 and 6) are mutually exclusive and collectively exhaustive variables. The sum of the three variables equal item 7.

Additional notes

- (1) Prior to January 2006, BLC only collected information about disqualified applicants. BLC did not track applicant data for those passing the background check.
- (2) Counted as total background checks completed, with one background check including both State and FBI checks. One applicant applying at one facility is counted as one record. One applicant applying at two different facilities counts as two records.
- (3) Nevada does not exclude by registry check. Nevada checks only the sexual offender registry and flags the background check if there is a positive response, as a back-up to the fingerprint check.
- (4) Nevada does not conduct name-based checks, except in the rare instance of an individual having no fingerprints that can be raised. Nevada always conducts both the State and FBI check, regardless of whether the individual is excluded at the state level. We do not track those excluded only at the state level because Nevada reports to the FBI, so anyone excluded at the state level would automatically be excluded by the FBI record.
- (5) Nevada does track those individuals excluded by their FBI record only, which would indicate that there is no disqualifying Nevada conviction.
- (6) Calculated as the total disqualified minus those disqualified by FBI only.
- (7) Includes only those disqualified by fingerprint check. Nevada does not track name check data.
- (8) Includes only those disqualified by fingerprint check. Nevada does not disqualify based on registry checks.

**Background Check Fees**

Nevada's Department of Public Safety charged \$21.00 for the state check plus \$24.00 for the national (FBI) check. The national fee changed after pilot, effective October 1, 2007, to \$19.25 for prints submitted electronically and \$30.25 for prints submitted on cards. The state fee did not change. If the fingerprints are rejected for poor quality, the provider may re-submit new prints twice for no additional charge.

In addition, individual fingerprint agencies, including law enforcement and private fingerprinters, charge their own fees for collecting fingerprints and printing cards or submitting electronically. These fees range from a low of \$5.00 per card to \$15.00 per card or more. About \$10.00 per card is a typical figure. To save this cost, some providers roll their own employee prints.

Nevada's live scan subgrant program required that participants not charge this service fee to health care workers through September 30, 2007.

Nevada's statutes require that providers keep in their files copies of the fingerprints submitted for each employee. Prior to the pilot, providers kept merely a photocopy of the cards that they mailed to DPS, but with the advent of electronic submission, providers must now request a printed card in addition to the electronic submission.

Nevada's statutes require that the provider pay the DPS fee for the background check but are silent about who must pay the cost, if any, of collecting fingerprints and printing the card for their files. The statutes also allow the provider to collect up to half of the DPS fee from the employee; and if the provider chooses to do so, the provider must allow the employee to pay over time. Several providers on Nevada's steering committee indicated that a common practice was to collect this fee from employees only if the employee resigned within 30 or 60 days of hiring.

### **Information Technology Enhancements**

The primary technology enhancements took place at the Department of Public Safety, whose plan to provide for electronic connectivity for civil applicant fingerprints was several years off at the time the program began.

By 2006, all booking agencies in the state were submitting criminal fingerprints electronically, but there was no infrastructure in place to accept civil applicant fingerprints electronically and transmit them to WINAFIS and IAFIS.

The three then-existing commercial fingerprint sites were able to transmit civil applicant fingerprint records electronically to a printer housed at DPS where the records were printed to cards, which DPS then scanned for entry into WINAFIS and IAFIS.

DPS had a plan to install the equipment that would allow such civil applicant records to be automatically received and fed directly into the fingerprint systems, but funding was not available for several years. As a result of the CMS grant funding, DPS was able to accelerate that program to 2007. This installation included:

- **Hardware:** a live scan store and forward device to which civilian agencies could connect to transmit prints via virtual private networks (VPNs) at their sites.
- **Software:** to route civil applicant fingerprint records directly to WINAFIS and IAFIS, as appropriate.

Another technology enhancement was the introduction of electronic data transfer between DPS, which evaluates the criminal history records, and BLC, which ensures that providers comply with the disqualifying decisions made by DPS. Prior to the program, DPS merely sent BLC a photocopy each of the disqualifying notices that they sent to providers. For BLC to track these disqualifications meant re-entering all the appropriate data in BLC's tracking system. The electronic data transfer eliminated re-keying the data.

An additional benefit of the electronic reporting is that DPS now provides BLC information on all the NRS 449 background checks, not simply the disqualified results, so that BLC can track other data, such as processing time or number of background checks conducted by each facility. This new information flow revealed that about 10 percent of facilities subject to the statute were not submitting any fingerprints.

### **Program Costs**

Nevada's program was completed using only two-thirds of budgeted funds, as shown in Table 5, which compares the Award budget with Actual expenditures.

Significant variances to the original budget reflect the change in program focus from having the state install, operate and maintain live scan equipment and to contract instead with various agencies to do so at their own expense, with some subsidy from the state. This change moved substantial funding from Personnel, Fringe Benefits, Travel and Equipment categories to the Contractual category.

This methodology also allowed the state to avoid spending the originally anticipated \$200,000 for program advertising (category Other), and instead the state was able to leverage the sales forces of various live scan equipment manufacturers to encourage agencies to participate in the program.

Personnel costs were also substantially lower because the program was able to use a higher skilled contract employee for 20-30 hours per week, rather than the four full-time managerial and administrative employees originally planned. As a result, fringe benefits did not apply.

**Table 5. Budget vs. Actual Program Costs**

<b>AWARD original budget</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>	<b>Total</b>
A Personnel	115,485	368,869	368,869	853,223
B Fringe Benefits	30,175	45,263	45,263	120,701
C Travel	9,100	31,796	31,796	72,692
D Equipment	20,954	338,098	47,458	406,510
E Supplies	4,960	4,960	4,960	14,880
F Contractual	20,000	40,000		60,000
G Construction				
H Other	5,808	136,942	136,942	279,692
Subtotal Direct Charges	206,482	965,928	635,288	1,807,698
I Indirect Charges	20,830	31,244	31,244	83,318
<b>TOTAL AWARD</b>	<b>227,311</b>	<b>997,172</b>	<b>666,532</b>	<b>1,891,016</b>

<b>ACTUAL expenditures</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>	<b>Total</b>
A Personnel	23,436	72,364	113,005	208,805
B Fringe Benefits				
C Travel	2,468	377	2,908	5,753
D Equipment	2,319	16,533	102,361	121,213
E Supplies	472	3,555	3,624	7,651
F Contractual		65,444	736,880	802,324
G Construction				
H Other	3,323	5,134	9,067	17,524
Subtotal Direct Charges	32,019	163,406	967,845	1,163,270
I Indirect Charges	3,275	12,363	23,711	39,349
<b>TOTAL ACTUAL</b>	<b>35,293</b>	<b>175,769</b>	<b>991,556</b>	<b>1,202,618</b>

<b>VARIANCE [Actual is more/(less) than Award]</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>	<b>Total</b>	<b>percent Variance</b>
A Personnel	(92,049)	(296,505)	(255,864)	(644,418)	-76%
B Fringe Benefits	(30,175)	(45,263)	(45,263)	(120,701)	-100%
C Travel	(6,632)	(31,419)	(28,888)	(66,939)	-92%
D Equipment	(18,635)	(321,565)	54,903	(285,297)	-70%
E Supplies	(4,488)	(1,405)	(1,336)	(7,229)	-49%
F Contractual	(20,000)	25,444	736,880	742,324	1237%
G Construction					
H Other	(2,485)	(131,808)	(127,875)	(262,168)	-94%
Subtotal Direct Charges	(174,464)	(802,522)	332,557	(644,428)	-36%
I Indirect Charges	(17,555)	(18,881)	(7,533)	(43,969)	-53%
<b>TOTAL VARIANCE</b>	<b>(192,018)</b>	<b>(821,403)</b>	<b>325,024</b>	<b>(688,398)</b>	<b>-36%</b>

**Sustainability**

Because Nevada's program is an existing statutory requirement for long-term care facilities, the state will continue to conduct the fingerprint-based state and national background checks and ensure that facilities remain in compliance by terminating disqualified employees.

The Bureau of Licensure and Certification, which enforces the provisions of the background check statutes, is a fee-based agency. Although BLC does not receive any of the fees associated with conducting the background checks, the program is supported by agency fees for initial licenses and renewals.

Appendix A addresses various statutory considerations, which may be the subject of legislative action in 2009, after consultations within the Health Division and with the Department of Public Safety.

## CONCLUSION

Nevada has been successful in its ten-year old program of denying employment in the long-term health care industry to individuals with specific criminal convictions. Whether this employment ban results in a higher quality of care in long-term facilities is not something Nevada can measure on its own, but rather needs to compare its data with states who do not conduct such background checks.

If the decision is to apply such employment prohibitions nationally, then the lessons of Nevada's program may be useful. Specific recommendations include:

- Apply technology early by encouraging the use of live scan fingerprint equipment to reduce rejections and to speed up the background check process.
- Allow third-party fingerprinters to take civil applicant fingerprints to relieve the burden of local law enforcement agencies, many of whom have little interest and fewer resources to deal with civil applicants.
- Consider which entities should be subject to the background check: is a hospice the same as a skilled nursing facility in this context?
- Consider which individuals should be subject to the background check:
  - All employees, regardless of whether they provide direct patient care or have access to resident private rooms?
  - Independent contractors, who may be directly supervised, may have no direct resident contact or who may be limited to public places only?
  - Volunteers, students or other unpaid individuals who may or may not be directly supervised by facility staff?
- Consider who should pay for the background check, the individual, the employer or provider, or the state; because in general that decision will determine who owns the results and may communicate them to other providers. This consideration is important to individuals applying with several different employers.
- Consider what criminal history should disqualify an individual: felonies and aging misdemeanors, crimes against persons and property, the lists of convictions that could be the same as other occupations, such as nurses, long-term care administrators, or even school teachers or volunteers. How many different types of background checks does the state want to conduct?
- Consider who should make the decision about whether to hire an individual despite the criminal history. In any case, the decider should have access to all relevant information, including the criminal history details.

**REFERENCES**

Federal Grant Number 11-P-930335/9-01, awarded to Nevada State Health Division  
December 28, 2004 by Centers for Medicaid and Medicare Services.

Nevada Administrative Code (NAC) Chapter 449, <http://leg.state.nv.us/NAC/NAC-449.html>.

Nevada Revised Statutes (NRS) Chapter 449, <http://leg.state.nv.us/NRS/NRS-449.html> .

Nevada State Health Division, Bureau of Licensure and Certification, [www.health.nv.gov](http://www.health.nv.gov)

**ABBREVIATIONS AND ACRONYMS**

BLC	Bureau of Licensure and Certification, in the Nevada Department of Health and Human Services, Health Division.
CMS	Centers for Medicare & Medicaid Services
DHHS	Nevada Department of Health and Human Services
DPS	Nevada Department of Public Safety
IAFIS	Integrated Automated Fingerprint Identification System
IT	Information Technology
MMA	Medicare Prescription Drug, Improvement and Modernization Act of 2003
NVHD	Nevada State Health Division
VPN	Virtual Private Network
WINAFIS	Western Identification Network Automated Fingerprint Identification System

## **APPENDIX A STATUTORY CONSIDERATIONS**

Considerations for legislative changes at completion of the Criminal History Background Check Pilot Program will take place in anticipation of the next (2009) legislative session. These considerations address confusing or conflicting statutory language and overlapping requirements that may be burdensome to providers.

### **Evaluation and Enforcement**

Under NRS 449.188, BLC “may” suspend or revoke the license of a licensee who continues to employ a person who is disqualified under the statute, but the clear language of the statute is that BLC is not compelled to do so. The problem BLC faces is that the bureau has insufficient information on which to exercise that judgment. Only DPS sees and evaluates the criminal history and is only authorized to release its decision about whether an individual is disqualified to the employer and to BLC.

This procedure varies from the method the state employs with nearly every other agency that enforces background checks, because in nearly every other case, DPS merely prints the relevant criminal history and forwards that record to the board or entity charged with enforcing background check requirements. The Nevada State Board of Nursing and Board of Examiners for Long-term Care Administrators, for example, each receives and evaluates all applicants’ criminal history records to determine whether they will issue a license.

The only basis for challenging the disqualification is if DPS relied on inaccurate information to reach its decision. To challenge a disqualification, the applicant must provide up-to-date court documents to DPS to demonstrate that the criminal history records on which DPS relied were inaccurate.

As a result of the current statutory limitation on release of criminal history information to BLC, the bureau makes no exceptions and instructs all employers that they must terminate anyone who is disqualified or face sanctions against their license to operate.

### **Waivers And Obsolete Convictions**

NRS 449.188, the statute that describes disqualifying criminal convictions, does not distinguish between misdemeanors and felonies. In general, the statute imposes a lifetime ban for crimes against the person, but only a seven-year ban for crimes against property.

BLC has seen several examples of individuals who may have pled guilty to a misdemeanor twenty or more years ago to avoid the cost of a trial, whose plea now permanently bars them from employment in covered facilities. Some examples include:

- A 40-year old guilty plea for solicitation for prostitution from a well-regarded nurse.

- A 30-year old guilty plea for contributing to the delinquency of a minor by a then-21-year old caught drinking in public with his 19-year old girlfriend.
- A 20-year old guilty plea for indecent exposure related to nude swimming on a public beach.

Although most states allow individuals to have records like these sealed and thereby restore their civil rights, in each of these particular cases, the misdemeanor records have been purged from the court files and so the court is unable to or refuses to seal the record.

Several states have record retention policies that authorize the destruction of court records, especially misdemeanor cases, after several years, making it impossible for a disqualified individual to update his criminal history. For example, Florida's Rules of Court (Rule 2.075) allow courts to destroy misdemeanor records after five years, and felony cases not adjudicated guilty after ten years.

The consideration is whether a single misdemeanor conviction that is more than, say, seven or ten years old should be a permanent bar to employment in these health care providers.

### Overlapping Requirements

Individuals that are associated with the facilities listed in NRS 449.176 and 449.179 may be subject to a variety of fingerprint-based criminal history background checks, each of which is independent of the others, and none of which may be used as a substitute for the others because all of the statutes have different lists of disqualifying criminal convictions. Table 6 identifies these statutes and to whom they apply.

**Table 6. Fingerprint-based Background Checks required by NRS**

<b>Statute</b>	<b>Background check required for</b>
NRS 118A.335	A person who will work 36 hours or more per week and who will have access to all dwelling units of dwelling units intended and operated exclusively for persons 55 years of age and older.
NRS 449.176	Each applicant for a license to operate a facility for intermediate care, a facility for skilled nursing, or a residential facility for groups.
NRS 449.179	An employee or an independent contractor of an agency to provide personal care services in the home, an agency to provide nursing in the home, a facility for intermediate care, a facility for skilled nursing or a residential facility for groups.
NRS 654	Administrator of a residential facility for groups and nursing facility administrator.
NRS 632.344	Applicant for nursing license or certificate.

### Licensed Employment Service Agencies

Nursing Pools and similar licensed employment service agencies provide caregivers to many types of health care facilities, including those covered by the NRS 449 background

check requirements. In Nevada, these pools and agencies cannot, however, conduct background checks on their personnel in advance to determine which ones to send to covered facilities. Each covered facility that they serve must conduct its own background check on individuals sent by the employment agency.

Facilities and other agencies not covered by the statute may conduct background checks under NRS 179A.210, which applies to every employer in Nevada, but information provided under that statute may be insufficient for determining eligibility under NRS 449. In addition, such a check would not relieve the hiring facility of its responsibility to conduct the background check under NRS 449.

The consideration is whether these overlapping statutes could accommodate a single background check that could be used by employment service agencies, to avoid repeating an inquiry for the same individual.

### **Covered Facilities and Employees**

NRS 449 background checks are required for only five of the 33 types of health care providers licensed by BLC. Some facilities, such as hospice or homes for individual residential care, provide services very similar to those subject to the background check.

The consideration is whether all facilities where individuals may reside overnight should be included in the background check, or whether individual residents could conduct their own NRS 449 check on their caregivers.

Another consideration is whether all employees and independent contractors, many of whom, such as dishwashers or gardeners, do not have direct patient contact, need a fingerprint-based background check. From the plumber spending an hour to fix a leaky sink to the pianist hired for a single concert in the main dining hall, all are currently subject to Nevada's requirement.

The consideration is whether providers should incur that extra cost of a background check for such individuals.

### **Voluntary Registry**

It is not unusual for an individual, such as a certified nurse aide or personal care attendant, to simultaneously apply with several facilities or agencies to ensure sufficient work hours. Nevada's law requires each hiring facility to pay for its own background check on the same individual.

NRS 449.179(2) does allow a facility to avoid the background check process if the individual provides proof that he passed an NRS 449 check within the previous six months. The problem facilities face is that the only proof is the Applicant Fingerprint Response that DPS provided to a previous employer, which notice explicitly prohibits the recipient from disseminating it to a second party or entity. Furthermore, there is clearly no incentive for the first employer to provide a copy of that notice to the individual to

take to the second employer, thereby allowing the second employer to save the cost of the background check that the first employer incurred.

One proposal under consideration is allowing an individual to submit his own prints to obtain a DPS clearance that he could then take to several employers, subject to the same six-month expiration as current law.

### **Cost of Applicant Lying**

Should an individual be subject to criminal or civil penalties for lying to a potential employer about his criminal record? NRS 449.179 requires the provider to pay for the background check, but it also requires the applicant to sign a statement attesting that he has no disqualifying criminal history. If the applicant lies, it is the provider who incurs the cost of the background check, as well as the training and other costs associated with hiring the individual on a provisional basis only to have to terminate him when the background checks are returned by DPS.

There is a provision that allows the employer to recover up to half the cost of the background check from the employee, and there is anecdotal evidence that employers generally do not choose to collect that amount unless they terminate the employee within 30 or 60 days of hiring them.

### **Coordinate NRS 449.176 with NRS 449.179**

NRS 449 has different requirements for different individuals in licensed entities for long-term care, a difference that may have been unintentional as NRS 449.179 was updated over time and NRS 449.176 was not addressed.

NRS 449.176 requires a fingerprint-based background check for “each applicant for a license to operate”:

- Facility for intermediate care,
- Facility for skilled nursing, or
- Residential facility for groups

NRS 449.179 requires a fingerprint-based background check for each employee or independent contractor for:

- Agency to provide personal care services in the home,
- Agency to provide nursing in the home,
- Facility for intermediate care,
- Facility for skilled nursing, or
- Residential facility for groups

One consideration is whether the “applicant for a license to operate” personal care and nursing agencies should be subject to the same background check as the employees or independent contractors.

Another consideration is that the “applicant for a license to operate” need not be a “natural person.” A corporation, for example, may apply for a license. It would appear to be possible that an individual could create a corporation to use to apply for a license. Then, if the individual acted only as the owner and not an employee or independent contractor, he could escape the background check entirely.

**APPENDIX B  
PROGRAM PARTICIPANTS**

The following entities were awarded subgrants to install new live scan equipment for civil applicants subject to NRS 449 background checks.

<b>Type</b>	<b>Participant</b>	<b>County</b>
County Agency	East Fork Fire and Paramedic Districts	Douglas
County Agency	Lyon County School District (for Dayton High School)	Lyon
County Agency	Lyon County School District (for District Office)	Lyon
County Agency	Lyon County School District (for Fernley High School)	Lyon
Law Enforcement	Boulder City PD	Clark
Law Enforcement	Douglas County Sheriff's Office	Douglas
Law Enforcement	Elko County Sheriff's Office	Elko
Law Enforcement	Humboldt County Sheriff's Office	Humboldt
Law Enforcement	Lander County Sheriff's Office	Lander
Law Enforcement	Lincoln County Sheriff's Office	Lincoln
Law Enforcement	North Las Vegas Police Department	Clark
Law Enforcement	Nye County Sheriff's Office	Nye
Law Enforcement	Pershing County Sheriff's Office	Pershing
Law Enforcement	Reno Police Department	Washoe
Law Enforcement	Washoe County Sheriff's Office	Washoe
Private	A. Doyle, Inc. dba Fingerprinting and More	Clark
Private	B & D Fingerprinting Services	Clark
Private	Boulder City Hospital	Clark
Private	Burton Studio	Clark
Private	Conlon, Jay D.	Clark
Private	Executive Passport Services LLC	Clark
Private	Fingerprinting Express LLC	Washoe
Private	Lend-A-Hand Senior Services	Washoe
Private	Silver State Mobile Fingerprinting Services, Inc.	Clark
Private	The Hunter Shelton Group, LLC, dba Eye On Nevada	Clark
Private	Treasures Angels	Clark
Private	Visiting Angels	Clark
State Agency	Nevada Department of Public Safety personnel	Carson City
State Agency	Nevada Department of Public Safety personnel	Carson City
State Agency	Nevada Legislative Police	Carson City
State Agency	Nevada Office of the Attorney General	Carson City
State Agency	Nevada Office of the Attorney General	Clark
State Agency	Nevada State Board of Nursing	Clark
State Agency	Nevada State Board of Nursing	Washoe
State Agency	Nevada State Emergency Medical Services	Carson City
State Agency	Nevada State Health Division Personnel	Carson City
Tribal	Washoe Tribal Police	Washoe

**APPENDIX C  
STEERING COMMITTEE**

Nevada's program organized a steering committee to provide community input to the program. In addition to the program participants listed in Appendix B, representatives from the following organizations participated on the steering committee:

- Assisted Living Advisory Committee
- Barton Health
- Eagle Valley Children's Home
- Fingerprinting Pros
- Nevada Board of Examiners for Long-term Care Administrators
- Nevada Department of Aging Services
- Nevada Department of Health Care Financing and Policy (Nevada Medicaid Agency)
- Nevada Department of Public Safety, Records and Technology Division (Central Repository)
- Nevada Healthcare Association
- Nevada Office of the Attorney General
- Nevada Rural Hospital Partners
- Nevada State Board of Nursing
- Nevada State Veterans' Home
- Northern Nevada Adult Mental Health Services
- Park Place
- Pershing General Hospital
- South Lyon Medical Center
- THI Care



*Building a Healthy New Mexico!*

# *New Mexico Background Check Pilot Program*

## *Final Report*

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*State Agency: New Mexico Department of Health  
Project ID Number: 11-P-93034/6*

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The statements contained in this report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare & Medicaid Services. The awardee assumes responsibility for the accuracy and completeness of the information contained in this report.

# **BACKGROUND CHECK PILOT Final State Report**

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## I. EXECUTIVE SUMMARY

The New Mexico Department of Health has successfully completed the Centers for Medicare & Medicaid Services (CMS) Background Check Pilot Program. The overarching goal of New Mexico pilot project, Providing Assistance, Communication, and Training (PACT) Project was to improve the effectiveness of the Caregivers Criminal History Screening Program while increasing provider compliance with the requirements set forth in the Caregivers Criminal History Screening Act and accompanying administrative rule. The New Mexico Department of Health was able to attain this goal by implementing a comprehensive plan that was divided into three key phases. The three phases systematically addressed the issues previously identified by New Mexico Department of Health staff through the thorough examination of internal operations and feedback from stakeholders.

The New Mexico Department of Health pilot project was divided into three essential phases. Each phase was meticulously designed to optimize CMS Background Check Pilot results. The phased approach laced the following major components into a comprehensive plan:

1. Establish a statewide care provider training and technical assistance for application submissions and fingerprinting designed to be delivered to live audiences;
2. Develop an integrated he Consolidated Online Registry for agency and provider use ;
3. Establish methods for monitoring provider compliance as required by the Caregivers Criminal History Screening Act;
4. Obtain necessary software and hardware upgrades for Caregivers Criminal History Screening Program;
5. Expand current program by establishing a crosswalk of other states' disqualifying convictions;
6. Conduct research for statutory and regulatory reform necessary to further improve the Caregivers Criminal History Screening Program client-based application.

The **first phase** of the project involved the development of the statewide training program and curriculum to improve application submissions and fingerprinting techniques. The training was titled, The Providing Assistance, Communication and Training Orientation. Notices and advertisements for the trainings were sent to the care providers and provider associations detailing the goals and schedule of the training. The training schedule was designed to methodically cover the state in regular intervals. The training staff ensured that each of the five New Mexico Department of Health regions were each visited per quarter. This was the minimum requirement set by PACT Project Staff. The training schedule did ensure that the more densely populated regions were visited in higher frequency.

Training materials and resources were designed and crafted for distribution at training sessions conducted by PACT Project Staff. The informational materials received at the Providing Assistance, Communication and Training Program Orientation included: new Caregivers Criminal History Screening Program regulatory changes, newly instituted Employee Abuse Registry requirements, Consolidated Online Registry instructions, proper fingerprinting guides and a Digital Versatile Disc, and the revised New Mexico Department of Health Incident Reporting requirements. This combination of materials was intended to provide a complete library of information to care provider personnel who previously were unaware of the rules and requirements involved with Caregivers Criminal History Screening Program and the new

Employee Abuse Registry. Additionally, in this first phase, the PACT Orientation Coordinator developed an inclusive process for care providers to request onsite technical assistance and began to schedule trainings to meet the needs of care providers.

Also occurring during the initial phase of this program was the conceptualization, design and launch of the Consolidated Online Registry. This web-based application was developed as part of the technical assistance provided by Number Six Software who was a subcontractor of the CNA Corporation, the CMS technical assistance contractor. The Consolidated Online Registry "consolidated" external and internal databases and synthesized the data for use by care provider staff and New Mexico Department of Health personnel. The databases included the Nurse Aide Registry, the New Mexico Employee Abuse Registry, and the Caregivers Criminal History Screening Program database. There are future plans to include the New Mexico Department of Public Safety's Sex Offender database into the Consolidated Online Registry.

The **second phase** of the PACT Project centered on the introduction of the Consolidated Online Registry to care providers and state agencies and implementing a full training schedule. The Consolidated Online Registry concept was designed as a one-stop-shop for providers' compliance with Caregivers Criminal History Screening Program, the Nurse Aide Registry and the New Mexico Employee Abuse Registry. The Consolidated Online Registry allows providers to run compliance reports of their current staff and their associated statuses in the registries for self-monitoring and compliance assessment. The Consolidated Online Registry enables providers to enter a prospective employee's Social Security number to verify their status on the registries. State agencies that have oversight authority are able to run compliance reports by provider and utilize these reports in their survey and monitoring activities. This functionality has considerably enhanced the ability of the survey and review teams to audit providers' compliance with Caregivers Criminal History Screening Program requirements as well as those of the Nurse Aide Registry, and the New Mexico Employee Abuse Registry.

In this second phase of the PACT Project, the PACT Project Leader contacted all providers by mail and email to inform them of the Consolidated Online Registry, its goals and training schedule. Training materials for the Consolidated Online Registry were developed in concert with the other training materials and were included when the web-based application went into production. Those training materials were also made available online via the New Mexico Department of Health website. The PACT Orientation Coordinator added the Consolidated Online Registry onsite technical assistance requests to the PACT Training Schedule and a series of trainings around the state were conducted to instruct providers on the use and benefits of the Consolidated Online Registry. Included in the training was an introduction of the Division of Health Improvement website and its components that can also be of benefit to providers. The ability to access and use the Consolidated Online Registry data proved incredibly valuable adding measures of accountability for both providers and enabling them to use the system instead of calling Caregivers Criminal History Screening Program staff for the information.

The second phase saw a major push in the PACT Orientation Schedule. Table 1 demonstrates the aggregate statistics of the trainings through the course of calendar year 2006. The highly successful training program directly contributed the improvement in quality of criminal history applications submitted and quality of fingerprint cards. PACT Orientation Staff also trained New Mexico Department of Health, New Mexico Aging and Long-Term Services Department, and New Mexico Attorney General's Office surveyor, reviewers, and investigators

on the new statutory requirements and proper use of the Consolidated Online Registry. This was essential in the lead up to the third phase of the project.

**Table 1**

<b>PACT Project Orientations in 2006</b>	
Care Provider Staff Trained	383
Care Provider Agencies	203
Total Trainings	21
Fingerprint Technical Assistance Trainings	4
Caregivers Fingerprinted by PACT Staff	449*

\*1,347 total fingerprint cards

The **third phase** of the PACT Project involved many distinct areas but resource centered on refining the widely successful training and curriculum and placed a heavy emphasis on increasing the ability of providers, surveyors and reviewers to measure and improve compliance of Caregivers Criminal History Screening Program, Nurse Aide Registry and the Employee Abuse Registry statutes and administrative rules. The PACT Project staff utilized compliance reports to do systemic analysis and the results were incorporated into the training curriculum to enhance and focus the training and technical assistance to more effectively produce measurable results. In the last phase of the PACT Project, the Project Leader used the data and work closely with surveyors and reviewers to monitor care provider compliance with Caregivers Criminal History Screening Program.

The additional components of the PACT Project that are necessary to the effort of improving the Caregivers Criminal History Screening Program system are the hardware/software upgrades and research/analysis activities conducted by the PACT paralegal were completed in the third phase. A primary hardware issue was that the outdated fingerprint card scanners utilized by Caregivers Criminal History Screening Program take between four to six minutes to scan one fingerprint card. Given the high volume of applicant fingerprint cards received by Caregivers Criminal History Screening Program, this causes extensive delays in processing applications. Another drawback to the outdated fingerprint scanners was that they had very little technical support. Newer scanners that have adequate technical support and are able to scan fingerprints in half the time were needed. Originally the New Mexico Department of Health had planned to purchase updated scanning terminals from the Sagem Morpho with Background Check Pilot funding but the New Mexico Department of Public Safety (DPS) entered into a contract with the vendor to supply a complete Automated Fingerprint Identification System with new Livescan and Cardscan terminals for the state agencies who utilized the new Automated Fingerprint Identification System. Unfortunately their project was over eight months behind schedule so Caregivers Criminal History Screening Program was not able to show any benefits of the new hardware during the course of the Background Check Pilot period. The systems continue to pose reliability and capacity problems to the New Mexico Department of Health.

**Table 2**

<b>PACT Project Orientations in 2007</b>	
Care Provider Staff Trained	427
Care Provider Agencies	58
Total Trainings	15
Fingerprint Technical Assistance Trainings	21
Caregivers Fingerprinted by PACT	1096*

\*3,288 total finger cards

The role of the PACT Project paralegal was integral throughout the course of the CMS Background Check Pilot Project in improving the effectiveness of Caregivers Criminal History Screening Program statutory and regulatory functions. The paralegal's role included the following:

1. Reviewing legal issues that prevent the program from disqualifying individuals with misdemeanor convictions;
2. Conducting research and analysis with recommendations to improve the process for obtaining provider trends data such as the number of employees by provider and turnover rates for targeting under-reporting providers;
3. Analysis of the reconsideration process is necessary to assess its adequacy and to recommend improvements;
4. Supervise the Legal Section of Caregivers Criminal History Screening Program;
5. Develop a crosswalk of all states' disqualifying convictions in order to streamline the criminal history screening process for New Mexico as well as other states having similar programs;
6. Review other states with this type program to determine if there are additional crimes that should be added to the disqualifying list.

The primary focus of the PACT Project was to refine current Caregivers Criminal History Screening Program policies and improve program operations but during the two-year period, by participating in the CMS Background Check Pilot, the New Mexico Department of Health was able to tackle issues not previously known during the initial planning of the New Mexico pilot project. The ability to detect program problems and issues has proved extremely valuable as the Department of Health expanded Caregivers Criminal History Screening Program's operations through statutory changes which have led to a 30 percent increase in applications submitted to the program state fiscal year 2007.

In 2005, to participate in the CMS Background Check Pilot, the New Mexico Department of Health had to go to the New Mexico Legislature and seek legislative changes in order to comply with the requirements established in Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (PL 108-173). The primary change that needed to be addressed was the 12-month exception which allowed a care provider to not submit a criminal history screening on a caregiver who had previously received a screening in the last 12 months. This gap was closed and the statute now met MMA requirements. The New Mexico Department of Health took the additional step of including general acute care hospital's caregivers in its Caregivers Criminal History Screening Program statute. These facilities were

not required by the MMA but inclusion of this care provider type played a significant role in the Caregivers Criminal History Screening Program operations.

## II. INTRODUCTION

The mission of the Caregivers Criminal History Screening Program (CCHSP) is to provide an effective, efficient and professional system of reporting and maintaining applicants' criminal histories and making appropriate employment fitness determinations through the utilization of a nationwide and statewide criminal history repository. The purpose of the Caregivers Criminal History Screening Program is to ensure, to the highest degree possible, the prevention of abuse, neglect and exploitation of recipients that receive health care in the State of New Mexico.

In New Mexico, the Caregivers Criminal History Screening Program managed by the New Mexico Department of Health has been conducting criminal history screenings on caregivers for long-term care provider facilities since 1999. Since CCHSP has been operating for 8+ years the Department was able to design and center the PACT Project on an integrated approach to improving care provider compliance with the regulatory requirements of the New Mexico Department of Health, Caregivers Criminal History Screening Program. PACT Project Staff, in collaboration with industry stakeholders, executed a proactive strategy that comprehensively addressed both defined CCHSP and care provider issues and uncovered previously unidentified programmatic problems associated with this relatively new statutory requirement.

The broad goals of the New Mexico Department of Health's PACT Project were to improve the CCHSP system by:

- Improving provider compliance with the requirements of the Caregivers Criminal History Screening Act by providing training, technical assistance and improved access to information;
- Improving the quality of application packet submissions by reducing the number of incomplete applications and the number of fingerprint card rejections, resubmissions and clearances by affidavit;
- Upgrading software and hardware utilized by CCHSP to improve processing time to make either a clearance or disqualification determination for an applicant;
- Compile a crosswalk of all states' disqualifying convictions in order to facilitate processing;
- Provide recommendations for statutory and regulatory reform.

In order to accomplish these broad goals, the PACT Project Staff formulated a series of internal projects timed throughout the Background Check Pilot period to meet on the predetermined desired outcomes. Those internal projects were:

- Develop and launch an integrated web-based application, the Consolidated Online Registry (COR), to provide access for care providers and state agencies to criminal history screening status, Nurse Aide Registry status, and New Mexico Employee Abuse Registry status to track and ensure compliance and thereby reduce risks posed by untrained, uncertified and inappropriate caregivers.
- Develop and implement a fingerprint ink and hard card application training program and curriculum for care providers, state agency personnel, and other industry stakeholders;
- Regular regional fingerprint and application submission trainings;

- Onsite technical assistance with application submission and fingerprinting to providers who requested it;
- Monthly evaluations of application and fingerprint card rejections and compliance with timelines by care provider;
- Onsite technical assistance based on rejection and compliance rates;
- Add functionality to New Mexico Department of Health website to enable care providers to access reports through the COR to gather staff clearance and training statuses enabling them to assess their compliance rate and take remediation steps as necessary;
- Evaluate New Mexico's criminal history screening statute and regulations and compared them with best practices of other states in order to implement regulatory and statutory reform;
- Compile a comprehensive crosswalk of states' disqualifying convictions to facilitate criminal history screening processes; and
- Replace outdated IDIS scanning equipment and software to expedite processing and ensure continued operations.

### III. PROGRAM DISCUSSION

#### A. Enabling Statutory Authority

The three objectives specific to the statutory and regulatory component of the PACT Project were to:

1. Evaluate New Mexico's criminal history screening process in order to suggest and implement statutory and regulatory reform;
2. Provide an analysis of the Caregivers Criminal History Screening Program administrative reconsideration appeals process to assess its adequacy and to recommend improvements;
3. Compile a crosswalk of states' disqualifying convictions to facilitate criminal history screening processes.

The *Caregivers Criminal History Screening Act* was initially passed by the New Mexico State Legislature in 1998 to ensure to the highest degree possible the prevention of abuse, neglect or financial exploitation of care recipients<sup>1</sup> with in the health care provider community. The legislative design of the statutory objective directed the Department of Health to develop a regulatory scheme in which an applicant who is offered employment or contractual services as a caregiver<sup>2</sup> to undergo both a nationwide and statewide criminal history screening background checks.

<sup>1</sup> "care recipient" means any person under the care of a provider who has a physical or mental illness, injury or disability or who suffers from any cognitive impairment that restricts or limits the person's activities." See *Caregivers Criminal History Screening Act*, at §29-17-4D(1), (NMSA 1978).

<sup>2</sup> See *Caregivers Criminal History Screening Act*, at §29-17-4(1), (NMSA 1978), "caregiver" means a person, not otherwise required to undergo a nationwide criminal history screening by the *New Mexico Children's and Juvenile Facility Criminal Records Screening Act*, §§32A-15-1 et. seq., (NMSA 1978), whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient served by that provider." See *Caregivers Criminal History Screening Act*, at §29-17-4B (NMSA 2007).

### **B. New Mexico Department of Health Implementing Regulatory Authority**

The *Caregivers Criminal History Screening Act* was implemented by adoption of the *Caregivers Criminal History Screening Requirements, 7.1.9*<sup>3</sup> New Mexico Administrative Code (NMAC).<sup>4</sup> Generally included within this rule are the developmental guidelines for the criminal history screening program; requirements and procedures for submission of applicant and caregiver fingerprint applications; payment of fees and an administrative reconsideration appeals process for an applicant or caregiver after receipt of an employment disqualification notification.

### **C. PACT and CCHSP 2005 Legislative Amendments and Regulatory Compliance with the New Mexico Administrative Code Requirements.**

In 2005 the New Mexico State Legislature amended the *Caregiver Criminal History Screening Act* to include in part hospital caregivers and an addition to the preexisting disqualifying conviction list with the supplement of burglary, fraud, and any attempt, solicitation or conspiracy involving any of the felonies in the subsection. However, the hospital caregivers were not included in New Mexico's background check pilot program design. The initial process of amending and subsequently promulgating the *Caregivers Criminal History Screening Requirements, 7.1.9 NMAC (2002)*, necessitated an internal collaborative effort of resources between the PACT Project Staff, CCHSP staff and participating members of the health care provider community.<sup>5</sup>

### **D. Substantive Changes to the *Caregivers Criminal History Screening Requirements 7.1.9 NMAC (2006)***

The initial rule promulgation process<sup>6</sup> of the then current CCHSP administrative rule began in late August of 2005. The objective of rule promulgation in the State of New Mexico is to establish standards<sup>7</sup> for uniform rule filings and common format.<sup>8</sup> These standards are

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The 2005 amendment, effective June 17, 2005, in Paragraph A and twice in Paragraph G, inserted "or hospital caregiver".

<sup>3</sup> The Department of Health is authorized to promulgate the administrative rules to implement the *Caregivers Criminal History Screening Act*. See § 29-17-5 (NMSA 1978). See also; *State Rules Act* §§14-4-7 et. seq., (NMSA 1978); "rules are promulgated by State agencies to execute and support New Mexico statutes." See also, NMAC History Notes at 7.1.9 NMAC; 7 NMAC 1.9, *Caregivers Criminal History Screening Requirements* filed 08-03-1998, delineating the annotation of changes or repeals of a rule to a part or a section noted at the end of a modified section. At a minimum, the history note contains the effective date of the original filing and the dates and identification numbers of any subsequent amendment(s), promulgation(s) and any repeal.

<sup>4</sup> See New Mexico Commission of Public Records - State Records Center and Archives, *Rules General Provisions* at 1.24.1.7U NMAC (2000), "NMAC" means the New Mexico administrative code, the organizing structure for rules filed by New Mexico state agencies. The NMAC is also the body of filed rules and the published versions thereof. The New Mexico Administrative Code is administered by the Administrative Law Division of the Commission of Public Records and is the filing point for the administrative rules promulgated by executive-branch agencies, for interstate compacts, and for county subdivision regulations. See also *State Rules Act* §§14-4-7 et. seq., (NMSA 1978).

<sup>5</sup> Unless otherwise provided by statute, no rule affecting any person or agency outside the Department of Health can be adopted, amended or repealed without a public hearing on the proposed action before the secretary or a hearing officer designated by him. See *Department of Health Act, 9-7-6E*. (NMSA 1978).

<sup>6</sup> The actual process of rule promulgation in New Mexico requires multiple administrative procedures under Title 1 General Government Administration Chapter 24 Rules, Parts 1, 10, 11, 15 and 20 NMAC.

<sup>7</sup> The NMAC style is guided by relevant portions of the current edition of the legislative drafting manual of the New Mexico legislature published by the New Mexico legislative council service. The following provisions are

designed to ensure that rules are readily identifiable and available for public inspection; that each rule filing can be historically traced from its current status back to the original rule filing; and that rule filings are structured for expeditious compilation into the New Mexico Administrative Code.<sup>9</sup> As such, the PACT paralegal first began with a careful analysis of the New Mexico Administrative Code rule filing and drafting requirements to address both the legislative substantive amendment and semantic clarification<sup>10</sup> to improve the sequential and specific sections to corresponding subsections and paragraphs.<sup>11</sup>

The following bullets highlight the PACT and CCHSP departmental substantive and textual or semantic revisions based upon the legislative amendments, administrative requirements and public hearing comments submitted from the health care provider community.

I. Legislative Amendment:

- Subsection F at 7.1.9.7 was amended to include a definition of “care recipient.”
- Subsection E, Paragraph (1) at 7.1.9.7 was amended to include “general acute care hospitals”
- Subsection K, at 7.1.9.7 was amended to include a definition of “hospital caregiver”<sup>12</sup>
- Subsection P at 7.1.9.7 was amended to include a definition of the statewide criminal screening process.
- Subsection G at 7.1.9.11 was amended to include the 2 additional felony disqualifiers of “burglary and fraud.”

specifically adopted: Chapter 4, Bill Drafting, Chapter 7, Legislative Style and Language Provisions, for example the while drafting the new 7.1.9 NMAC 2002 rule there were numerous punctuation or capitalization changes throughout the amended rule to conform with the NMAC format i.e., “Department” had been changed to lower case “department.” Although seemingly a minor error this particular example was riddled throughout the rule with similar errors. See New Mexico Commission of Public Records - State Records Center and Archives, *General Government Administration, Rules, New Mexico Administrative Code*, at 1.24.10.12.A (1)-(3) NMAC.

<sup>8</sup> See New Mexico Commission of Public Records - State Records Center and Archives, *General Government Administration, Rules, New Mexico Administrative Code*, at 1.24.10.6 NMAC

<sup>9</sup> The NMAC is designed to promote access and assist research by adopting a system for uniformly organizing state rules that facilitates fully searchable electronic access. Additionally, it is designed to facilitate electronic publication and availability via the internet. See New Mexico Commission of Public Records - State Records Center and Archives, *General Government Administration, Rules, New Mexico Administrative Code*, at 1.24.10.6 NMAC (2007).

<sup>10</sup> For example the initial reading of the scope of applicability at 7.1.9.2 NMAC (2006) was specific to “caregivers” and “care providers” yet there were four classes of general applicability covered by this rule; applicant, caregiver, hospital caregiver and care provider. Throughout the revised rule the vast majority of the bracketed text was not clear as to whether the applicant, caregiver or hospital caregiver was being addressed and consequently placed on notice as to the applicable section, subsection or paragraph. See appendix 4 at 7.1.9 NMAC (2006).

<sup>11</sup> The hierarchy of the NMAC is structured by title, chapter, part and section. See New Mexico Commission of Public Records - State Records Center and Archives, *Rules General Provisions* at 1.24.1.7U NMAC (2000).

<sup>12</sup> See *Caregivers Criminal History Screening Requirements* at 7.1.9.7K NMAC “hospital caregiver” means any person whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient serviced by that care provider in an inpatient setting who is not a licensed New Mexico health care professional practicing within the scope of a profession’s license.

- Subsection H at 7.1.9.11 was amended to include “an attempt, solicitation, or conspiracy involving any of the felonies in this subsection”

## 2. PACT Substantive Amendments

- Subsection C at 7.1.9.8 and subsections G and P at 7.1.9.7 were amended to require a definition of conditional **supervised employment** by a care provider to ensure the prevention of abuse, neglect or the misappropriation of property of a care recipient pending receipt of the caregiver’s criminal history background screening. The expectation is that the care provider will employ a managerial oversight program, which can demonstrate a systematic and routine monitoring of the safety and quality of service provided by the caregiver or hospital caregiver to the care recipient during the caregiver’s conditional employment period.<sup>13</sup>
- Paragraph (3), Subsection D at 7.1.9.8 was amended to increase the number of fingerprint cards submitted to CCHSP with the initial application packet from 2 to 3 cards.
- Subsection B at 7.1.9.8 was amended to provide one exception to the general rule to submitting the *required* statewide and nationwide criminal history background screening. The exception *ONLY* applies to those individuals who have already submitted to a statewide *and* nationwide criminal screening through the CCHSP within the last 12 months and have subsequently received an employment clearance letter.<sup>14</sup>

This change necessitated a modification to existing PACT Project policy to maintain compliance with the requirements set forth in the MMA. The Department of Health along with CMS determined that those applicants and caregivers eligible for this 12-month exception applying for a fitness determination with a care provider type included in the MMA would be required receive a nationwide screening to complete their application.

The negotiated terms specified that the PACT Project staff would use savings from the redistribution of the vehicle for PACT Project Team for In-State Travel and the non purchase of the IDIS Card Scanners to pay for the estimated 800 additional nationwide screenings and the associated processing costs. The savings from the redistribution of the

<sup>13</sup> Amended language as follows: “conditional employment” means supervised employment pursuant to a bona fide offer of employment by a care provider to an applicant, caregiver or hospital caregiver, which is contingent upon the receipt of notice from the department that the applicant’s, caregiver’s or hospital caregiver’s nationwide and statewide criminal history screening indicates no existence of a disqualifying conviction, or notice from the department pending an administrative reconsideration procedure under Section 7.1.9.10 NMAC. This includes that period of employment during the time allowed for responding to the department’s request for additional information in cases where the applicant’s, caregiver’s or hospital caregiver’s criminal history record indicates an arrest without a final disposition for a crime listed under Section 7.1.9.11 NMAC. See 7.1.9.7G NMAC (2006).

<sup>14</sup> Amended language as follows: Exception: A caregiver or hospital caregiver applying for employment or contracting services with a care provider within twelve (12) months of the caregiver’s or hospital caregiver’s most recent nationwide criminal history screening which list no disqualifying convictions shall only apply for a statewide criminal history screening upon offer of employment or at the time of entering into a contractual relationship with the care provider. At the discretion of the care provider a nationwide criminal history screening, additional to the required statewide criminal history screening, may be requested. See appendix XX at 7.1.9.8B NMAC (2006).

vehicle and not purchasing the IDIS Card Scanners allowed the PACT Project to pay for the additional fees not covered by the care provider and expand the training training schedule in the last three quarters or the grant period.

- Paragraphs (2) and (3) of Subsection A at 7.1.9.9 were amended to provide clarification between a disqualifying conviction and an arrest and/or charge pending final disposition. Paragraphs (2) and (3) state that “the department *will not make a final determination* for an applicant, caregiver or hospital caregiver with a pending potentially disqualifying conviction. In such instances of a pending potentially disqualifying conviction for which no final disposition has been made, the department will notify all parties concerned by certified mail that an employment clearance has not been granted.”<sup>15</sup>
- Subsection B at 7.1.9.9 was amended to clarify that in all cases pending before the Reconsideration Committee it is the entirety the discretion of the care provider to continue the employment services of an applicant, caregiver or hospital caregiver whose nationwide criminal history record reflects a disqualifying conviction while awaiting a final employment determination.<sup>16</sup>
- Subsection F at 7.1.9.8 was amended to require that all fees and pertinent application information for all employees who meet the definition of an applicant, caregiver or hospital caregiver be submitted to the CCHSP no later than *twenty (20) calendar days* from the first day of employment or effective date of a contractual relationship with the care provider
- Paragraph (2), Subsection C at 7.1.9.9 was amended to require the care provider to notify the department within fourteen (14) days, as determined by the postmark, of the date and type of action taken to satisfy the removal requirements set forth in 7.1.9.9C (1) subsequent to termination of an employee who receives a *final* employment disqualification letter.
- Subparagraph (a), Paragraph (1), of Subsection B at 7.1.9.10 was amended to require that an applicant, caregiver or hospital caregiver after given notice by the CCHSP of a disqualifying conviction may submit a written request for an administrative

<sup>15</sup> Amended language as follows:

“ (2) An applicant’s ~~caregiver’s or hospital caregiver’s~~ failure to respond within the required timelines ~~regarding the final disposition of the arrest for a crime that would constitute a disqualifying conviction~~ shall result in ~~[that applicant’s]~~ the applicant’s, caregiver’s or hospital caregiver’s temporary disqualification from employment as a caregiver or hospital caregiver pending written documentation submitted to the department evidencing the final disposition of the arrest. [in the State of New Mexico] Information submitted to the department may be evidence, for example, of the certified copy of an acquittal, dismissal or conviction of a lesser included crime.

(3) The department will not make a final determination for an applicant, caregiver or hospital caregiver with a pending potentially disqualifying conviction for which no final disposition has been made.” See appendix XX at 7.1.9.9A (2)-(3) NMAC (2006).”

<sup>16</sup> Amended language as follows: **Employment Pending Reconsideration Determination:** At the discretion of the care provider, ~~[a-caregiver]~~ an applicant, caregiver or hospital caregiver whose nationwide criminal history record reflects a disqualifying conviction and who has requested administrative reconsideration may continue ~~[to be employed]~~ supervised employment pending a determination on reconsideration.

reconsideration within *fourteen (14) calendar days*, as determined by the postmark, from the date of the notice issued by the department;

#### IV. STATE AGENCY AND STAKEHOLDER COLLABORATION

Stakeholders played a vital role during the Background Check Pilot period and were crucial to the successful implementation to New Mexico's overall implementation strategy. The list of stakeholders in which New Mexico Department of Health collaborated ranges from industry associations, direct care providers, advocate agencies, higher education institutions, and other statewide governmental agencies. Initially the New Mexico Department of Health collaborated with several key industry organizations to gain both feedback and support for the grant project.

- The New Mexico Health Care Association (NMHCA), whose membership includes the following:
  - Nursing Facilities,
  - Facilities for the Developmentally Disabled (*In New Mexico these facilities are called Intermediate Care Facilities for the Mentally Retarded or ICF/MRs*),
  - Assisted Living/Residential Care Facilities.
- The New Mexico Association for Home & Hospice Care (NMAHHC), whose membership includes the following:
  - Home Health Agencies,
  - Regional Members-Home Health Providers Outside New Mexico,
  - Individual Members,
  - Hospices,
  - Association Members-Businesses or Organizations Related to Home Care,
  - Case Management Agencies,
- New Mexico Hospital Association (NMHA), whose membership includes the following:
  - New Mexico licensed acute inpatient, specialty or general hospitals and health systems,
  - Long-Term Care Facilities,
  - Primary care, Home care and Rehabilitation Facilities,
  - Residential Treatment Facilities,
  - Non-New Mexico Institutions,
  - Government Facilities; including Indian Health Services, Department of Health and Public Health Service providers,
  - Insurers, Health Maintenance Organizations and Managed Care Organizations,
  - Other qualified health care institutions as determined by the New Mexico Hospital Association Board.

The three associations listed played an integral role in the both the rule promulgation process and program policy decisions. Throughout the Background Check Pilot period, PACT Project Leader met with the association's directors and their members on a regular basis to provide them direct feedback on their compliance rates and to resolve any potential issues with CCHSP and criminal history screening process.

PACT Project Staff met with representatives from the New Mexico Aging and Long-Term Services Department to assist them implementation of program changes and assist them with interpretation of program requirements. The New Mexico Aging and Long-Term Services Department operates the Adult Protective Services Division which investigates incidents of abuse, neglect, and exploitation for Personal Care Attendant Care Providers and a state funded self directed waiver program. One component to those investigations is a verification by the investigator that CCSHP criminal history screening was conducted on the caregiver. PACT Project Staff briefed Adult Protective Services Investigators on the statutory changes and new requirement for care providers. Additionally, The PACT Project Leader and Paralegal collaborated with personnel from their self-directed waiver office and Personal Care Attendant office to ensure that those programs properly addressed the change in CCHSP requirements and provided technical assistance to their regional offices to better meet care provider inquiries.

The PACT Project Staff worked in partnership with The New Mexico Attorney General's Medicaid Fraud Unit providing them access to the Consolidated Online Registry and training them on specific CCHSP requirements and on an ongoing basis assisted their investigators in their fraud investigations. This was the first time that staff from the New Mexico Department of Health and staff from the Attorney General's Medicaid Fraud Unit had collaborated on that level.

Several partnerships were reinforced within the Department of Health during the Background Check Pilot period. The Development Disabilities Support Division teamed with PACT Project Staff to hold joint quarterly divisional meetings covering a wide range of topics including CCHSP program requirements and the Employee Abuse Registry which now was under the purview of CCHSP. The quarterly meetings were the first of their kind and marked a new direction in cooperation between the two divisions.

PACT Project Staff teamed with the Information Technology Support Division throughout the development of the Consolidated Online Registry. This relationship was strained and suffered several setbacks. Support and development involvement waned throughout the development and deployment phases of the Consolidated Online Registry launch which made it extremely difficult for the application developer to deliver the application on schedule. The difficulties ranged from hardware procurement to database maintenance.

Within the Division of Health Improvement, PACT Project Staff met regularly with staff from the Quality Management Bureau, the Incident Management Bureau, and the Health Facility & Licensing Bureau to address any issues or questions and were regular presenters at their bureau meetings. The Quality Management Bureau is responsible for assuring accountability and compliance with program, contractual and quality standards of community based programs. The Incident Management Bureau conducts investigations and provides data-tracking of reported allegations of abuse, neglect and exploitation. The Health Facility & Licensing Bureau is responsible for establishing, monitoring and enforcing quality standards for over 1100 health facilities to assure the safety and wellbeing of residents/patients/clients. The three bureaus along with CCHSP form the enforcement arm of the New Mexico Department of Health.

**V. DESCRIPTION OF STATE BACKGROUND CHECK PROGRAM**

The Caregivers Criminal History Screening Act requires that if persons whose employment or contractual service with a care provider include direct care or routine and unsupervised physical or financial access to any care recipient served by that provider must undergo a nationwide and statewide criminal history screening prior to employment. Subsection B of 7.1.9.8. NMAC stipulates that care providers can only **conditionally** employ a caregiver **pending** completion of the criminal history screening, with the understanding that the results will meet the requirements of the law. A complete criminal history screening is divided into three elements: Application Submission and Processing, Employment Fitness Determination, and Administrative Reconsideration (if needed).

**A. APPLICATION SUBMISSION AND PROCESSING**

Upon hiring an employee or entering into a contract of a caregiver, a care provider must complete and submit a complete CCHSP application for processing. Completed applications must be submitted no later than 20 calendar days following the bona fide offer of employment. A complete CCHSP Application includes:

- Three (3) completed applicant fingerprint cards;
- Copy of a photograph identification, (Drivers License or Passport) that meet the requirements of the Immigration and Naturalization Act;
- A signed New Mexico Department of Health Authorization for Release of Information form including social security number; and
- A \$65.00 fee for each application submitted for criminal screening

<b>CCHSP Application Fee Distribution</b>	
Statewide Background Check	\$10.00
Nationwide Background Check	\$24.00
<u>Operating Costs</u>	<u>\$31.00</u>
Total fees	\$65.00

During the PACT Project the Department of Health charged \$65.00 for a caregiver’s criminal history screening. Of that \$65.00, \$24.00 is paid to the FBI for the nationwide criminal history screening. The Department of Health also pays \$7.00 for the statewide criminal history screening and a \$3.00 per transaction fee to transmit data to NM Department of Public Safety (DPS) through a secure transmission protocol for a combined state fee of \$10.00. The Department of Health retains \$31.00 to cover the costs of processing and administrating CCHSP. The fee should be paid for by the care provider but PACT Project staff has discovered an emerging industry practice in which the care provider passes that cost onto the applicant or caregiver in various ways.

The fee payment must accompany the fingerprint application, or otherwise be credited to the Department of Health prior to or contemporaneous with the Department of Health’s receipt of the complete application package. The manner of payment of the fee is by bank cashier check payable to the NM Department of Health, or other method of funds transfer acceptable to the Department. Business checks will be accepted unless the business tendering the check has

previously tendered a check to the Department of Health unsupported by sufficient funds. The fee covers the processing of a second set of fingerprint cards should the first be unreadable by the IDIS. The \$65 fee will be charged to the care provider for submission of a third and any subsequent fingerprint sets.

The Caregivers Criminal History Screening Act requires that the following care provider types screen direct care employees:

- State owned or operated health care facilities
- Intermediate care facilities for the mentally retarded
- General acute care hospitals
- Long-term care hospitals
- Psychiatric hospitals
- Rehabilitation hospitals
- Hospice services
- Guardianship providers
- Adult residential care facilities
- Adult community residential facilities
- Adult limited diagnostic treatment centers
- Case management entities providing services to persons with developmental disabilities
- Adult boarding homes
- Adult day care centers
- Adult family care homes
- Adult halfway homes
- Care providers operating respite, companion or personal care programs funded by the New Mexico Aging and Long Term Services Department
- Care providers funded through the New Mexico Children Youth and Families Department providing homemaker and adult care services
- Disabled and elderly residential care providers providing services paid for in whole or in part by state funds
- Home health agencies
- All residential habilitation service or respite service care 7.1.9.2 NMAC providers authorized to be reimbursed in whole or in part by state funds or under any Medicaid or Medicaid waiver program
- Nursing home facilities
- Any other care provider entity which is licensed or Medicaid certified and which is not specifically identified herein.

For the purposes of the PACT Project, the Department of Health only submitted data to CMS on the care provider types specifically identified in the MMA.

Care provider agencies who have submitted all completed criminal history screening documents and paid all applicable fees for a nationwide and statewide criminal history screening for the caregiver must keep them under conditional supervised employment pending receipt of fitness determination letter from The New Mexico Department of Health as to whether the caregiver has a disqualifying conviction. Once the application is received by CCHSP, the

application will receive a quality assurance review. During the quality assurance review, CCHSP staff check the packet with specific criteria and if the application is missing an item(s) or if the forms are filled out incorrectly the complete package will be returned for completion or correction by the care provider. Once the application has received the quality assurance review it is date stamped and the payment is separated from the remaining application items. CCHSP Financial Specialist takes the all the checks received each day and processes for deposit.

The other three pieces of the application are assigned to CCHSP's data entry clerks. The clerks take the applications and enter the following information into the CCSHP client-based application:

- Care Provider Identification Number
- Payment Details
- Last Name
- First Name
- SSN
- Date of Birth
- Alias
- Address
- Sex
- Race
- Eyes
- Hair
- Caregiver Position
- Date of Hire
- Fingerprint Date
- Employee Abuse Registry Screening
- Employee Abuse Registry Screening Date
- Prior Felony Disclosure
- Fingerprint card rejection

Figure 1, on the following page, is the screen within the CCHSP database interface used by staff to enter the basic demographic information. If the information is entered correctly the database will the criminal history screening application a control number. The control number becomes the criminal history screenings new identity and all actions are driven by that number.

Once the application has been entered manually in to the CCHSP database data entry clerk writes the control number assigned by the database on all pieces of the criminal history screening application. Once the control number is written in the appropriate areas it now physically moves to the next step in the process.

Figure 1

The screenshot shows a software window titled "Input New Applications". The form is organized into several sections:

- Top Section:** Fields for AppNo, SSN, and Name.
- Facility Section:** A dropdown menu for FacNo.
- Check Section:** Fields for Check No, Check Date, Total Check Amt (displaying 0.00), Payment Date, ARFmtNo (displaying NEW), and Balance (displaying \$0.00). There is also a checkbox for State Fee.
- Personal Information Section:** Fields for SSN and EmpNo (displaying NEW). Below these are fields for Last Name, First Name, Middle, and Alias.
- Address Section:** A field for Address.
- Demographics Section:** Fields for DOB (displaying //), Sex, Race, Eyes, and Hair.
- Employment Section:** Fields for Position, Hire Date, and FP Date.
- Screening Section:** Fields for EAR Screen? and EAR Screen Date.
- Disclosure Section:** A checkbox for Applicant Disclosure?.
- Footer Section:** A checkbox for Di FPC Rtrnd CP, a checkbox for FPC QI Reject?, and buttons for Print Screen, New, Add, and Close.

The Cardscan section of CCHSP receives the application for the data entry clerks and prepares them for scanning. Cardscan clerks enter nearly the exact same information as previously entered by the data clerks into the Cardscan system and scan the fingerprint card. This redundancy is extremely inefficient and is a major cause to the habitual backlog endured by CCHSP. Once the Cardscan clerks selects to send the criminal history screening application the demographic information along with the fingerprints are transmitted electronically to the New Mexico Department of Public Safety's (DPS) Automated Fingerprint Identification System for a statewide criminal history search and than routed on to the Federal Bureau of Investigation's criminal history repository for a nationwide criminal history search. The assumption is that the fingerprints on the applicant fingerprint card are of high enough quality that both systems will be able to read them and subsequently match upon finding a "hit."

The Cardscan clerks print off the results nationwide and statewide criminal history screenings returned by the New Mexico Department of Public Safety and the Federal Bureau of Investigation and match them with the appropriate criminal history screening application. If the results came back negative, or a "clear," for both screenings than the Cardscan clerks enter that manually into the CCHSP database and that application is ready for to receive a clearance letter. The data entry clerks prints the letters in the queue and prepares them to be mailed to the care provider agency. If the results show a "hit," meaning the screenings returned criminal history information, than the application is sent to the CCHSP Legal Section for review.

Following this process and in the event the applicant or caregiver was eligible for the 12-month exception statewide only criminal history screening and they fell under the purview of the CMS Background Check Pilot, the Department of Health conducted a nationwide criminal history screening on the applicant or caregiver. This additional step was necessary to meet MMA requirements and to ensure compliance with previous negotiated terms with CMS. Once It was determined by PACT Project staff that the application should receive a nationwide criminal history screening, it was routed to the CCHSP Cardscan Section for processing. The Cardscan Section would conduct the nationwide screening and forward any results to the CCHSP Legal Section for a fitness determination.

Under the negotiated terms, the care provider was required to submit the initial required fee of \$20.00 as directed by CCHSP policy for those eligible applicants or caregivers and the PACT Project paid for the remaining portion of the criminal history screening application fee. On a weekly basis, PACT Project staff identified the applications included under the MMA requirements and forwarded those results to the CCHSP Program Manager. The CCHSP Program Manager verified the list of applications and once the list was correct it was forwarded to the CCHSP Financial Specialist for invoicing. The CCHSP Financial Specialist sent out a monthly invoice to the PACT Project for the additional nationwide criminal history screening and associated administrative fees totaling \$45.00 per application.

#### **B. EMPLOYMENT FITNESS DETERMINATION**

If an the criminal history screening application's results show that the caregiver has a criminal history that file is forwarded to the CCHSP Legal Section for review and determination. The CCHSP legal assistants review the rap sheet and determine if there is any item in that individual's criminal history that would disqualify them from employment in accordance with the Caregivers Criminal History Screening Act and Rule. If there is an item in their criminal history that does meet the threshold determined by the CCSHP disqualification list than a Disqualification letter is generated and sent via certified mail to the caregiver and the care provider. If the item in the does not meet the threshold it is updated in the CCHSP database and it processed for clearance. The fitness determinations of those caregivers with criminal histories are made by the trained legal assistants under the supervision of the PACT Project Paralegal who does hold a Juris Doctorate degree.

If the caregiver receives a Disqualification letter but wishes to appeal the determination they may request in writing within fourteen calendar days, as determined by the postmark, of their intention to do so. This request must be made directly by the caregiver and the care

provider must continue to comply with the supervision requirements outlined in the CCHSP statute and rule.

The following felony conviction list is used by the CCHSP legal assistant to determine if the caregiver is eligible for employment or contractual services with a care provider:

- homicide;
  - trafficking, or trafficking in controlled substances;
  - kidnapping, false imprisonment, aggravated assault or aggravated battery;
  - rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure, or other related felony sexual offenses;
  - crimes involving adult abuse, neglect or financial exploitation;
  - crimes involving child abuse or neglect;
  - crimes involving robbery, larceny, extortion, burglary, fraud, forgery, embezzlement, credit card fraud, or receiving stolen property; or
  - an attempt, solicitation, or conspiracy involving any of the felonies in this subsection.
- [7.1.9.11 NMAC - Rp 7 NMAC 1.9.12, 08/15/02; 7.1.9.11 NMAC - N, 01/01/06]

### C. ADMINISTRATIVE RECONSIDERATION

CCHSP does have relief for those individuals who have been determined to not meet employment requirements specified by the Caregivers Criminal History Screening Act and Rule. This appeals process is called Administrative Reconsideration. The reconsideration proceeding is intended to be an informal non-adversarial administrative review of written documentation. It will be conducted by a reconsideration committee designated for that purpose by the New Mexico Department of Health. The reconsideration committee will issue an employment clearance determination based upon the completed request for reconsideration and all supporting documents submitted. In cases where the reconsideration committee finds the need for additional or clarifying information, the reconsideration committee may request that the applicant, caregiver or hospital caregiver supply such additional information within the time set forth in the reconsideration committees' request.

In determining whether a caregiver's nationwide criminal history record reflects a disqualifying conviction may be employed, the reconsideration committee shall take into account the requirements of Section 28-2-1 to 28-2-6, NMSA 1978 of the criminal offender employment act. However, that act is not dispositive. The following factors may be considered:

- Total number of disqualifying convictions;
- Time elapsed since last disqualifying conviction or since discharge of sentence;
- Circumstances of crime including whether violence was involved;
- Activities evidencing rehabilitation, including but not limited to substance abuse or other rehabilitation programs;
- Whether conviction was expunged by the court or whether an unconditional pardon was granted;
- False or misleading statements about any conviction in the signed declaration;

- Evidence that caregiver poses no risk of harm to the health and safety of care recipients; and
- Age of caregiver at time of disqualifying conviction.

The committee may issue a clearance determination to a caregiver if the request for reconsideration and accompanying documentation clearly demonstrates it has sufficiently satisfied one of the following three grounds for a reconsideration clearance determination.

- **Inaccuracy:** The nationwide criminal history record inaccurately reflects a disqualifying conviction. This ground for a reconsideration employment clearance determination applies:
  - In instances of factual error in the nationwide criminal history record, from any source;
  - In instances of error arising from the departments' application or use of the inappropriate criminal statute or standard to the disqualifying conviction at issue; and
  - In instances where the department, pursuant to the caregiver's required consent, applies a rebuttable presumption of a disqualifying conviction to an arrest for a felony that lacks a final disposition in the nationwide criminal history record.
- **No Risk of Harm:** The employment or contractual services provided by an caregiver or with a disqualifying conviction presents no risk of harm to a care recipient. The reconsideration employment clearance determination issued by the reconsideration committee under this ground may be limited, in certain cases, based upon the evidence in the request for reconsideration and the accompanying documentation. The reconsideration determination of whether the applicant, caregiver or hospital caregiver presents no risk of harm to a care recipient is based upon the risk arising from the disqualifying conviction.
- **No Bearing on Fitness:** The disqualifying conviction does not directly bear upon the caregiver's fitness for employment with the care provider.  
[7.1.9.10 NMAC - Rp 7 NMAC 1.10, 08/15/02; 7.1.9.10 NMAC - N, 01/01/06]

## VI. CUMULATIVE DATA STATISTICS

Table 3 provides an overview of the criminal history screenings conducted by CCHSP on those care provider types included in the MMA. These screenings are only a fraction of the overall criminal history screenings conducted by CCHSP. CCHSP is charged with screening caregivers who are employed in long-term care, as well as community programs and the general acute care settings. Over the same grant period CCHSP process 36,364 criminal history screening applications that were not from the MMA required care provider types.

**Table 3**

<b>Cumulative PACT Project Statistics</b>	
Total Criminal History Screenings	13,145
Total Disqualifications	269
Disqualified by only the Nationwide Screening	103
Disqualified by only the Statewide Screening Results	20
Disqualified by combined Nationwide and Statewide Results	146
Percent Disqualified	2%

A key element of the CCHSP process is the Administrative Reconsideration process. This the caregivers opportunity to appeal to the Department the initial fitness determination made by CCHSP. During the grant period 87 caregivers requested and submitted a complete reconsideration packet. PACT Project staff noticed a considerable increase in the quality of the reconsideration applications following the implementation of the PACT Project Orientations. 47% of the approved Administrative Reconsideration request occurred in the last 10 months of the grant period.

**Table 4**

<b>Cumulative Administrative Reconsideration Results</b> (Applicants or caregivers who had potentially disqualifying results in their criminal history)	
Total Administrative Reconsideration Requests	87
Administrative Reconsideration Requests Approved	57
Administrative Reconsideration Requests Not Approved	30
Percent Approved	65.5%
Approved between 1/1/07 – 9/30/07	27

## **VII. PACT PROJECT EXPENSES**

Since the Department of Health has been operating a stable CCHSP for 8+ years the focus of the PACT Project was to enhance an already operating program. This philosophy drove how the Department prioritized the use of resources. Employee salaries along with the fringe benefits comprised 78% of the overall grant spending. This was necessary because during the grant proposal period the Department recognized that with the labor intensive CCHSP process additional employees would be necessary to ensure successful grant implementation.

**Table 5**

<b>PACT Project Expenses</b>	
Personnel	59%
Fringe Benefits	19%
Travel	11%
Equipment	6%
Supplies	1%
Other	4%

**VIII. PROGRAM IMPLEMENTATION ISSUES**

- DATA ELEMENT REPORT

PACT Project Staff faced challenges associated with the CMS Data Element Report for the entire Background Check Pilot period. Originally when the guidelines were published by the CNA Corporation regarding the data elements requirement PACT Project Staff identified that the CCHSP database captured all but three of the data elements. The fields needed were the applicant's date of hire, fingerprint date, and position type. PACT Staff requested technical assistance

- CCHSP STAFF SHORTAGE

The inclusion of general acute care hospitals which increased the total number of criminal history applications submitted to CCHSP coupled with severe logistical issues and staff shortages have caused an increase in the CCHSP processing timeline. During the Background Check Pilot period, CCHSP operated with a deficit of 2-4 staff members. The on-site supervisor was removed for disciplinary reasons, and a data entry clerk was excused for a medical condition, the financial specialist retired, the new financial specialist left for another agency, and another clerk retired. Key staff members who possessed tremendous amounts of program knowledge were no longer contributing causing the backlog to continue to grow. The staff members were not grant project staff members. They were funded by CCHSP funds and in place prior to the grant project. CCHSP was able to fill the open positions internally but that created a deficit of employees in other areas of CCHSP. The open Program Coordinator position was filled by the CCHSP Legal Assistant and the Financial Specialist with an internal legal clerk. CCHSP filled the Legal Assistant position and the remaining clerks but the staff shortage was a significant obstacle to overcome.

- INTERIM DISTRIBUTION IMAGING SYSTEM (IDIS) INOPERABILITY DUE TO THE CCHSP OFFICE MOVE

During the latter part of August and the month of September 2006, CCHSP moved office locations. Although CCHSP/PACT Staff planned for the move months in advance, and entered all necessary work orders, delays continued to impede services to the new office location. Subsequently, CCHSP waited an additional two weeks for telephones and network connections,

thus limiting our ability to access servers centrally located in another New Mexico Department of Health facility, limiting application processing. Additionally, CCSHP Staff coordinated with New Mexico Department of Public Safety personnel for the move of the two IDIS machines. While DPS moved and installed the machines timely fashion at the new location, the IDIS settings had not been recalibrated correctly by Department of Public Safety IT personnel which caused the system to fail. Consequently, it took DPS IT staff 31 days to troubleshoot and correct the problem and have the IDIS operational. Having the IDIS system caused down for that period of time caused a nearly three thousand application backlog. CCHSP endured the effects of this down period for the remainder of the grant period.

- INCREASE IN APPLICATION PROCESSING TIMELINE

CCHSP saw a 30 percent increase in criminal history screening applications submitted in state fiscal year (SFY) 2007 from SFY 2006 and a nearly 20% increase in SFY 2006 from SFY 2005. In the first half of the grant period, a criminal history screening application cleared by both the FBI and DPS the average was 17 days from receipt of the application until the file was closed and the fitness determination was sent to the care provider. Due to the increase in volume of application submissions, logistical issues, and staff shortage the timeline for those criminal history screenings increased to over 31 days.

Table 6

<b>Total Criminal History Screenings Submitted</b> (Long-Term Care and General-Acute Care Combined)	
State Fiscal Year 2005	19,060
State Fiscal Year 2006	22,758
State Fiscal Year 2007	33,592

- THE 12-MONTH EXCEPTION

The New Mexico Legislature allowed for an exception for those “caregivers” or “hospital caregivers” who had received a full nationwide and statewide criminal history screening in the previous 12 months to undergo a statewide only criminal history screening when applying with a new care provider. To comply with the requirements set fourth in the MMA, New Mexico Department of Health agreed to conduct the nationwide criminal history screening on those applicable “caregivers” who were employed with the care providers matching the types specified in the MMA. CMS also agreed to allow New Mexico to reduce the scope of their pilot program to only the mandatory long-term care providers referenced in the MMA, and permitted the Department to use grant funds to cover the cost of the caregiver’s nationwide criminal history check.

New Mexico faced several challenges in complying with this requirement. The first was that the CCHSP system had unreliable and incomplete data in the care provider type field. This made narrowing the required criminal history screenings extremely difficult. This situation was complicated by a regulatory requirement that CCHSP destroy all fingerprint cards once the file

has been processed and closed. In June 2006 PACT Project staff and CMS agreed that beginning July 1, 2006, CCHSP would retain the fingerprint card so that the additional nationwide criminal history screening requirement could be met and grant funds would be used to pay for the additional nationwide criminal history screenings. Due to the already destroyed fingerprint cards New Mexico was unable to conduct the nationwide criminal history screenings on those “caregivers” who were received from April 1, 2006 – June 30, 2006.

PACT Project Staff updated the CCHSP system through a collaborative effort between CCHSP, the Administrative Services Bureau and the Health Facility and Licensing Bureau. Once this was complete, New Mexico queried the appropriate criminal history application by care provider type and separated for processing. CCHSP IDIS staff members conducted the criminal history screenings on the separated criminal history screening applications and the PACT Project staff entered the data/results into the CCHSP system. New Mexico continued to submit this information in data elements report through the grant period.

- IMPROVING THE EFFECTIVENESS OF THE CCHSP LEGAL OFFICE PROFILE AND DEFINING THE SPECIFIC JOB DUTIES OF THE CCHSP LEGAL OFFICE STAFF

The CCHSP Legal Office is in the unique position of being both a first tier administrative review of applicants’ with disqualifying convictions and the final administrative appellate review by the New Mexico Department of Health, Division of Health Improvement’s Reconsideration Committee.<sup>17</sup> The responsibilities of the Legal Office pertaining to an applicant caregiver application packet may only begin when there is a “hit” by either Department of Public Safety or Federal Bureau of Investigation on an applicant’s criminal background check. However, the CCHSP (Program) and Legal Office had thus far operated as one unit. Although individual job duties did exist the Program had not sufficiently delineated the distinct role and responsibilities concerning those between the legal staff<sup>18</sup> and Program staff.

An essential element of creating and subsequently fostering a professionally administered legal office was establishing stringent protocol between the Program staff and that of the Legal Office. The specific responsibilities assigned to Program personnel could not allow the Legal Office to supplement other position responsibilities such as processing initial caregiver applications with no disqualifying convictions or in the alternative Program staff initiating legal correspondences or ex-parte discussions or communications with a potential caregiver or care provider pertaining to a potential employment disqualification.

<sup>17</sup> Pursuant to 7.1.9.10 NMAC (2006) each applicant who receives an initial “notice of employment disqualification” may request an administrative appeal through the CCHSP Legal Office. The reconsideration Committee then acts as an independent informal non-adversarial administrative review of written documentation submitted by the applicant. Depending upon the recommendation of the Reconsideration Committee an applicant may or may not be issued an employment clearance letter based upon the all supporting documents submitted. See 7.1.9.10D NMAC (2006).

<sup>18</sup> The CCHSP Legal Office employs one paralegal and one clerk specialist whose responsibilities include in part, case file management pertaining to all applicants whose criminal history reports a disqualifying conviction of an enumerated felony. The Legal Office staff interacts directly with all applicants or by representation of counsel during the reconsideration appeals process, for the purposes of preparing and presenting before the Reconsideration Committee.

Subsequently the PACT agenda was both a broad examination of the general functions of the CCHSP Legal Office and specific programmatic goals for the future direction of operations following the conclusion of the grant. The following bullets highlight the PACT programmatic and administrative regulatory changes following the adoption of the amended 2006 CCHSP rule.

- All correspondences containing any legally operative documents are now processed directly by the Legal Office. Consequently, all legal correspondences are immediately forward to the Legal Office and not delayed by alternative channels.
- All existing CCHSP legally operative form letters were reformatted with corrected statutory and regulatory legal citations.
- Eliminated an unnecessary and onerous programmatic procedure of requesting additional court documents when no court disposition was listed on the criminal history screening report.
- Revised the reconsideration appeal process instruction letter with an emphasis on applicant comprehension.
- Established a weekly joint PACT and CCHSP Legal Office case file review prior to each Reconsideration Committee meeting.
- A continuing interpretative regulatory and statutory on-the-job training was introduced to the CCHSP Legal Office by the PACT paralegal. The training addressed statutory versus case law interpretation; what charge(s) constitutes a felony, interpreting dismissals and other pleas pertaining to a reported disqualifying conviction in accordance with Subsection J at 7.1.9.7 NMAC 2006.<sup>19</sup>
- INCORPORATING LEXISNEXIS INTO CCHSP LEGAL SECTION OPERATIONS AND THE PACT PROJECT CROSSWALK

An integral part of the CCHSP Legal Office's review of applicant disqualifying convictions required the staff to pursue creative though time consuming avenues for conducting interstate criminal statutory research. Through an internal review of the Legal Office's viable options PACT reintroduced an underutilized commercial web based research engine LexisNexis®. As a leading commercial provider of one of the most comprehensive legal research web based engines, with access to searchable documents from more than 32,000 legal,<sup>20</sup>

<sup>19</sup> See *Caregivers Criminal History Screening Requirements* at Subsection J at 7.1.9.7 delineates the distinctions of a **disqualifying conviction** by a plea, judgment or verdict of guilty, a plea of nolo contendere, an *Alford* plea or any plea or judgment entered in connection with a suspended sentence, in this state or from any other state or jurisdiction to a felony crime listed in 7.1.9.11 NMAC (2006).

<sup>20</sup> Among the legal publishing brands within LexisNexis are Butterworths, JurisClasseur, Malayan Law Journal, Abeledo-Perrot and Orac.

sources, LexisNexis has been an indispensable tool for allowing the Legal Office to research the law more efficiently while accessing a multi-state database.<sup>21</sup>

Ultimately LexisNexis has provided a more effective solution to the daily work demands of filing and comparing interstate statutory conviction citations. The following bullets highlight the PACT programmatic and administrative regulatory improvements following the implementation of the LexisNexis search engine program.

- Case law, statutes and administrative materials which most importantly provided a complete collection of federal and state statutes with "Official Publisher" status in seventeen jurisdictions.
- Public records options that provide the Legal Office staff with a streamline factual discovery of public records which includes criminal history records and inmate indexes; court filings; jury verdicts, and settlement.
- Focus on a specific area of law or jurisdiction with resources features, which allow expanding the original search by use of similar citation patterns or passages of text that match an on-point case of interest.

Follow research issues on a monthly, weekly or daily basis; get regular Shepard's updates on citing authorities that could potentially affect the validity of your cases; and get regular updates on court filings and other court records activity from LexisNexis CourtLink.

- STAFF TRAINING IN REGULATORY INTERPRETATION OF THE ENUMERATED DISQUALIFYING CONVICTIONS PURSUANT TO THE *CAREGIVERS CRIMINAL HISTORY SCREENING ACT*.

A narrow interpretation of the enumerated felony convictions under the *Caregivers Criminal History Screening Act* and subsequent implementing rule, had limited the disqualifying convictions to those plainly stated by the crime. Subsequently a similar pattern of association was then applied to corresponding felony convictions of other states. An integral part of the PACT paralegal's agenda extended to providing training to the Legal Office staff regarding regulatory interpretation of the enumerated felony convictions under the *Caregivers Criminal History Screening Act*.

The New Mexico State Legislature arguably intended an expansive regulatory and programmatic interpretation of the *Caregivers Criminal History Background Screening Act*. This

<sup>21</sup> All fifty states maintain an independent legislative and administrative numerical system of statutory codification and rule filing similar to that discussed in footnotes 12 and 25. However, the elements of culpable criminal conduct remain in any jurisdiction an issue requiring the commission of both an act (actus rea) and mental state (mens rea). In relation to researching specific crimes, for instances those enumerated under the *Caregiver Criminal History Act*, the proposition of state jurisdictional boundaries posing an inconsistency in delineating the elements of criminal conduct are a non-factor. The specific or general intent of the conduct taken is the measure criminal culpability and the elements of the crime will remain the same. For this reason, the addition of LexisNexis as the primary research tool has provided immediate access to cross-reference varying statutory chapters containing what are essentially common elements.

is evidenced by the legislature's insertion of pertinent legal clauses with in the sentence structure to provide an expansive programmatic interpretation, rather than a strict regulatory reading delineating a rigid list of disqualifying convictions. For example, subparagraph (4) exclusively addresses sexual offenses by specifically stating "rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure or other related sexual offenses." However, the latter sentence clause states "*or* (emphasis added) other related sexual offenses." With the addition of one conjunction the semantics of the list of disqualifying convictions is extended to encompass any one of the felony offenses listed under Chapter 30, Article 9 of the *New Mexico Criminal Code*. This example is further illustrated at subparagraph (5) and (6) of §29-17-5D of the Act which expands *crimes involving* (emphasis added) adult abuse, neglect or financial exploitation and *crimes involving* (emphasis added) child abuse or neglect.<sup>22</sup>

As a result of the training the Legal Office's ability to independently research the letter of the law, as a mechanism for interpretation, ensures the expansive statutory objective of the CCHSP regulatory scheme in both an interstate and intra-state.

#### **IX. INFORMATION TECHNOLOGY ENHANCEMENTS**

The Consolidated Online Registry initiative is focused on providing a one-stop repository for care providers to quickly ascertain employment suitability for new caregivers. The existing Division of Health Improvement Caregivers Criminal History Screening Program (CCHSP) is a client-server application (Visual Basic 6 and MS SQL Server) and is maintained by New Mexico Department of Health personnel. The central focus of this project was to make segments of the CCHSP data available and to augment that data with other related information sources including: Nurse Aide Registry (NAR), New Mexico Employee Abuse Registry (EAR) and New Mexico Sex Offender database. The Consolidated Online Registry data is made available to authorized New Mexico users via the Internet. Other data sources may be added in the future.

Unlike the current approach that depends on manual contact with CCHSP personnel to determine suitability of New Mexico caregivers, the Consolidated Online Registry provides a one-stop, self-service alternative for New Mexico care providers to determine if preexisting issues exist for a potential caregiver. While the registry does not provide details of any abuse, neglect or exploitation, it will identify that such details may exist and give the employer the contact information of the entity providing such details. The key benefit is to enforce the zero tolerance policies and provide quality services to the New Mexico citizenry. Within New Mexico there is no single source of this vital information. This registry addresses this issue.

CCHSP is formally charged with ensuring quality healthcare services within the New Mexico. The CCHSP program has been used internally since 1999. At its inception the program handled approximately 4,000 applications from caregivers. Applications stabilized at nearly 20,000 per year commencing in 2001, but planned facility and program expansions coupled with resource constraints and background check requirements necessitate the evolution of the CCHSP

<sup>22</sup> Notably each of the CMS Pilot Program states have similar language. For example, Nevada's annotated statutory authority under NRS 449.188 list "sexual assault, statutory sexual seduction, incest, lewdness, indecent exposure *or any other* (emphasis added) sexually related crime."

application into a one stop shop location for care providers offering a “self service” style approach. Care providers using the Consolidated Online Registry are able to view a broader source of information and use it in determining caregiver suitability and it lowers the burden on CCHSP staff in summarizing and presenting information to directly to care providers.

The PACT Project Staff requested and received IT technical assistance through the CMS Background Check Pilot for the Consolidated Online Registry. Once the reporting requirements were published, PACT Project Staff evaluated the requirements and determined that three key data fields were not captured in the CCHSP database and two others needed modification. PACT Project Staff again went to CMS to request technical assistance to more integrate and properly configure the CCHSP application to both capture the data required and produce an accurate data report for submission. This request was denied by CMS. This denial put CCHSP in very difficult position. It was unable to capture the data in a efficient fashion and was growing increasing behind due to increased application submissions and Interim Distribution Imaging System failures yet still wanted to properly comply with the data element guidelines. CMS proposed that CCHSP manually input the data into a separate database and have IT staff merge the data prior to submission. PACT Project Staff reluctantly agreed only to maintain good standing within the CMS Background Check Pilot.

The agreement made by PACT Project Staff ultimately had a negative impact on CCHSP operations because it required that the limited staff resources had to be pulled off of processing criminal history applications and transferred to inputting supplemental data into an additional database. This compounded the growing backlog of criminal history screenings needed to be processed by CCHSP. PACT Project Staff sought support from New Mexico Department of Health Information Technology Support Staff for the data element report issues but the support was inconsistent and lacked follow through. Ultimately, the data submissions were incomplete and lacked the accuracy required. This continued for three straight quarters and endangered New Mexico’s status within the CMS Background Check Pilot.

CMS did authorize a Business Process Reengineering by the developers of the COR system working in conjunction with PACT Project Staff. The Business Process Reengineering evaluated the current “as is” CCHSP process and developed a “to be” process taking into consideration statutory requirements, IT limitations, and CMS/MMA constraints. The “as is” design clearly showed what PACT Project had already discovered, a series of inefficient procedures adding unneeded time to an already stretched timeline. The “to be” design was based on a “push” and “gate” design utilized to control and monitor employee efforts and it streamlined processing to eliminate unnecessary steps.

Following the three quarters in which the New Mexico Department of Health experienced the chronic issues with the data elements report CMS offered a very limited technical assistance project to assist CCHSP with capturing the missing data. The technical assistance offered was limited by CMS staff to only adding three data fields while including a canned report that met CMS specifications. This improvement was delivered in late July 2007. The install was completed one week after the quarterly data element report was due to CMS. PACT Project Staff requested an extension to be able to use the new modified application to produce the data elements report. This request was denied by CMS and the New Mexico Department of Health

was forced to compile and submit an incomplete report for the 4th straight quarter. When the upgrade was finally complete, PACT Project Staff were able to submit the final data elements report using the new functionality.

## X. ACTIONS TO SUSTAIN

CCHSP is funded through income associated with the cost of a criminal history screening applications. The program will continue operations in accordance with pre-Background Check Pilot operations. The New Mexico Department of Health has made the commitment to subsidize the CCHSP budget to support a modified training schedule to ensure future operations. Additionally, an Information Technology Support Division staff position has been identified to support the COR system and provide future enhancements.

## XI. CONCLUSIONS

- IMPROVED CRIMINAL HISTORY SCREENING APPLICATION QUALITY

A **significant outcome** of the project was the substantial improvement in compliance by care provider agencies and the reduction of demonstrated stress on the processing end by CCHSP through the efforts to train, communicate and inform the care provider agencies. The quality of submissions has greatly improved through the Background Check Pilot period and application issues continue to decrease. This has reduced the resources needed in the quality assurance check step and eventually the improvements should allow for the redirection of staff from redundant processing to training and compliance monitoring.

This model proved enhanced application quality that resources are better used to train, assist and inform on the front end of the process than in working and reworking problems at the back end of the system. The PACT Project successfully demonstrated that proactive and ongoing training support will improve the quality of application submissions, improve provider compliance and enable a reduction of clerical staff at CCHSP reducing overall operating costs.

- INADEQUATE INFORMATION TECHNOLOGY INFRASTRUCTURE

The PACT Project identified a major concern of IT infrastructure. A national criminal history screening program must be funded to the degree that each state has the necessary infrastructure to provide the service in a timely fashion. New Mexico could not move to an electronic process of submitting fingerprint cards because the New Mexico Department of Public Safety did not have the adequate infrastructure to electronically match the prints until the final months of this pilot. CCHSP had to utilize an antiquated system and care providers were forced to wait weeks for results. This created a situation in which the New Mexico Department of Health was requiring care providers to submit criminal history screening applications within suspense period but was unable to produce results in a similar fashion.

A secondary result was that caregivers discovered a **loophole in the enforcement** of the CCHSP requirements due to the infrastructure deficiency. A subset of caregivers found that they could jump from one agency to another agency either just before or after their Final

Disqualification letter reached the agency. Multiple examples of this occurred during the pilot period and further emphasized the needed for the faster turn around time in processing the criminal history screening applications.

- PROVIDE MULTI-LINGUAL SERVICES

In New Mexico, the PACT Project Staff found that the caregiver workforce includes a high percentage of immigrant workers. All services and documents should be produced in multiple languages to better serve the caregivers who are subject to a national criminal history requirement. It is important in all areas of the program but especially important in any appeals process. The PACT Project discovered that a high number of Final disqualifications were determined because the caregiver did not respond correctly. Additional investigation determined that a high percentage were because the caregiver did not comprehend the administrative reconsideration instructions. It is unclear how many would have been cleared had they understood the instructions but not having multi-lingual support has further decreased an already strained and limited workforce.

- UNIFORMITY OF FEDERAL LEGISLATION VERSUS STATE SOVEREIGNTY AND STATUTORY CONSISTENCY

Federal implementation of a national criminal history screening program<sup>23</sup> would require a consensus among the states not a mandatory buy-in system that promotes one level of agency tracking<sup>24</sup> which may not be conducive to that of fifty individual states. As a matter of Constitutional Law the concept of each state's right<sup>25</sup> to accept or refuse the imposition of federal legislation is an inherent power<sup>26</sup>, granted under the 10<sup>th</sup> Amendment of the U.S Constitution. For example, the participating states would be required to prescribe a federal threshold of culpable conduct<sup>27</sup> to which each states' legislature has predetermined what criminal

<sup>23</sup> At the time of this report Senate Bill 1577 '*Patient Safety and Abuse Prevention Act of 2007*' was introduced which was read twice and referred to the Committee on Finance. June 7, 2007, 110 Congress 1<sup>st</sup> Session. In pertinent part the proposed Bill purports to amend titles XVIII and XIX of the Social Security Act to require screening, including national criminal history background checks, of direct patient access employees of skilled nursing facilities, nursing facilities, and other long-term care facilities and providers, and to provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

<sup>24</sup> See Section 3(b)(1) Senate Bill 1577 '*Patient Safety and Abuse Prevention Act of 2007*' identifies the creation of a coordinated, nationwide system of state criminal background checks.

<sup>25</sup> States rights refers to the 10<sup>th</sup> Amendment, U.S. Constitution interpreted as "rights not conferred on the federal government or forbidden to the States" Black's Law Dictionary at 1409.

<sup>26</sup> Also referenced as the legal doctrine of a state's inherent police power, the term references the capacity of a state to regulate behaviors and enforce order within its territory, often commonly framed in terms of public welfare, security, morality, and safety. Police power is legally considered an inherent power, limited only by prohibitions specified in the constitution of a state, making it the most expansive authorized power exercised by a state.

<sup>27</sup> The commission of a crime requires both an act and mental state. In criminal law in order to have criminal conduct a perpetrator requires the element of both mens rea and actus rea. The actus rea representing the physical aspect of a crime, whereas the mens rea involves the mental intent factor. Thus the mens rea, actus rea and the specific or general intent of the conduct taken is the measure criminal culpability. In criminal law, the intent to accomplish the precise act, which the law prohibits, is considered "specific intent". In criminal law, the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result, which eventuated.

conduct operates as a bar to employment. Such an imposition would be contrary to an essential element of the police power doctrine of law.<sup>28</sup>

Moreover, states have historically codified culpable criminal conduct by statute enacted by the each legislature or by the adoption of the National Conference of the American Law Institute's Model Penal Codes.<sup>29</sup> However, more frequently than not, the state adopting the American Law Institute's Model Penal Codes will subsequently modify it to some extent to meet its own needs or in the alternative may adopt only a portion of such.<sup>30</sup> As a matter of administrative efficiency and public policy each of the participating states of a federal criminal history screening program would subsequently maintain an individually separate title and chapter assignment for each disqualifying conviction<sup>31</sup> independent of the federal and sister states. As such, the implementation of a federal program would depend largely upon actual consistency among the state legislatures and most importantly agency programmatic interpretation.

Ultimately the success of federal legislation will not be the threat of competing interstate legislative objectives or varying state statutory criminal titles and chapters, but whether or not the federal statute defining the disqualifying criminal convictions can sufficiently delineate the federal objective with the implementation and interpretation soundly with in the purview of each state regulatory agency.

- EXPANDING THE NEW MEXICO DEPARTMENT OF HEALTH'S REGULATORY OVERSIGHT THROUGH THE CAREGIVERS CRIMINAL HISTORY SCREENING ACT AND RULE

Following the regulatory amendments to 7.1.9 NMAC 2006 one objective of the PACT Project was to incorporate CCHSP into a greater administrative oversight scheme with in New Mexico Department of Health's regulatory program. By rule promulgation an interrelated network of regulatory requirements were implemented utilizing the existing CCHSP Act and rule.<sup>32</sup>

- *The Lynn and Erin Compassionate Use Act §§29-17-1 et seq.*, (NMSA 2007)

<sup>28</sup> As discussed in footnote 44 as essential element of a state's inherent police power, regulate behaviors and enforce order within its territory, would intruded upon by the adoption of a federally proscribed imposition of disqualifying criminal convictions, thus once again, the state's police power is legally considered an inherent power, limited only by prohibitions specified in the constitution of a state, making it the most expansive authorized power exercised by a state.

<sup>29</sup> The National Conference of the American Law Institute is comprised of legal scholars, who are responsible for the Restatements in the various disciplines of the law and who, jointly with the National Conference of Commissioners on Uniform State Laws, prepare some of the Uniform State Laws.

<sup>30</sup> See Black's Law Dictionary at 1003

<sup>31</sup> All fifty states maintain an independent legislative and administrative numerical system of statutory codification and rule filing.

<sup>32</sup> In conjunction with the amendment to the *Caregiver Criminal History Screening Act*, §§29-17-1 *et seq.*, (NMSA 1978) and implementing rule, 7.1.9 NMAC (2006), the New Mexico Department of Health also promulgated an additional supplemental administrative rule requirements for pre-employment screening pursuant to the *Employee Abuse Registry Act*, §§ 27-7A-1 *et. seq.*, (NMSA 2005); implementing rule *Employee Abuse Registry*, 7.1.12 NMAC (2006). The rule is applicable to a broad range of New Mexico providers of health care and services and employees of these providers who are not licensed health care professionals or certified nurse aides. This rule requires that all applicable health care providers check with the Department's employee abuse registry and prohibits employing an individual on the registry.

At the close of the 2007 State of New Mexico Legislative session Governor Richardson signed into law the *Lynn and Erin Compassionate Use Act*.<sup>33</sup> The *Lynn and Erin Compassionate Use Act*, which contains multiple regulatory requirements, calls for in relevant part for the New Mexico Department of Health, Division of Public Health to establish a regulated system of medical use cannabis by: issuing identification cards for participating qualified patients,<sup>34</sup> and designated caregivers;<sup>35</sup> and developing a distribution system by state licensure of medical use cannabis producers and production facilities and the designation of a medical use marijuana advisory board.<sup>36</sup>

Pursuant to the Act, the New Mexico Department Health staff preformed a collaborative effort<sup>37</sup> to promulgate<sup>38</sup> the *Medical Use of Marijuana Registry Identification Cards* 7.34.3 NMAC, which in part govern the safe use and possession of medical marijuana for individuals living with debilitating medical conditions, and the safe possession and administration of medical marijuana to those individuals by designated caregivers.<sup>39</sup>

Most notably contained within the provisions of the rule is at Subsection 8, Paragraph (1) entitled *Designated caregiver application requirements and prohibitions* the rule requires all designated caregiver applicants are required to consent to a nationwide and statewide criminal history screening background check in accordance with all rules and procedures of the department's caregivers criminal history screening program. In addition to the rules and procedures of the *Criminal History Screening Act*, §§ 29-17-2 et. seq., NMSA (1978), the requirements at 7.34.3 NMAC also state "if an applicant has been convicted of a felony violation of the Controlled Substance Act, §§ 30-31-1 et seq., NMSA (1978), which has occurred less than three (3) years from the date of the applicant's completion of all obligations associated with the conviction, the applicant is prohibited from being a designated caregiver."<sup>40</sup> If the applicant has been convicted of more than one (1) felony violation of the Controlled Substance Act, §§ 30-31-

<sup>33</sup> See *Lynn and Erin Compassionate Use Act*, Senate Bill 523, codified at §§ 26-2B-1 et. seq., (NMSA 2007), pending final approval by the NM Department of Health Secretary of implementing administrative rule 7.34.3 NMAC (2007), see appendix XXX. With the enactment and subsequent rule promulgation and public hearing New Mexico became only the twelfth state to pursue an administrative regulated field for the production, possession, distribution or dispensing of medical use of marijuana for qualified patients, designated caregivers and licensed producers.

<sup>34</sup> "Qualified patient" means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received a registry identification card issued pursuant to the requirements of this rule." See *Medical Use of Marijuana Registry Identification Cards* at 7.34.3.7BB NMAC.

<sup>35</sup> "Designated caregiver" means a resident of New Mexico who is at least eighteen (18) years of age and who has been designated by the patient's practitioner or qualified patient as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of marijuana pursuant to the provisions of the act." See *Medical Use of Marijuana Registry Identification Cards* at 7.34.3.7K NMAC.

<sup>36</sup> See *Lynn and Erin Compassionate Use Act*, §§ 26-2B-1 et. seq., (NMSA 2007)

<sup>37</sup> Due to the extensive intradepartmental regulatory oversight mandated under of the *Lynn and Erin Compassionate Use Act* the PACT paralegal worked in a collaborative venture that included PACT, CCHSP, Administrative Services Bureau, and Harm Reduction Bureau during the initial drafting process of the proposed rule.

<sup>38</sup> The Department of Health has held public hearing and comment on the promulgation of *Medical Use of Marijuana Registry Identification Cards* 7.34.3 NMAC and *Advisory Board Duties & Requirements*, 7.34.2 NMAC, on October 1, 2007. See appendix 5.

<sup>39</sup> See *Medical Use of Marijuana Registry Identification Cards*, at 7.34.3.6 NMAC.

<sup>40</sup> See *Medical Use of Marijuana Registry Identification Cards* at 7.34.3.8.D(1) NMAC

1 et seq., NMSA (1978), the applicant and qualified patient will be notified by registered mail that the applicant is permanently prohibited from being a designated caregiver and cannot be issued a medical use marijuana registry identification card.

- *Incident Reporting, Intake, Processing and Training Requirements 7.1.13 NMAC 2006*

The incorporation of regulatory oversight continued through the promulgation of the *Incident Management Reporting Requirements 7.1.12 NMAC 2006*. This rule established standards for licensed health care facilities and community based service providers to institute and maintain an incident management system and employee training program for the reporting of abuse, neglect and misappropriation of property.<sup>41</sup> As an integral element of the PACT Training component of the pilot program the promulgation of the *Incident Management Reporting Requirements* enable the CCHSP to further broaden regulatory ties with the health care provider community and the New Mexico department of Health, Division of Health Improvement, Incident Management Bureau.

- *Licensing Requirements for Alcohol and Drug Treatment Facilities 7.32.9 NMAC*

The current promulgation of the *Licensing Requirements for Alcohol and Drug Treatment Facilities 7.32.9 NMAC* represents a new rule applicable to an expanded number of substance abuse treatment providers of detoxification services.<sup>42</sup> For example, it will apply to those treatment facilities providing long and short term social detoxification services, medically monitored detoxification services, medically managed detoxification services and other intensive treatment services. Most importantly, this new rule will be pertinent to all employees hired under the applicable “caregiver” definition of 7.1.9.7D(1) NMAC.

- Incorporation of the CCHSP Regulatory Requirements into the Department of Health, Developmental Disabilities Support Division, *Interpretative Standards for Developmental Disabilities Waiver Programs*

The incorporation of the CCHSP regulatory requirements into the Department of Health, Developmental Disabilities Support Division’s Interpretative Standards<sup>43</sup> for Developmental Disabilities Waiver Programs applied to all services providers through the Medicaid Home and Community Based Services Waiver programs for individuals with developmental disabilities. The Developmental Disabilities Support Division of the Department of Health has established these standards to guide service delivery and promote the health and safety of individuals served by DD Medicaid Waiver Provider Agencies. These standards became effective March 1, 2007, and address each service covered by the Developmental Disabilities Waiver as renewed in 2006, as well as personnel requirements for people employed by or subcontracting with agencies providing services. All provider agencies that enter into a contractual relationship with DOH to provide Developmental Disabilities Waiver Services must comply with each applicable requirement under the *Caregivers Criminal History Screening Requirements* at 7.1.9.11A-H NMAC (2006).

<sup>41</sup> See *Incident Reporting, Intake, Processing and Training Requirements* at 7.1.13.6 NMAC.

<sup>42</sup> See appendix 6, *Licensing Requirements for Alcohol and Drug Treatment Facilities 7.32.9 NMAC*. This rule is currently pending public hearing and publication.

<sup>43</sup> These standards interpret, and further enforce the Human Services Department, Medical Assistance Division standards and regulations governing the Developmental Disabilities Waiver, (MAD-736, effective 7/1/02).

- FUTURE REGULATORY REFORM

The following bulleted regulatory provisions have been identified as persistent programmatic issues encountered by PACT Project staff.<sup>44</sup>

- **Subsection C, and A, Paragraph (2) at 7.1.9.9 NMAC.** Currently both PACT and CCHSP staff have identified two areas for clarifications that involve an applicant caregiver's disqualification for non-compliance with the reconsideration procedures under Subsection A(2) as oppose to a notice of final disqualification under Subsection C following an administrative decision by the Reconsideration Committee. The present language of the rule does not specify to a legal certainty whether a disqualification for noncompliance bars an applicant caregiver from subsequently reapplying with the same care provider after termination.
- **Incorporation of the *Criminal Offenders Employment Act* §§ 28-2-1 to 28-2-6, (NMSA 1978).** The current rule permits the Reconsideration Committee to take into account the requirements of the *Criminal Offenders Employment Act*. Unfortunately, the Act is not dispositive in the reconsideration Committee's decision or applicable with in the current regulatory and programmatic confinements of 7.1.9. NMAC. Presently the CCHSP Legal Office issues a notice of disqualification to all applicants whose criminal history screening reports a charge under any one of the enumerated disqualifying convictions. This process does not consider the statutory objective of the *Criminal Offenders Employment Act*<sup>45</sup> or the effect of subjugating an applicant through the administrative reconsideration procedures for a single instance occurring in some cases as long as twenty year ago.
- **Subsection B at 7.1.9.9 Exemption to Employment Pending Reconsideration Determination:** At the discretion of the care provider, an applicant caregiver or hospital caregiver who has requested an administrative reconsideration may continue conditional supervised employment pending a determination on reconsideration. The initial intention of the amendatory language of the rule at subsection B was to provide the continuance of employment during the reconsideration process while also maintaining the continuity of the health care services to the care recipient. Unfortunately the exemption has promoted a practice of laying-off the applicant caregiver during the reconsideration process although that individual is entirely responsible for providing services to a dependent family member. The resulting consequent is that the applicant caregiver continues providing services to the family member while the health care

<sup>44</sup> Although the inclusion of additional disqualifying convictions has been discussed the issue is a matter beyond that which is attainable by departmental regulatory amendments. The three examples proposed represent semantics concerning substantive text and does not attempt to circumvent the New Mexico State Legislature.

<sup>45</sup> See *Criminal Offenders Employment Act* at §28-2-2 (NMSA 2006) Purpose of act "The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible."

provider maintains a regulatory sanctioned windfall of maintaining both contractual relationships with the caregiver and recipient.

**XII. APPENDIX**

- *Caregivers Criminal History Screening Requirements* at 7.1.9 NMAC (2006)
- *Caregivers Criminal History Screening Act*, at §29-17-2 et seq., (NMSA 1978)

# WISCONSIN BACKGROUND CHECK PILOT PROGRAM FINAL REPORT

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The statements contained in this report are solely those of the authors and do not necessarily reflect the views or policies of the Centers for Medicare and Medicaid Services. The awardee assumes the responsibility for the accuracy and completeness of the information contained in this report.

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## 1. INTRODUCTION

Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (PL 108-173) established the framework for a program to evaluate national and state background checks on prospective employees with direct access to patients of long-term care facilities or providers. The program to identify efficient, effective, and economical procedures for conducting background checks was administered by the Centers for Medicare & Medicaid Services (CMS), in consultation with the US Department of Justice, from January 2005 through September 2007.

CMS selected seven states to participate in the Background Check Pilot Program. The states, representing rural and urban areas and ethnically and culturally diverse populations, included: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin. CMS awarded additional funding to several states to create and deliver a comprehensive abuse prevention training program to employees and managers of long term care facilities. The states selected for the additional training funds are Alaska, Michigan, and Wisconsin.

### Wisconsin Caregiver Law

The Wisconsin Department of Health and Family Services (DHFS) implemented the Caregiver Law on October 1, 1998, under the authority of Act 27 (1997-1999 biennial budget). The 1999 – 2001 Budget Bill, enacted as 1999 Wisconsin Act 9, became effective October 29, 1999.

The Wisconsin Caregiver Program responds to the potential for physical, emotional and financial abuse of vulnerable citizens by persons who have been convicted of serious crimes or have a history of improper behavior. The Caregiver Law is intended to protect clients in health care settings from abuse, neglect or misappropriation of property by requiring employers and licensing agencies to:

- conduct caregiver background checks;
- closely examine the results of the caregiver background checks for criminal arrests and convictions or findings of misconduct by a governmental agency; and,
- make employment and licensing decisions based on the results of the background checks in accordance with the requirements and prohibitions in the law.

Therefore, the Caregiver Law requires two types of caregiver background checks:

1. Those completed by entities on their employees and contractors, and
2. Those completed by the Division of Quality Assurance (DQA) on license holders/legal representatives and nonclient residents of DQA regulated entities.

Caregivers with convictions of serious crimes or a history of improper behavior may be permanently barred from working in regulated facilities, unless clear and convincing evidence of rehabilitation has been provided to the Department, through the Rehabilitation Review process. Entities that fail to comply with the provisions of the program may be subject to program sanctions, such as a required corrective action plan, mandatory training, or the denial, revocation or suspension of the license, certification or registration by the Department.

The Caregiver Law also requires all regulated entities to report allegations of abuse, neglect or misappropriation of client property to DQA, as well as requiring employers to complete background checks for all caregivers employed by entities regulated by the Department.

The Caregiver Program is implemented under ss.50.065 and ss.146.40, Wis. Stats. and Chapters HFS 12 and 13 of the Wisconsin Administrative Code, which can be found at <http://dhfs.wisconsin.gov/caregiver/StatutesINDEX.HTM>.

#### **Employer Driven Process**

The underlying philosophy of the Caregiver Law is that employers are responsible for making sure that the individuals working in their facilities are appropriate within the state guidelines. Therefore, all regulated healthcare and daycare employers are required to complete caregiver background checks and make appropriate hiring decisions based on the results.

The Caregiver Law was designed to provide employers with the tools needed to screen out potential abusers before they have access to vulnerable adults and allow entities to make prompt employment decisions without state government involvement in the hiring decision:

- **Background Check Results** – Wisconsin is an open records state; therefore, employers have access to criminal history information, as well as administrative finding and licensing information. The Integrated Background Information System (IBIS) was designed to allow background check results to go directly to the provider. Employers request caregiver background checks, in most cases online, and receive results from the state Department of Justice, Department of Regulation & Licensing and DHFS within minutes. Employers are then able to make employment decisions based on complete information. Employers are also required to obtain criminal history info from other states if the person has resided outside of Wisconsin in the last 3 years. Because each state's process for obtaining this information is different, this can be a difficult and time-consuming process.
- **Offense List** – The Wisconsin Offenses List includes crimes of physical violence. Only those crimes and offenses on the Offenses List and comparable crimes and offenses from other states or U.S. jurisdictions are bars to employment, regulatory approval or nonclient residency. Because the list is fairly short, employers indicate they do not have difficulty identifying offenses on a prospective employee's criminal record that prohibit employment.
- **Fair Employment Law** – Under Wisconsin's Fair Employment Law, an employer may also determine if any conviction not on the Offenses List is substantially related to the duties of the job and may refuse to hire a candidate for that reason. Because employers receive the complete criminal record, they are better able to make substantially related decisions. It is believed that the employer who is interviewing the candidate, checking references, reviewing the background check results and has a clear understanding of the position requirements is in the best position to make the hiring decision. For example, an employer who is hiring for a position that transports residents may choose not to hire a candidate with driving related offenses or one who is hiring for a position that passes medication may choose not to hire someone with drug related offenses. Because these offenses are not on the Offenses List, the employer has discretion to make the most appropriate decision.
- **Rehabilitation Review** – Although the law bars employment for caregivers with convictions of serious crimes or a history of improper behavior, any caregiver who has committed a bar with rehabilitation crime, who has a finding of misconduct or who has a child abuse or neglect finding may apply for a Rehabilitation Review to seek approval to work as a caregiver or reside as a nonclient resident in an entity regulated by DHFS. The State of Wisconsin's position is that everyone should have the right to demonstrate proof of rehabilitation.

Entities that fail to comply with the provisions of the program may be subject to program sanctions, such as a required corrective action plan, mandatory training, or the denial, revocation or suspension of the license, certification or registration by the Department. Since October 1998, more than 2 million caregiver background checks have been completed, approximately 27,000 every month. Because the Wisconsin caregiver background check process is fairly easy and inexpensive, compliance with caregiver background check requirements is high. Of the citations issued to Wisconsin nursing homes, less than 2% concern non-compliance with the background check requirements.

### **Background Check Pilot**

Wisconsin proposed a "pilot within the federal pilot" approach. Wisconsin's federal background check requirements applied to specific, geographically-located counties selected for pilot participation. Four counties were selected for rural and metropolitan representation, rapid and slow growth populations, border counties with high interstate movement, and a variety of commuting patterns. The pilot counties were also selected based on their proximity to fingerprint scanning processing centers, and distribution among the state survey agency, the Division of Quality Assurance (DQA) regions. The pilot counties included Dane, Kenosha, La Crosse, and Shawano.

Wisconsin built on its existing employer driven process philosophy to design its pilot program. This philosophy operates within the atmosphere in which state criminal histories are considered open records, allowing anyone to run a criminal history background check. All Wisconsin court records, including civil records, are available online. There were many strengths to building on the existing process including:

- **Timeliness** – Fingerprint results were posted within 24-48 hours of the appointment, allowing employers to make an immediate fitness determination and hiring decision. This timeliness increased safety because employers completed the full background check prior to hiring the individual. The speed also reduced the potential of ineligible caregivers "gaming" the system by working for a facility for just under the time it takes to run the background check.
- **Inexpensive** – Because employers make the fitness determination, no fees were charged for state staff to review results. Wisconsin employers have the experience and knowledge to review criminal history information and make choices that fit with their organization. Employers indicated that they would likely run a separate check if all they received from the state was a "yes" or "no" decision on the fitness determination. A state-run system would also likely slow the process, further encouraging employers to run their own checks.
- **Simple** - Wisconsin's process is straightforward. Wisconsin's Offenses List is relatively short and the conditions apply to everyone the same way – all the crimes are lifetime bans unless the person successfully completes a Rehabilitation Review. Anomalies are handled on a case-by-case basis. This is a more effective process than establishing different time lines for different offenses. No records need to be kept at the state level regarding where individuals are employed and the state agency does not need to keep copies of fingerprints or background check results.
- **Employer Responsibility** – Employers are responsible for ensuring safety in their facility. Because the liability rests with them, they take an active interest in the background check. Employers have all the information they need to make the fitness determination using the

Offenses List, and to make substantially related decisions. Employers know best the duties of a specific job and what convictions are substantially related to that position. Facilities are monitored through the survey process. At each survey, a random sample of employee records is reviewed. If a problem is found, more records are reviewed. Employers who have not accurately followed the process are cited.

There are some areas that are not addressed by Wisconsin's Caregiver Law or pilot process:

- **Rap Back** – Wisconsin can not easily institute a rap back system using an employer driven process. Because no state agency maintains records of employment, it is not possible in the current system to institute a rap back process. However, the crimes on Wisconsin's Offenses List are severe. It is likely that a caregiver convicted of one of the crimes on the Offenses List would serve time in jail and the employer would know that the caregiver was no longer eligible. In addition, employers are required to run a new background check every 4 years on employees.
- **Confidentiality issues** – Under Wisconsin's system, employers receive a copy of the caregiver's full background check. In some states, this is a concern due to confidentiality reasons. Wisconsin's system is in keeping with the state's philosophy of open records. Although a state fitness determination with a rap back may limit employer's access to background checks, it requires that a state agency keep detailed records of caregiver fingerprints, background checks, and employment decisions. Many caregivers would be more concerned with a state agency maintaining a copy of their fingerprints than with the employer having a copy of their background check. This is especially true for the vast majority of caregivers who have no record. 85% of those hired have no criminal histories. Although an FBI background check is perhaps more centralized and complete, it is not the only way to access criminal history information. Most criminal history information is available and can be compiled by private firms who specialize in checking state databases. Even if the state ran the checks and made the fitness determination, many employers would still conduct background checks.

## 2. PROGRAM DISCUSSION: WISCONSIN BACKGROUND CHECK PILOT

Wisconsin's existing authority to meet the requirements of the CMS Background Check Pilot Program requirements is detailed in Wisconsin Statutes, section 50.065. Additional authority was required to fully implement the following CMS Background Check Pilot requirements:

### **Immunity Provision**

Wisconsin requested a statutory change for the immunity provision as part of the Governor's Biennial Budget in February 2005. While it was anticipated that union and civil liberty groups might oppose the immunity language, arguing that Wisconsin's Fair Employment Law already allows pending criminal charges and criminal convictions to be considered in employment and licensing decisions, the change was passed by summer 2005. The statutory language change ensured that employers in the pilot program using federal background checks for employment determinations used it only for the purpose of determining the suitability of the individual for employment. The language also ensured that employers were immune from civil liability suits resulting from employment, termination or licensing determinations.

The following language was added to s. 50.065:

50.065(2)br: Except as provided in subd. 2, an entity that receives information regarding the arrest or conviction of a caregiver from the Federal Bureau of Investigation in connection with a criminal history search under this section may use the information only to determine whether the caregiver's arrest or conviction record disqualifies him or her from serving as a caregiver. An entity is immune from civil liability to a caregiver for using arrest or conviction information provided by the federal bureau of investigation to make an employment determination regarding the caregiver. 2. Subdivision 1. does not apply to use by an entity of arrest or conviction information that the entity requests from the Federal Bureau of Investigation after September 30, 2007.

This immunity clause sunset with the end of the pilot. No concerns were raised about the immunity clause during the pilot.

#### **Personal Care Worker Agencies**

Personal Care Worker (PCW) providers are not included under Wisconsin's Caregiver Law. As a result, it was necessary to find an alternative means of including them in the pilot. Wisconsin DHFS first requested a waiver from CMS to exclude PCWs from the pilot. The following issues were raised:

- DHFS originally estimated 608 sets of prints related to PCWs. The revised estimate was 1,030 sets of prints. Since PCWs were not currently required to do background checks, it was not known if the new estimate was correct.
- As part of the pilot, DHFS committed to holding employers harmless in the area of cost. Employers paid the same fees they paid under the existing Caregiver Law. PCW agencies were not required to run a background check and therefore paid no fees. To be consistent with other employers, DHFS had to cover the full costs of PCW agency background checks.

The request to exempt PCWs from the pilot was denied by CMS. Due to the tight time frames, legislation was pursued to include PCW providers in the pilot (*See Appendix 1 – DHFS Legislative Request to Include PCWs*) and DHFS entered into negotiations with Medicaid-funded PCW agencies to have them voluntarily participate in the pilot.

The PCW agencies in Dane County raised the most concerns about participating in the pilot. Their concerns focused on the access to the fingerprint vendor. After significant discussions, DHFS attempted to accommodate Dane County Human Service's Request of a second fingerprint site on the north side of Madison. A PCW provider initially agreed to host the fingerprint services one evening per week. The plan was abandoned when the provider identified security issues with having non-employees enter the building in the evening. DHFS agreed to revisit the issue if transportation and hours became an issue once the pilot started. Once the pilot began, Dane County PCWs had no complaints about getting to the fingerprint site.

Ultimately, DHFS entered into agreements with all the Medicaid-funded PCW providers in Dane, Kenosha, La Crosse and Shawano counties. The PCW providers agreed to voluntarily participate in the pilot in exchange for the pilot covering the background check fees and providing free abuse and neglect prevention training. DHFS developed, in consultation with the PCW providers, a contract that included the benefits of participation (free background checks and training on prevention of abuse and neglect) and the requirement that agencies follow a prescribed background check process and report their results to DHFS on a quarterly basis. Agencies that failed to comply with the background check requirements would be billed for the

costs of the checks completed. (See Appendix 2 – Memorandum of Agreement with La Crosse County.)

#### Long-term Care Hospitals

The Wisconsin Hospital Association (WHA) also asked for an exemption for Long-term Care Hospitals citing long distances to drive to fingerprint locations and potential impacts on recruiting caregivers. DHFS responded that long-term care hospitals are a required provider type and could not be exempted from the pilot. (See Appendix 3 – DHFS response to WHA.)

### 3. BACKGROUND CHECK PROGRAM COMPONENTS

Wisconsin's Caregiver Background Check Pilot included the provider types listed in the chart below. The numbers of providers fluctuated throughout the pilot.

Provider Type	No. Pilot Facilities Beginning of Pilot	No. Pilot Facilities End of Pilot
1. Skilled Nursing Facilities/Nursing Facilities	43	43
2. Long-Term Care Hospitals, Swing Beds	2	2
3. ICFs/MR	4	4
4. HCBS Group Homes Over 8 Beds*	108	108
5. Home Health Agencies	18	18
6. Personal Care Worker-Only Agencies and subcontractors	29	32
7. Hospices	5	6

Providers were phased into the pilot as follows:

County	Begin Date	End Date
• Dane County	March 1, 2006	– September 30, 2007
• Kenosha County	March 1, 2006	– September 30, 2007
• La Crosse County	February 1, 2006	– September 30, 2007
• Shawano County	March 1, 2006	– September 30, 2007

Douglas County was included in the original pilot design. CMS agreed to permit Douglas County to be excluded from the pilot when the PCW exemption was denied. DHFS provided the following reasons for eliminating Douglas County from the pilot:

- Wisconsin expected to get only 800-950 background checks in Douglas County (representing 5-6% of all of our background checks).
- Douglas County was repetitive of La Crosse County, which also borders Minnesota. Douglas County was also repetitive of Shawano County, which is rural.
- Because Douglas County is approximately 350 miles away from Madison, it was difficult to engage their employers in the pilot.
- Getting fingerprints scanned would be difficult in Douglas County. When Wisconsin's pilot proposal was written, Promissor, the fingerprint vendor, indicated that Douglas County would be served by the site in Duluth, MN. Promissor subsequently relayed that they could not permit the Duluth site to be used. As an alternative, employers in

Douglas County were to be served by Promissor's mobile unit. Difficulties with this process were expected, including 2 week waiting periods before appointments could be scheduled.

- Training Douglas County caregivers would have also been difficult. Douglas County is at least six hours from Madison making any training trip three days long, with travel times longer during winter months. As a result, it would have been necessary to spend a significant portion of the training budget to include Douglas County. Given the limited number of background checks, the costs were not warranted.

#### **Phase-In Description**

Wisconsin's Caregiver Background Check Pilot implementation began on February 1, 2006. Starting in February 1, 2006, all affected entities in La Crosse County were required to conduct a fingerprint-based background check for all newly hired caregivers.

Several significant start-up problems occurred in February 2006. The vendor for La Crosse County, Promissor, did not have a location secured in the city of La Crosse. The Wisconsin Department of Administration (DOA) has an ongoing contract with Promissor to provide fingerprint services for various state agencies. Promissor originally had an office in La Crosse but moved its location to Sparta, Wisconsin in May of 2005 to accommodate individuals being fingerprinted for the Wisconsin Department of Transportation. When DHFS learned of the move in August 2005, DHFS began working with DOA and Promissor to move the office back to La Crosse. By February 2006, the move had still not been made. As a result, Promissor established a temporary site in a hotel. Within a few weeks, a La Crosse County employer offered rental space to Promissor within the La Crosse city limits.

While Promissor was establishing a main office in La Crosse, their call center provided inaccurate information on whether caregivers could be fingerprinted in La Crosse. Often times providers were told that no services were available for caregivers or that the only location was in Sparta. Providers often had to make multiple phone calls or wait on the line for up to 30 minutes to make an appointment. In addition, the first round of fingerprints sent from the Wisconsin Department of Justice (DOJ) to the FBI were rejected because the FBI had not set up their system to accept the pilot fingerprints.

To address the La Crosse County concerns, DHFS convened a meeting with Promissor and the employers in La Crosse on April 4, 2005. Nearly all of the La Crosse providers attended. During the meeting, the issues were discussed and potential resolutions were identified. This meeting resolved the majority of concerns raised by La Crosse providers.

Starting March 1, 2006, all affected employers in Dane, Kenosha and Shawano Counties were required to conduct a fingerprint-based background check for all newly hired caregivers. No significant start-up issues arose in the Dane, Kenosha or Shawano Counties. All affected employers in the four pilot counties began submitting quarterly data reports in April 2006.

#### **Covered Direct Patient Access Employees**

Under Wisconsin's Caregiver Law and the pilot, a caregiver is defined as a person who meets all of the following: employed by or under contract with an entity; has regular, direct contact with the entity's clients or the personal property of the clients; and is under the entity's control.

This definition includes all employees providing direct care and may include housekeeping, maintenance, dietary, administrative staff, and contractors, if those persons are under the entity's control and have regular, direct contact with clients or the client's property.

The following groups of potential caregivers were not subject to the pilot requirements although they may be subject to Wisconsin's existing Caregiver Law: caregivers hired by an affected employer to provide services exclusively in a non-pilot county, students, volunteers and owners/operators of regulated facilities (whose background checks are run by DHFS)

#### 4. BACKGROUND CHECK PROCESS

The following procedures provide a step-by-step description of Wisconsin's Caregiver Background Check Pilot process.

##### Written Disclosure & Authorization

All newly hired caregivers completed a Background Information Disclosure (BID) Form ([Attachment 1](#)) before beginning work. If the prospective employee's BID disclosed a state or federal conviction or finding by a governmental agency of client abuse, neglect or misappropriation, or child neglect or abuse findings that require a Rehabilitation Review or license limitations that prevent a person from working in a position requiring a license, the prospective employee did not begin employment until the full background check was completed.

Caregivers with a clean BID were able to be employed for up to 60 days, pending receipt of the background check results and the fitness determination. The entity kept a copy of the BID in the individual's file.

Entity officials notified the individual that their fingerprints were used to check the criminal history records of the state and FBI. An authorization form was issued for this purpose and kept on file with the results for as long as is necessary to keep the record.

##### Collection of Fingerprints & Technology

Wisconsin pilot counties used FBI compliant live scan equipment, utilizing Wavelet Scalar Quantization (WSQ) to compress the images at a 15:1 ratio. Fingerprint scanning centers were equipped to capture fingerprints in a digital mode and transmit the electronic file to Wisconsin DOJ's server for processing.

- Promissor, Inc. was authorized by the State of Wisconsin to collect digital fingerprints for the federal background check pilot. Promissor collected pilot prints for La Crosse and Shawano Counties.
- Department of Administration (DOA), Division of Gaming (DOG) was authorized by the State of Wisconsin to collect digital fingerprints for the federal background check pilot. DOG collected pilot prints in Dane and Kenosha Counties.

Originally, DHFS planned to use Promissor in all the pilot counties. However, employers in Kenosha County complained that the closest Promissor location was in Milwaukee. (See *Appendix 4 – Kenosha Answers*.) Given the traffic, it could take caregivers more than an hour to

drive from Kenosha to the Promissor Milwaukee location. At the time, Promissor was unable open a fingerprint scanning location in Kenosha.

WI DOJ suggested that DHFS speak to the Department of Administration's Division of Gaming which collects fingerprints for their own program's purposes. In addition, the Division of Gaming has a fingerprint scanning location in Kenosha at the Dairyland Greyhound Race Track. Division of Gaming agreed to collect caregiver prints in both Dane and Kenosha at a significantly reduced rate.

#### Fingerprint Collection Locations

County	Provider	Location
Dane	Division of Gaming	Madison - Division of Gaming Madison Office, Hwy 18/19 and Fish Hatchery Road (on a bus line) Madison – Community Living Alliance (PCW Provider), corner of East Washington and Stoughton Road (on a bus line) *within 25 miles of all providers
Kenosha	Division of Gaming	Kenosha - Dairyland Greyhound Park 5522 104th Avenue, Kenosha, WI *within 25 miles of all providers
La Crosse	Promissor	La Crosse – Promissor Office 811 Monitor Street, Suite 206 La Crosse, WI 54601 *within 25 miles of all providers
Shawano	Promissor	Green Bay – Promissor Office 2350 University Avenue #100 Green Bay, WI 54302 Wausau – Promissor Office 2620 Stewart Avenue Suite 118 Wausau, WI 54401 *within 50 miles of all providers

Shawano Medical Center, a long-term care hospital in Shawano County made a formal request through the Wisconsin Hospital Association (WHA) and the Rural Wisconsin Health Cooperative (RWHC), to be exempt from the pilot. Shawano Medical Center argued that the travel to Green Bay or Wausau to be fingerprinted was too far for caregivers. Prior to receiving the formal request, pilot staff had offered to meet with Shawano Medical Center to talk about alternative fingerprint collection methods to reduce the burden on Shawano providers. Shawano Medical Center declined to meet and instead decided to send a formal letter. (See Appendix 5 – DHFS response to WHA & RWHC.)

After the letter was received, DHFS entered into negotiations with Shawano Medical Center and Promissor to set up a mobile fingerprint site at Shawano Medical Center once every 6 weeks. Fingerprint services in Shawano County were provided from December 2006 through September 2007 once every 6 weeks. Appointments often went unfilled and the Shawano site experienced a much higher no-show rate than the Green Bay and Wausau locations.

**Transmittal Methods**

After the applicant's identity was authenticated, the applicant was fingerprinted. The digital fingerprint record was transmitted to the Wisconsin repository and the FBI via the WI Department of Justice (DOJ). The state and federal fingerprint background check results were then posted on the secure WI DOJ Criminal History website. Employers logged onto the website to get their results. Pilot employers were required to set up an account with the WI DOJ.

The original pilot proposal intended to use the BadgerNet state server system to relay results back to providers. During the development of the proposal and in subsequent meetings in January and February of 2005, WI DOJ staff were cooperative and stated that their system could handle the changes needed to implement this pilot. In late April 2005, however, WI DOJ staff raised concerns about DOJ's ability to implement large portions of the original design, including: tracking requests by employer; using BadgerNet or another secure website to provide background check results to the employer that requested the search; billing employers; and returning results in a reasonable time frame. WI DOJ staff indicated they had a 2 week delay in returning civil background check results.

Until meeting on 4/26/05, no mention was made of a cost associated with BadgerNet. At that meeting, WI DOJ staff stated that it would cost each provider roughly \$2,300 to get BadgerNet installed plus a \$1,100 monthly fee. Materials on WI DOJ's website indicate that there is no cost involved with BadgerNet.

The INCH system which hosts the Criminal History website was also discussed as a possible vehicle for sending results but it was dismissed with little explanation. Another issue at the time was the billing. Originally, DHFS planned to have providers run only a state and national fingerprint search and offset the costs by continuing to charge providers for the Caregiver Law name-based search. DOJ staff indicated that their billing system could not run one check but bill for a different check.

After speaking with the Division Administrator at DOJ, DHFS and DOJ agreed to use the INCH system to post results. DHFS also decided to require both the name-based Caregiver Background Check and the state and federal fingerprint searches. This decision eliminated the billing complications. WI DOJ billed providers for the name search as usual, costs of the FBI fingerprint search were paid by pilot funds, and DOJ agreed to waive the state fingerprint search fee. The Division Administrator also assured DHFS that results would be sent back in a timely manner with a 24-hour turn around time for results. Once these decisions were made, the development and implementation went smoothly.

**Records Check**

The following describes the process for conducting the search of registries, other databases, state and national criminal history records under the Wisconsin Caregiver Background Check Pilot:

**Registry/Database Check**List of registries:

1. Wisconsin Nurse Aide Registry – online search – no cost
2. Other state's nurse aide registry, if prospective employee indicated living in another state –

- online search – no cost
3. US HSS Office of Inspector General (OIG) List of Excluded Individuals/Entities – online search – no cost

Affected health care employers were responsible for checking the registries listed above, all of which are on-line searches. Health care employers completed the registry searches after the prospective employee submitted their Background Information Disclosure (BID) form and before the fingerprint background check was initiated. The employer evaluated the information in the registries. If the prospective employee had a finding in any of the registries listed above, the entity denied employment and did not have to proceed further with the background check.

If the individual passed the registry review, employers sent them to get their fingerprints scanned. All fingerprint scans were forwarded by the:

- Vendor to WI DOJ which ran the prints through the state fingerprint database;
- WI DOJ to the FBI for a federal fingerprint search; and,
- WI DOJ to DHFS for an Integrated Background Check Information System (IBIS) check.

IBIS Database:

1. Findings of Abuse or Neglect of a Client, or Misappropriation of a Client's Property listed on the Caregiver Misconduct Registry (a subsystem of the Wisconsin Nurse Aide Registry)
2. Denials or Revocations of Operating Licenses for Adult Programs
3. Denials or Revocations of Operating Licenses for Child Programs
4. Rehabilitation Review Findings
5. Status of Professional Credentials, Licenses or Certifications

The results from the IBIS check were posted on a secure website along with the results of the state and federal fingerprint background checks. The employer evaluated all of the information received from the caregiver background check to make the employment decision.

**State Criminal Records Check**

The health care employer was responsible for requesting the state criminal records check, evaluating the information, and making a hiring decision based on the results of this and other checks. Promissor and the WI Division of Gaming were responsible for capturing the fingerprints and submitting them to WI DOJ. WI DOJ was responsible for conducting the state criminal records check and posting the results on the secure website within 24 hours. Findings were transmitted via a secure website to the employer that requested the background check.

**National Criminal Records Check**

The health care employer was responsible for requesting the state criminal records check, evaluating the information, and making a hiring decision based on the results of this and other checks. Promissor and the Division of Gaming were responsible for capturing the fingerprints and submitting them to DOJ. WI DOJ was responsible for submitting the request to the FBI, receiving the results and posting the results on the secure website within 24 hours. Findings were transmitted via a secure website to the entity that requested the background check.

### Checking Sequence

#### *Federal Background Check Pilot Program Pilot Background Check Process*

Affected employers followed a seven step Pilot Background Check Process. The background check process could be stopped at any of the 7 steps below if disqualifying information was found. Providers checked state and federal background check results against:

- Wisconsin Offenses List, and
  - OIG Exclusion List
1. Caregiver completes the form HFS-64 Background Information Disclosure (BID) and Authorization for Release of Federal Bureau of Investigation (FBI) Information (Attachment 2)
  2. Employer checks free registries to see if caregiver has any substantiated incidents of abuse or neglect, including:
    - Wisconsin Caregiver Misconduct Registry
    - Office of Inspector General (OIG) Exclusion List
    - Other state Misconduct Registry, if appropriate
  3. Employer completes name-based Caregiver Background Check, which includes:
    - Response from the Department of Justice Wisconsin Criminal History Record Request name search
    - A letter from the Department of Health and Family Services that reports the status of a caregiver's administrative findings or licensing restrictions
  4. Employer makes arrangements for the caregiver to be fingerprinted
  5. Caregiver attends fingerprint appointment
  6. Fingerprints are checked against Wisconsin's criminal records and FBI criminal records and are sent back to the employer via a secure website
  7. Employer makes final hiring decision
    - These steps were covered extensively in the pilot technical training. Instructions were also posted on the pilot website for providers to follow. Technical assistance was given to providers with questions. Within the first quarter, however, most providers had a good handle on the new process and very few questions arose.

Employers referred caregivers with questions to the Applicant Fact Sheet (Attachment 3).

### Elimination of Unnecessary Checks

Background checks were completed in seven stages (see above). The employer could terminate the background check at any point that disqualifying information (substantiated findings or criminal convictions barring employment as a caregiver) was verified. The employer notified the prospective employee of the disqualifying information. The offense itself was shared. The individual could also request a copy of their background check from the employer.

During the pilot process, employers were required to submit quarterly data on hiring decisions based on background check results. With a few early exceptions, most employers followed the steps of the process and did not continue with the background check once disqualifying information was found.

### Background Check Costs and Fees

The costs associated with each level of Wisconsin Caregiver Background Check (i.e., state registries, state criminal records, FBI national records), included the following;

Background Check Component	Fees	
Digital Fingerprint Capture	\$18.00	*
Nurse Aide Registry	\$0.00	
OIG Exclusions List	\$0.00	
State Name-based Criminal History Check	\$2.00 – 13.00	**
Other Registry/Databases (IBIS – listed below)	\$2.50	
State Fingerprint Criminal History Check (waived)	\$15.00	***
FBI IAFIS Check	\$24.00	
Other	NA	

\*Promissor billed DHFS \$18 per appointment, for individuals who attended appointments and for those who failed to show. Division of Gaming did not charge for capture services; DHFS paid for the limited-term employee salaries.

\*\*Non-profits pay \$2; government entities pay \$5; for-profits pay \$13 under both the Caregiver Law and the pilot process.

\*\*\*WI DOJ waived the \$15 state fingerprint criminal history check fee for purposes of the pilot.

Other Registries/Databases included the state IBIS check:

- Findings of Abuse or Neglect of a Client, or Misappropriation of a Client's Property listed on the Caregiver Misconduct Registry (a subsystem of the Wisconsin Nurse Aide Registry)
- Denials or Revocations of Operating Licenses for Adult Programs
- Denials or Revocations of Operating Licenses for Child Programs
- Rehabilitation Review Findings
- Status of Professional Credentials, Licenses or Certifications

#### Fee Payment Process

Health care employers continued to pay the current rates for the caregiver background check state name-based criminal history check and regulatory search. However, pilot funds for Personal Care Worker-Only Agencies were used to cover this fee, as it was a new cost to these agencies that were not currently part of the WI Caregiver Law. DHFS used pilot funding to cover all the remaining costs (Fingerprint Capture and FBI IAFIS Check).

#### 5. FITNESS DETERMINATION

Affected health care employers in the four pilot counties (Dane, Kenosha, La Crosse, Shawano) reviewed the results of the state and federal background checks, made the appropriate fitness determination and hiring decision for their prospective caregiver employees. Concerns were raised that providers might have a difficult time reviewing the results of the FBI search. These issues were covered by the pilot technical training and employers contacted DOJ directly with any questions regarding the background check. No systemic issues were identified.

Unlike other pilot states where state agencies made the fitness determination, Wisconsin employers had full discretion, within the limits of the state's employment laws and Caregiver Law, to make a hiring decision using the information from the background check. According to the Caregiver Program Manual:

- Only those crimes and findings by governmental agencies on the Offenses List and comparable crimes and offenses from other states or other U.S. jurisdictions are bars to employment, regulatory approval and nonclient residency.
- Any conviction not on the Offenses List may be determined to be substantially related to the duties or the circumstances of the job. This may result in:
  - Refusal to hire a candidate for that reason, although an employer is not required to bar the person from employment;
  - Denial, revocation or suspension of a license, certificate or approval or registration; or
  - Denial of residency of a nonclient resident.

Health care employers submitted summary data to WI DHFS on a quarterly basis. In a qualitative survey conducted in April 2007, providers said that they found the fingerprinting process: 31% easy; 46% somewhat easy; 21% somewhat difficult, and 2% difficult.

#### Missing Dispositions

Health care employers made a good-faith attempt to obtain the disposition information, including conviction records, from the appropriate jurisdiction such as the county clerk of courts, tribal jurisdiction, or armed services branch when:

1. The person reports a charge or conviction of a serious crime that does not appear on the DOJ or NCIC criminal history record request;
2. The DOJ or NCIC report does not clearly indicate the disposition of a serious crime;
3. The BID, DOJ or NCIC response indicates a conviction that occurred five years or less from the date on which the information was obtained of:
  - Misdemeanor battery s. 940.19 (1), Stats.
  - Battery to an unborn child s. 940.195, Stats.
  - Battery, special circumstances s. 940.20, Stats.
  - Reckless endangerment s. 941.30, Stats.
  - Invasion of Privacy s. 942.08, Stats.
  - Disorderly conduct s. 947.01, Stats.
  - Harassment s. 947.013, Stats.
 where the conviction occurred five years or less from the date on which the information was obtained; or,
4. The military discharge was other than "honorable."

The employer obtained complete information to make determination. Health care employers were familiar with tracking down missing disposition information. When providers had questions, they contacted the WI DOJ directly. Information on interpreting responses may also be viewed on DOJ's website at <http://www.doj.state.wi.us/dles/cib/forms/cib/reading.pdf>.

#### Disqualifying Information

In addition to the disqualifying offenses listed in the MMA, the following disqualifying information was used to bar employment under Wisconsin's Caregiver Background Check Pilot:

Citation	Wisconsin Disqualifying Offenses
940.01	First degree intentional homicide
940.02	1 <sup>st</sup> degree reckless homicide
940.03	Felony murder

940.05	2 <sup>nd</sup> degree intentional homicide
940.12	Assisting suicide
940.19 (2) – (6)	Battery (felony)
940.22 (2) or (3)	Sexual exploitation by therapist; duty to report
940.225 (1), (2) or (3)	1 <sup>st</sup> , 2 <sup>nd</sup> or 3 <sup>rd</sup> sexual assault
940.285	Abuse of vulnerable adults (misdemeanor or felony)
940.29	Abuse of residents of a penal facility
940.295	Abuse or neglect of patients and residents (misdemeanor or felony)
948.02(1)	1st degree sexual assault of a child
948.025	Repeated acts of sexual assault of a child
948.03 (2)(a)	Physical abuse of child – intentional – cause great bodily harm
	Finding by a governmental agency of neglect or abuse of a client, or of misappropriation of a client's property.
	Finding by a governmental agency of child abuse or neglect.

### Timeliness

The timeframe began when the entity received the completed Background Information Disclosure (BID) form from the prospective employee. Name based results were returned within one (1) hour. The fingerprint process resulted in criminal histories being posted within 24-48 hours of the fingerprints being submitted to WI DOJ. Employers made final fitness determinations within 24-48 hours.

The time frame was longer when prints were rejected by the FBI. The FBI ran a manual search for individuals whose prints are rejected for image quality twice. For the first several months, DHFS contacted Susan Larsen, the CMS Background Check Pilot Director, who coordinated the process with the FBI. After that, WI DOJ handled the process. Due to a systems limitation between WI DOJ and the FBI, this process was not automated. Instead, WI DOJ had to wait until they received a monthly invoice from the FBI to request the manual search. As a result, manual FBI searches could take up to 45 days to complete. WI DOJ is in the process of updating this system, which will dramatically reduce the processing time.

## 6. EMPLOYMENT/STAFFING AGENCIES

Employment agencies, including temporary staffing agencies, were permitted to initiate and conduct background checks under Wisconsin's Caregiver background Check Pilot. If an employment agency supplied health care providers with caregiver staff, those staff were subject to the existing state background check requirements. The employment agency indicated in writing that the caregiver had no offenses on the Offenses List and was eligible for employment. The agency advised the entity of any convictions in the person's background, to allow a fitness determination and consider whether any convictions were substantially related to the duties of the job. Employment agencies had access to the same background check information as an entity if the employment agency is hiring a caregiver.

Entities could contract the caregiver background check duties to an employment agency or third party (e.g., technical college, background check service, etc.), but the entity was ultimately responsible for the completion and accuracy of the background check process. If the entity contracted with another party to conduct and maintain the background checks, a written

agreement must be on file, allowing the party to retain the required background information. The health care employer is ultimately responsible for the completion and accuracy of the background check process. Reviews of background check information were done during regular site visits.

## **7. PROVISIONAL EMPLOYMENT**

With only a few exceptions, all background checks were completed within the 60-day time period. A handful of cases missed this deadline due to either processing mistakes by the employer (all of which were resolved) or because the employer was waiting for a manual FBI search because the caregiver's prints were rejected twice by the FBI.

Entities provided supervision during the 60-day period pending receipt of complete state and federal background check results. At a minimum, this supervision included periodic direct observation of the person. The definition of supervision varies with each program type and each covered entity must follow its own program supervision requirements.

## **8. BACKGROUND CHECK ACCURACY**

Promissor and the Division of Gaming completed a quality assurance check on all submitted prints before forwarding them to DOJ. If the applicant wished to challenge the accuracy of the FBI background check record, s/he appealed to the FBI by writing to the FBI, NICS Operations Center. The FBI investigated the matter by contacting the agency that denied the transaction or the data source. 28 CFR 16.34 provides the following instructions for persons wishing to challenge the record's accuracy:

- If the person believed his/her identification record is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, s/he should apply directly to the agency that contributed the questioned information.
- The subject of a record may also direct his/her challenge regarding the accuracy or completeness of any entry on his/her record to the FBI, Criminal Justice Information Services (CJIS) Division.
- The FBI forwarded the challenge to the agency that submitted the data and requested that agency verify or correct the challenged entry.
- Upon receipt of an official communication from the agency that contributed the original information, the FBI CJIS Division makes the necessary changes.

Wisconsin's pilot program staff are not aware that any individual challenged the validity of their background check during the pilot.

## **9. APPEALS**

Wisconsin's Caregiver Background Check Pilot provided the following process for an applicant to appeal the results of a background check or fitness determination:

**Criminal Fingerprint Appeal**

Persons who were arrested and fingerprinted by a Wisconsin criminal justice agency and subsequently released without charges being filed, or the charges were dismissed or the person was acquitted by a court, may have the arrest removed from the record. However, to qualify, all of the charges listed on the arrest fingerprint card must have been dismissed or not charged. If an arrest record qualifies for removal, a *Fingerprint Record Return Request* form ([Attachment 4](#)), and a copy of the documentation substantiating the arrest disposition qualifies for removal, must be completed and sent to the Crime Information Bureau. When processed, the arrest fingerprint card and all related information related will be deleted. If the arrest information was forwarded to the FBI, they will be notified and will destroy their record. Expungement of a case in court does not satisfy the statutory requirements for removing arrest information from the criminal record.

The DOJ Crime Information Bureau (CIB) reviewed the request and checked state records to ensure that the individual was released without charges being filed, if the charges were dismissed or the individual was acquitted by a court. To qualify, all of the charges listed on the arrest fingerprint card must have been dismissed or not charged. Charges amended to a lesser offense do not qualify for removal. Expungement of a case in court does not satisfy the statutory requirements for removal of arrest information from an individual's criminal record. Expungement by the court only removes the information from the court record, not from the Wisconsin criminal history database. Appeals are tracked by the DOJ CIB. Criminal fingerprint appeals did not increase during the pilot period.

**Caregiver Misconduct Appeal**

Caregivers may appeal a misconduct substantiated finding decision listed on the Wisconsin Caregiver Misconduct Registry by requesting a fair hearing with the Department of Administration, Division of Hearings and Appeals. Fair hearings must be requested within 30 days. The caregiver is allowed to work pending the fair hearing decision.

Appeals are processed by the Department of Administration, Division of Hearings and Appeals which has 90 days to schedule the hearing and 30 days after the hearing is held to issue a decision. DHFS cannot post the individual's name on the misconduct registry until the decision is issued. Appeals are tracked by the Division of Hearing and Appeals. Caregiver misconduct appeals did not increase during the pilot period.

**Regulatory Appeal**

A person who has been denied regulatory approval or whose regulatory approval has been revoked and believes discrimination has occurred, may appeal the decision through their licensing agency. Regulatory appeals did not increase during the pilot period.

**Employment Appeal**

Any person who has been refused employment or terminated from employment and believes discrimination has occurred, may file a complaint under s. 111.335, Stats. Appeals are filed by contacting the Wisconsin Department of Workforce Development (DWD), Division of Equal Rights. An appeal must be filed within 300 days of the employment action. The complaint is assigned to an equal rights officer to be investigated. The investigator acts impartially and independently, and represents neither the complainant (person filing the complaint) nor the respondent (employer being complained against). The investigator cannot give legal advice to the parties. An attorney should be contacted if either party needs legal advice. (The Division can provide a list of attorneys who handle fair employment cases). After the division receives a

complaint, a copy is sent to the respondent, who must provide a written answer to the complaint. The investigator may contact the complainant after receiving this answer and may request more information from the parties or any witnesses. The investigator may ask the parties if they wish to resolve the case through a settlement.

If a case is not settled, the equal rights officer completes an investigation and drafts an initial determination of whether there is "Probable Cause" or "No Probable Cause" to believe that the law has been violated.

- Probable Cause (PC) is not a finding of discrimination. It means there was enough believable information about discrimination to send the case on for a hearing on its merits.
- No Probable Cause (NPC) This finding means there wasn't enough evidence of discrimination. It does not always mean there was no discrimination. The case is dismissed, unless the complainant files a written appeal within 30 days.

Discrimination hearings are similar to a court proceeding. Both parties present evidence under oath before an administrative law judge (ALJ). The ALJ reviews the evidence and hears testimony of witnesses, then issues a decision on whether or not discrimination occurred. All relevant evidence and testimony must be presented at this hearing as it is the only chance for the parties to do so. Information given earlier to the investigator is not considered at the hearing. The ALJ cannot represent either party. Legal counsel may be advisable at this point, but is not required.

If discrimination is proven by a complainant under state law, an ALJ can award wages lost, interest on lost wages, attorney fees and costs. A job offer may also be ordered, if appropriate. Either party may appeal the ALJ's decision. Additional relief for damages such as humiliation and emotional pain or for punitive damages may be awarded only if a case is filed in federal court. Appeals are tracked by the Department of Workforce Development, Division of Equal Rights. Employment appeals did not increase during the pilot period.

## 10. REHABILITATION REVIEW

Wisconsin's Caregiver Background Check Pilot provided a rehabilitation provision, permitting employment for individuals with previous disqualifying behaviors or offenses. An individual completes a [Rehabilitation Review Application](#) form ([Attachment 5](#)) and submits it to the DHFS Office of Legal Counsel. The individual has 90 days from the date the application was submitted to provide a complete set of their supporting materials.

HFS12.12(4)(d) The Rehabilitation Review Panel considers information, such as:

- Evidence of successful parole, probation, incarceration or work release privileges.
- Proof the person has not had subsequent contacts with law enforcement agencies.
- Whether the person is on the sexual offender registry or a similar registry in another jurisdiction.
- Evidence of rehabilitation, such as a successful treatment program, public or community service, volunteer work, recognition by other public or private authorities for accomplishments or efforts of restitution.
- The amount of time between the crime, or offense, the request for Rehabilitation Review, and the age of the person at the time of the offense.

- Personal reference checks and comments from employers, agencies, statements from therapists, counselors and other professionals.
- Employment history, including evidence of acceptable performance or competency and dedication to the person's profession.

Each application for appeal is handled on a case-by-case basis by the DHFS Office of Legal Counsel. Once the Rehabilitation Review Application is received, the applicant is notified of the time and location of the Rehabilitation Review panel meeting and is given an opportunity to answer the panel's questions.

HFS12.12(5) After reviewing all of the materials and conducting a Rehabilitation Review panel meeting, the panel issues a written decision indicating one of the following:

- *Approval:* If the Panel received sufficient evidence of rehabilitation, the panel approves the Rehabilitation Review application and may specify conditions or limitations to the approval.
- *Denial:* If the Panel did not receive sufficient evidence of rehabilitation, the decision lists the denial reasons and informs the applicant of his/her right to file an appeal within 10 days of the decision.
- *Deferred:* The Panel may defer a final decision for up to six months to gather additional information or for other reasons.

Requests and decisions are tracked by the DHFS Office of Legal Counsel. DHFS submits a report to the state legislature every year that specifies the number of persons in the previous year who have requested a rehabilitation review, the number of persons who successfully demonstrated that they have been rehabilitated, and the reason for each person's success or failure. Rehabilitation review applications did not increase during the pilot period.

#### **Relapse of Offenders**

An agency or tribe that granted a person a rehabilitation approval may immediately temporarily rescind the rehabilitation approval when the agency or tribe has knowledge that the person has done either of the following:

1. The person has failed to comply with or abide by any conditions or limitations imposed with the rehabilitation approval.
2. The person knowingly submitted false information or withheld pertinent information relevant to the rehabilitation request that otherwise could or would have affected the review panel's decision to grant the rehabilitation approval. No additional steps are taken by DHFS.

### **11. BACKGROUND CHECK PROCESS FLOW**

See Background Check Flow Chart ([Attachment 6](#)).

### **12. COMPLIANCE MONITORING & FEEDBACK**

#### **Program Monitoring Activities**

The federal background check results and documents were retained by the employer, to document their compliance. The employer determined where and how the background check records are maintained, but the records must be readily available to DQA staff upon request.

During survey, DQA staff reviewed the personnel records of a sample of caregivers (nurse aides, nurses, housekeeping staff, etc.) and documented their findings to ensure program compliance. During these reviews DQA staff checked for the following issues:

- Obtaining written disclosure
- Obtaining written authorization
- Obtaining 10 rolled fingerprints
- Referring/conducting applicants for background check determination (as applicable)
- Making fitness determination (as applicable)
- Making appropriate hiring, termination decisions, etc.

#### **Entity Sanctions and Feedback**

A pilot health care employer may be subject to sanction if it failed to adhere to the provisions of Wisconsin's Caregiver Background Check Pilot requirements, including failure to:

- Hire, employ, or contract with a caregiver, or permit a nonclient resident to reside at the entity when the entity knew or should have known that the person is barred from doing so; or
- Violate any provision of initial background information gathering under the federal background check requirements.

If an entity failed to adhere to the requirements listed above, the following sanctions may be imposed, including:

- A forfeiture not to exceed \$1,000;
- A requirement for the entity to submit a corrective action plan specifying corrections the entity will make to their screening practices;
- Background check training or other appropriate training, at the entity's expense;
- Conditions or limitations placed on the license, certification or registration, including denial, revocation, or suspension; and/or
- A requirement for the entity to use a temporary employment agency for screening and hiring personnel.

Only five (5) health care employers, or 2% of the 211 employers who participated in the pilot, were cited for background check related deficiencies between March 2006 and September 2007. The five employers were located in Dane and Kenosha counties; no healthcare employers were cited for background check requirements in La Crosse or Shawano counties.

#### **Unintended Negative Effects**

DHFS worked diligently to ensure easily accessible fingerprint sites in all of the pilot counties. Individuals using Promissor were able to schedule an appointment using an 800 number or the Internet. Individuals using DOA, Division of Gaming in Kenosha and Dane were not required to make an appointment as services were provided on a drop-in basis with set hours. Entities in Shawano County that were not close to a Promissor site or that could not schedule a timely appointment with Promissor were permitted to submit ink rolled fingerprints to DOG for scanning.

In a qualitative survey conducted in April 2007, providers indicated that they found the fingerprinting process: 31% easy; 46% somewhat easy; 21% somewhat difficult, and 2% difficult. Sample comments included:

- We notified managers in meetings and updated staff on the new pilot program so employees understood the purpose. That was the easy part. The part that was a bit more difficult was finding extra time to go over the process with each new employee. Adding more time to an already busy day was difficult to find, but we figured it out.
- Applicants have a hard time understanding why they need to do it. In addition, many complaints were received regarding the Promissor staff and scheduling for an appointment. The quarterly report gets confusing but is manageable.
- Easy enough to instruct new applicants on what it was for, and how to do it.
- I find that implementing the process is fairly easy but getting employees to go to the Division of Gaming during their open hours has been difficult because many of our employees have full time day jobs and the Division of Gaming is only open from 8a to 4p or 4:15p M-F.

Utilizing digital fingerprint services by a private agency reduced the stigma prospective employees may experience by providing customer-focused fingerprint scanning services, rather than requiring contact with busy law enforcement agencies.

In a qualitative survey conducted in April 2007, 90% of providers said that they did not experience a reduction in prospective candidates because of the fingerprinting requirements. Sample comments included:

- Very minimal negative impact on prospective candidates.
- Some candidates didn't want to drive to the printing site or be printed twice. Some of our applicants work per diem and it can be a drawback for a part time position.
- Not unless people decided not to apply or continue with the employment process because of this requirement. (I may or may not know about that.)
- Once we mentioned that this would be included in our background checks; a handful of people did not continue the process.

DHFS promoted the benefits of the background check program through three advisory committees, through presentations to various provider groups, and through technical training for the pilot. All informational materials about the pilot also promoted the benefits of the background check program.

In a qualitative survey conducted in April 2007, 56% of providers said that they would like the fingerprint requirement to continue. Sample comments included:

- I like the extra set of precautionary review that the fingerprinting offers.
- We believe the State BG check is sufficient. The fingerprint process is timely and in our case, can cost money and loss of potential staff.
- Yes and no....yes, because as the person running the background checks, I only had to complete the WI check and then send them for fingerprinting. No, because I am worried about the cost.
- We would see no problem with the requirement continuing if the cost is minimal and works like it has been. The fact that it brings up results that the criminal check we conduct does not always shows that it is useful. But the fact that it hasn't brought up something that was disqualifying that wasn't on the name-based check would make more sense to be free than to pay extra for this.

Applicants were not required to pay any fees for the fingerprint process. The applicant's responsibilities were outlined in the Applicant Fact Sheet.

### 13. EDUCATION & TECHNICAL ASSISTANCE PLAN

#### Communication – Public Awareness

DHFS continued to partner and collaborate with the Wisconsin DOJ and DRL to develop the federal background check pilot policies, procedures, and system requirements. In addition, input was sought from Wisconsin's Ombudsman Program and appropriate health care associations, to ensure facility buy-in and successful pilot background check implementation. A one-page summary was widely shared ([Attachment 7](#)).

Direct mailings – All affected entities received a letter of introduction about the project. The letter was sent in June 2005. (See *Appendix 6 – Introduction Letter*.) Another letter was sent in October 2005 with detailed information on steps providers needed to take to prepare for the pilot. (See *Appendix 7 – Tech Training Letter Oct 2005*.) A month before the pilot began, providers received a third letter reminding them of the pilot steps and the data collection. (See *Appendix 8 – Pilot Reminder Letter Feb 2006*.) After the pilot began, remaining correspondence was handled via e-mail. On a quarterly basis, providers received e-mail reminders on filling out the quarterly data collection forms ([Attachment 8](#)).

Website – DHFS established a website for this project. The website includes general information about the pilot with links to CMS. All of the materials from the technical trainings are posted including all of the forms and links providers need to complete the full background check. To see the full website, go to: <http://dhfs.wisconsin.gov/caregiver/fedBCpilot.htm>. A question and answer document listing the most common questions is also posted. (See *Appendix 9 – Pilot Q & A*.)

#### Committees/Workgroups –

- *Background Check Pilot Planning Committee* – Provide input on the big picture issues related to the background check pilot including developing policy, and communicating that policy to entities. 8-12 members met 4 times in 2005.
- *Background Check Implementation Committee* – Provide input on the more technical and implementation aspects of policy, procedures and data collection associated with the background check pilot. 15-20 members met 6 times throughout the project.
- *Abuse Prevention Training Planning Committee* – Provide input on the training plan for the abuse prevention aspect of the pilot including the Experiential Training and the Topical Training. 15-20 members met 4 times. Individual members were called upon for their expertise throughout the pilot.

Ad Hoc Presentations – Whenever possible, pilot staff addressed associations, committees, and entity groups to discuss the pilot project.

#### Technical Assistance Methods

DHFS provided initial training to participating entities during 9 training sessions across the 4 pilot counties. Over 220 provider representatives were trained. To facilitate participation, pre-implementation training sessions were conducted at locations near pilot entities. The training consisted of MS PowerPoint presentation, case examples, open discussion and handouts.

The content of the training was focused on the following:

- Collection of scanned fingerprints,
- National record check provisions,
- Making appropriate employment decisions,
- Informing employees of background check requirements,
- Differences/similarities between federal background check pilot policies and Wisconsin's current background check requirements,
- Other components, e.g., appeals, Rehabilitation Reviews, compliance, enforcement and reporting requirements,
- Data Collection requirements, and
- Overview of abuse prevention training with instructions on how to enroll staff.

The response to the technical training was positive. The statement "I understand the steps I have to take to be in compliance with the pilot" received a 3.6 on a four-point scale. Comments included:

- Donna and Becca were very knowledgeable and presented the material in an organized and understandable manner. Well Done! Keep up the good work.
- The presenters communicated the materials in a concise, organized and relevant manner. Very enjoyable personalities.
- Presenters are sensitive to provider needs.
- All questions were answered. Trainer knew information.
- This met my expectations. I thought it was thorough.

Ongoing technical assistance was provided in the following ways:

- Supplied all training attendees with comprehensive handouts.
- Provided participants with appropriate state agency contact information.
- Compiled a directory of facilities within the pilot region.
- Included Federal Background Check Pilot Program information on the Department's website.
- Created a computer-based training module for entities, surveyors and other interested parties on an as-needed basis for current or new entity staff.

Training for Surveyors was provided through a webcast. On-going support for surveyors has handled by adding a Federal Background Check Pilot module to existing New Employee Orientation for all newly hired surveyors during the pilot period.

#### 14. SYSTEM INFRASTRUCTURE

Wisconsin pilot counties used FBI compliant live scan equipment, utilizing Wavelet Scalar Quantization (WSQ) to compress the images at a 15:1 ratio. Fingerprint scanning centers were equipped to capture fingerprints in a digital mode and transmit the electronic file to Wisconsin DOJ's server for processing. DHFS and DOJ enhanced the IBIS system to recognize requests stemming from the fingerprint search, conduct a query based on that request and post the IBIS results to a secure email server. DOJ used their existing secure website to post the background check findings. Only minor systems changes were needed at DOJ to implement the pilot. The total costs were under \$50,000.

Information was tracked by existing data systems:

- DOJ collected data on the number of background checks;
- DHFS financial systems tracked the costs of the background checks and the total costs of the pilot;
- ACTS tracked the resident and family complaints,;
- the Office of Caregiver Quality (OCQ) tracked incident reports and substantiated findings;
- ASPEN tracked deficiency citations.

### 15. FINAL PILOT DATA & COST

#### Number and results of pilot background checks conducted:

Wisconsin health care employers in the four pilot counties completed background checks on:

- 14,748 individuals
- 9,998 or 68% were hired
- 4,120 or 28% not hired due to reasons other than their background check
- 640 or 4% disqualified due to the background check results
  - 277 (2% of all caregivers and 43% of all disqualified caregivers) were disqualified because they lied on their background information disclosure form about crimes that would not otherwise disqualify them
  - 56 (.4% of all caregivers and 9% of all disqualified caregivers) were disqualified because of background information found during the registry searches
  - 265 (2% of all caregivers and 41% of all disqualified caregivers) were disqualified because of background information found during the state name search
  - 42 (.3% of all caregivers and 7% of all disqualified caregivers) were disqualified in the fingerprint process: 16 refused to be fingerprinted; 24 had disqualifications on the FBI criminal history; of those, 2 had a conviction on the Wisconsin Offenses List, 2 had convictions on the Federal Exclusion List, and 20 had a substantially related offense.

Overall, of the 4% of caregivers disqualified due to background check reasons, 93% were identified during the existing WI Caregiver Law background check requirements. (See Appendix 10 – Date Narrative and Appendix 11 – WI Cumulative Data spreadsheet.)

#### Cost of background check/fingerprint capture:

Promissor billed DHFS for fingerprint capture appointments in La Crosse and Shawano counties. The DOG did not bill DHFS for fingerprint capture services in Dane and Kenosha counties; DHFS paid the salary of the limited-term employees hired to capture the prints.

	<i>Actual Cost</i>	<i>Potential Cost</i>
Fingerprint Capture	34,488 (La Crosse & Shawano)	187,560
PCW Name-based Search	12,965	40,191.50
Fingerprint BC Fee	250,080 (State fee waived)	406,380 (State & Fed)
<b>TOTAL</b>	297,533	634,131.50

(See Appendix 12 – CBC Fingerprint Fees spreadsheet.)

## 16. PILOT PHASE-DOWN PLAN

Wisconsin's Caregiver Background Check Pilot requirements sunset at the end of pilot period. Entities in the 4 pilot counties continue to comply with the Wisconsin Caregiver Law requirements. DHFS ensured that all caregivers who completed the final hiring decision (including the 60-day provisional hire period) before September 30, 2007 completed a fingerprint-based background check. Entities received a notice in August 2007 that at the end of the pilot they should revert back to the name-based background check process. (See *Appendix 13 – Close-Down letter.*) DHFS worked with entities to ensure that they understand this change. The fingerprint scanning provider was informed of the pilot's end date and did not take any new customers after September 27, 2007.

Health care employers were paying the same fees during the pilot that they did under standard Wisconsin regulations. The employers were billed in the same way. As such, the billing procedures did not have to end with the pilot as they are the same procedures normally in place. The CMS grant was not billed after the pilot because Wisconsin will no longer be conducting finger-print background checks.

All written communication to entities clearly stated that the pilot ended on September 30, 2007. Entities were issued written notification in August 2007 that the pilot ended at the end of September. Information was also available on the website:

- Wisconsin pilot legislation sunset September 30, 2007.
- All regulated health care providers continue to adhere to the Wisconsin Caregiver Background Check requirements.

## 17. CONCLUSION

The Caregiver Program was implemented in October 1998 and more than 2,600,000 caregiver background checks have been completed since its implementation. The Caregiver Law was designed to provide Wisconsin employers with the tools needed to screen out potential abusers before they have access to residents and to allow entities to make prompt employment decisions. However, little data had been gathered to evaluate the overall effectiveness of conducting background checks, including whether the safety of residents and their quality of care has improved.

Through the Caregiver Background Check Pilot, Wisconsin received funding to expand its background check requirements for caregivers in four counties – Dane, Kenosha, La Crosse and Shawano. The remaining funding was used to develop and provide innovative training on abuse and neglect prevention for direct caregivers in the pilot counties. Beginning in February and March of 2006, all newly hired caregivers in the four pilot counties had to pass a fingerprint-based state and FBI background check in addition to Wisconsin's existing Caregiver Law background check requirements. DHFS worked closely with the WI Department of Justice to establish a streamlined system to run fingerprint based background checks and return the results directly to employers. All prints were submitted electronically and the results were posted within 24-48 hours.

Despite employers initial concerns that the fingerprint based background check would slow the hiring process, employers who participated in the pilot found the background check process

easy to complete. 90% of pilot employers said they did not experience a reduction in prospective candidates because of the fingerprinting requirement. Only a handful of candidates refused to be fingerprinted during the pilot period. 70% of the pilot employers said that they would be willing to continue to run fingerprint based background checks if the costs were the same as the Caregiver Background Check. Another 20% said they would be willing to continue if fingerprinting was optional.

The federal background check pilot provided Wisconsin with the opportunity to evaluate its current background check requirements and identify the following best practices:

- **Staged background check process:** During the pilot, Wisconsin gathered data to track background check results and entity employment decisions to properly evaluate both the pilot requirements and the existing Caregiver Program's impact and effectiveness. Despite initial concerns, caregivers were willing to be fingerprinted. Most caregivers, who were disqualified due to their background check results, were disqualified before the fingerprint background check. The staged pilot process allowed employers to stop the process as soon as any disqualifying information was found. Many employers indicated that they will continue the up-front free registry searches post-pilot. The overall results of the pilot verify the effectiveness of the existing Wisconsin Caregiver Law requirements.
- **Employer-driven process:** Wisconsin established an automated system for entities to receive prompt, economical fingerprint-based background checks. Electronically submitted results provided a quick turn-around of 24 to 48 hours. It was challenging, but doable, to establish a process in which the employer receives the background check results. Wisconsin employers prefer receiving the full background check results, making the employment fitness determination and appropriate substantially related decisions.
- **Limit fingerprinting:** The pilot increased assurance to long term care employers that employees providing direct care did not have a history of committing abuse, neglect, or stealing client property. Many of the participating employers indicated they appreciated getting more criminal history information through the FBI background search. Even when disqualifying information was not found, employers felt reassured by the additional FBI background check. The national background check provided by the FBI eliminated the need to track down out of state results for caregivers who have lived outside of Wisconsin. Overall, employers indicated that they found FBI background checks most beneficial when the individual had resided outside of Wisconsin.

### Summary

Wisconsin has required background checks for caregivers working in regulated healthcare and daycare settings since 1998 and supports a requirement for all caregivers nationwide to undergo a thorough background check. For states that currently do not require background checks, federal legislation will have a significantly positive impact.

As a result of Wisconsin's participation in the pilot, Wisconsin recommends that federal legislation require states to achieve certain outcomes but allow states flexibility in program design, including the option of an employer driven process model such as Wisconsin's Caregiver Law.

**18. ATTACHMENTS**

<b>Attachment Number</b>	<b>Attachment Title</b>
1.	Background Information Disclosure (BID) Form
2.	Fingerprint authorization form
3.	Applicant Fact Sheet
4.	Fingerprint Return Request Form
5.	Rehabilitation Review Application form
6.	Background Check Process Flowchart
7.	WI Caregiver Background Check One Page Description
8.	Quarterly Data Collection Tool

**19. APPENDICES**

<b>Appendix</b>	<b>Section</b>	<b>Description</b>	<b>File Name</b>
1	2	Legislative request for inclusion of PCWs in pilot	DHFS Legislative Request to Include PCWs.doc
2	2	PCW MOA with La Crosse County	CBC PCW MOA.doc
3	2	DHFS response to Wisconsin Hospital Association letter	06-0427068_Leitch.doc
4	4	Question and Answer document for providers in Kenosha	Answers for Kenosha.doc
5	4	DHFS response to WHA and Rural Healthcare Cooperative letter	06-080101_WHA&RWHC.doc
6	13	Introduction letter sent to all providers before the pilot began	Intro Letter June 2005.doc
7	13	Letter to providers with details on pilot and technical training	Tech Training Letter Oct 2005.doc
8	13	Letter to providers reminding them that the pilot is beginning	Pilot Reminder Letter Feb 2006.doc
9	13	Question and Answer document	Pilot Q&A 1-07-06.doc
10	15	Pilot data narrative	Data Narrative_2007.doc
11	15	Cumulative data summary	WI Cumulative Data_06-07.xls
12	15	Costs associated with fingerprint background checks	CBC Fingerprint Fees LTD.xls
13	16	Close-down letter	Close Down Letter.doc

	ALASKA	NEW MEXICO	NEVADA
<b>Lifetime Ban</b>	<p>Attempt to commit a crime if the crime attempted is murder in the first degree, unclassified felony other than murder in the first degree, class A, B, or C felony and is a barrier crime, class A or class B misdemeanor and is a barrier crime; solicitation to commit a crime if the crime solicited is murder in the first degree, unclassified felony other than murder in the first degree, class A, B, or C felony and is a barrier crime; Conspiracy to commit a crime if the object of the conspiracy is murder in the first degree, a crime punishable as a class A or B felony; Murder in the first or second degree; manslaughter; criminally negligent homicide; assault in the first, second, and third degrees; stalking in the first degree; kidnapping; crimes involving domestic violence in the first degree, sexual assault in the first, second, third, or fourth degree; incest; enticement of a minor; unlawful exploitation of a minor; indecent exposure in the first or second degree; robbery in the first or second degree; extortion; arson in the first and second degree; endangering the welfare of a child in the first degree if a Class B or C Felony or a Class A misdemeanor; endangering the welfare of a vulnerable adult in the first or second degrees; failure to register as a sex offender or child kidnapper in the first or second degrees; indecent viewing or photography if a Class C Felony or Class A Misdemeanor; distribution of child pornography if a Class A or B Felony; Possession of child pornography; electronic distribution of indecent material to a minor; promoting prostitution in the first, second, and third degrees if a Class A or B Felony and the person who was induced or caused to engage in prostitution was under 16 or 17 years of age at the time of the offense.</p> <p>Stalking in the first degree; theft in the first degree; issuing a bad check (if class B Felony); issuing a bad check if a Class B Felony; Fraudulent use of an access device if a Class B Felony; burglary in the first degree; criminal mischief in the first and second degrees; forgery in the first degree; offering a false instrument for recording in the first degree; scheme to defraud; defrauding creditors if a Class B Felony; terrorist threatening in the first degree; manufacture or delivery of an imitation controlled substance in the first, second or third degrees; misconduct involving weapons in the first or second degrees; criminal possession of an explosive if a Class A or B Felony; promoting prostitution in the first degree if the person who was induced or caused to engage in prostitution was 18 years of age or older at the time of the offense; delivery of an imitation controlled substance to a minor; Fraudulent or criminal insurance act if a Class B Felony; operating a vehicle, aircraft, or watercraft while intoxicated; refusal to submit to chemical tests.</p>	<p>Homicide, trafficking, or trafficking in controlled substances; kidnapping, false imprisonment, aggravated assault or aggravated battery; rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure, or other related felony sexual offenses; crimes involving adult abuse, neglect, or financial exploitation; involving child abuse or neglect; involving robbery, larceny, burglary, fraud, forgery, embezzlement, credit card fraud, or receiving stolen property; an attempt involving any of the felonies in this subsection.</p>	<p>Murder, voluntary manslaughter, mayhem; assault with intent to kill or to commit sexual assault or mayhem; sexual assault, statutory sexual seduction, incest, lewdness, indecent exposure or any other sexually related crime; Abuse or neglect of a child or contributory delinquency; A violation of any provision of NRS 200.50955 or 200.5099, two statutes addressing elder abuse and neglect.</p>
<b>10 Years From the Date of Conviction*</b>	<p>Stalking in the first degree; theft in the first degree; issuing a bad check (if class B Felony); issuing a bad check if a Class B Felony; Fraudulent use of an access device if a Class B Felony; burglary in the first degree; criminal mischief in the first and second degrees; forgery in the first degree; offering a false instrument for recording in the first degree; scheme to defraud; defrauding creditors if a Class B Felony; terrorist threatening in the first degree; manufacture or delivery of an imitation controlled substance in the first, second or third degrees; misconduct involving weapons in the first or second degrees; criminal possession of an explosive if a Class A or B Felony; promoting prostitution in the first degree if the person who was induced or caused to engage in prostitution was 18 years of age or older at the time of the offense; delivery of an imitation controlled substance to a minor; Fraudulent or criminal insurance act if a Class B Felony; operating a vehicle, aircraft, or watercraft while intoxicated; refusal to submit to chemical tests.</p>		<p>Any violation of any federal or state law regulating the possession, distribution or use of any controlled substance or any dangerous drug as defined in chapter 454 of NRS; Any offense involving fraud, theft, embezzlement, burglary, robbery, fraudulent conversion or misappropriation of property. Any other felony involving the use of a firearm or other deadly weapon.</p>
<b>5 Years From the State of Conviction</b>	<p>Theft in the third degree; criminal trespass in the first degree; criminally negligent burning; criminal mischief in the fourth degree; forgery in the third degree; deceptive business practices if a Class A misdemeanor; criminal nonsupport if a Class A misdemeanor; violating protective order; interfering with a report of a crime involving domestic violence; criminal possession of explosives if a Class A misdemeanor.</p>		
<b>1 Year From the Date of Conviction</b>	<p>Criminal mischief in the fifth degree; unlawful contact in the first or second degrees; harassment</p>		

Lifetime Ban	ILLINOIS	MICHIGAN**
	<p>Solicitation of Murder; Class; Solicitation of Murder for Hire; First Degree Murder; Intentional Homicide of an Unborn Child; Second Degree Murder; Voluntary Manslaughter of an Unborn Child; Involuntary Manslaughter and Reckless Homicide of an Unborn Child; Death; Involuntary Manslaughter and Reckless Homicide of an Unborn Child; Drug Induced Homicide; Kidnapping; Aggravated Kidnapping; Indecent Solicitation of a Child; Sexual Exploitation of a Child; Exploitation of a Child; Child Pornography; Aggravated Domestic Battery; Aggravated Battery; Heinous Battery; Aggravated Battery With a Firearm; Aggravated Battery of an Unborn Child; Aggravated Battery of a Senior Citizen; Drug Induced Infliction of Great Bodily Harm; Criminal Sexual Assault; Aggravated Criminal Sexual Assault; Predatory Criminal Sexual Assault of a Child; Criminal Sexual Abuse; Aggravated Criminal Sexual Assault; Abuse/Gross Neglect of a LTC Facility Resident; Criminal Neglect of an Elderly/Disabled Person; Financial Exploitation of an Elderly/Disabled Person; Armed robbery; Aggravated Vehicular Hijacking; Aggravated Robbery.</p>	<p>Felonies related to manufacture, distribution, prescription, or dispensing of a controlled substance after August 21, 1996; Felony or misdemeanor patient abuse; Felony health care fraud; Ever found not guilty by reason of insanity; Ever had a finding of abuse, neglect, or misappropriation of property in a nursing facility (non-criminal findings).</p>
<p>10 Years from the Date of Conviction*</p>		<p>Misdemeanors involving the use or threat of violence; Misdemeanors involving the use of a firearm or dangerous weapon; Misdemeanors involving abuse of vulnerable adults, eg. Misdemeanor elder abuse; Misdemeanor criminal sexual conduct (4th degree); Misdemeanor involving cruelty or torture; Misdemeanor involving abuse or neglect).</p>
<p>5 Years from the Date of Conviction</p>	<p>Forcible Detention; Battery of an Unborn Child; Tampering with Food, Drugs or Cosmetics; Aggravated Stalking; Home Invasion; Ritual Mutilation; Ritual Abuse of a Child; Financial Identity Theft; Aggravated Financial Identity Theft; Forgery; Robbery; Vehicular Hijacking; Burglary; Residential Burglary; Arson; Aggravated Arson; Residential Arson; Unlawful Use of a Weapon by a Felon; Aggravated Discharge of a Firearm; Aggravated Discharge of a Machine Gun; Unlawful Discharge of Firearm Projectiles; Armed Violence; Permitting sexual abuse of a child; Cannabis Trafficking; Delivery to Person Under 18; Calculated Criminal Cannabis Conspiracy; Manufacture of Controlled/Counterfeit Substance Controlled Substance Analog; Controlled Substance Trafficking; Look-alike Substances; Calculated Criminal Drug Conspiracy; Element of the Offense; Delivery to a Person Under 18; Violations at School; Public Housing; Public Park; Employing Person Under 18; Delivery of Substance; Aggravated Unlawful Use of a Weapon; Unlawful Sale or Delivery of Firearms on the Premises of any School; Theft; Unlawful Use of a Weapon if a Felon; Manufacture, Delivery, or Possession With Intent to Deliver/Manufacture if a Felon; Delivery of Cannabis on School Grounds if a Felon; Endangering the Life or Health of a Child if a Felon; Offense of Retail Theft; Domestic Battery; Unlawful Restaurant; Aggravated Unlawful Restraint; Child Abduction; Aiding and Abetting Child Abduction; Reckless Discharge of a Firearm; Receiving Stolen Credit Cards or Debit Cards; Receiving a Credit or Debit Card with Intent to Use, Sell, or Transfer; Selling or Buying a Credit Card; Using a Credit or Debit Card With the Intent to Defraud; Altering an Electronic Transmission With the Intent to Defraud; Criminal Jurisprudence Act; Wrongs to Children Act; Aggravated Assault.</p>	<p>Misdemeanor involving cruelty if committed by an individual under the age of 16; Misdemeanor home invasion; eg. misdemeanor breaking and entering; Misdemeanor embezzlement; Misdemeanor negligent homicide; Most misdemeanor theft offenses; Retail fraud (shoplifting) in the 2nd degree; Certain misdemeanor controlled substance offenses; Most misdemeanors involving fraud.</p>
<p>1 Year from the Date of Conviction</p>	<p>Unlawful Use of a Weapon if a Misdemeanor; Manufacture, Delivery, or Possession With Intent to Deliver/Manufacture if a misdemeanor; Delivery of Cannabis on School Grounds if a misdemeanor; Endangering the Life or Health of a Child if a misdemeanor; Aggravated Assault if a misdemeanor; Criminal Trespass to Residence; Pretending to be a Nurse; Assault; Battery; Theft or mislaid property.</p>	<p>Misdemeanor assaults; Retail fraud (shoplifting) in the 3rd degree; Most misdemeanors involving creation, delivery, possession or use of a controlled substance.</p>

<u>Lifetime Ban</u>	<u>IDAHO</u>	<u>WISCONSIN</u>
	<p>Abuse, neglect, or exploitation of a vulnerable adult. Aggravated, first-degree and second-degree arson. Crimes against nature. F forcible sexual penetration by use of a foreign object. Incest. Injury to a child. Felony or misdemeanor. Kidnapping. Lewd conduct with a minor. Mayhem. Murder in any degree, voluntary manslaughter, assault, or battery with intent to commit a serious felony. Poisoning. Possession of sexually exploitative material. Rape. Robbery. Felony stalking. Sale or barter of a child. Sexual abuse or exploitation of a child. Video voyeurism. Enticing of children. Inducing individuals under eighteen (18) years of age into prostitution or patronizing a prostitute. Any felony punishable by death or life imprisonment. Attempt, conspiracy, or accessory after the fact.</p>	<p>First degree intentional homicide; 1st degree reckless homicide; Felony murder; 2nd degree intentional homicide; Assisting suicide; Battery (felony); Sexual exploitation by therapist; duty to report; 1st, 2nd, or 3rd degree sexual assault; Abuse of vulnerable adults (misdemeanor or felony); Abuse of residents of a penal facility; Abuse or neglect of patients &amp; residents (misdemeanor or felony); 1st or 2nd degree sexual assault of a child; Repeated acts of sexual assault of same child; Physical abuse of a child – intentional causation of bodily harm; Sexual exploitation of a child – intentional causation of bodily harm; Sexual activity; Incest with a child; Child enticement; Soliciting a child for prostitution; Exposing child to harmful material or harmful descriptions or narrations; Possession of child pornography; Child sex offender working with children; Neglect of a child – resulting in death (felony); Abduction of another's child; constructive custody; Finding by a governmental agency of neglect or abuse of a client, or of misappropriation of a client's property; Finding by a governmental agency of child abuse or neglect.</p>
<p><u>10 Years from the Date of Conviction*</u></p>		
<p><u>5 Years from the Date of Conviction</u></p>	<p>Aggravated assault, Aggravated battery, Arson in the third degree, Burglary, A felony involving a controlled substance; Felony theft, Forgery of and fraudulent use of a financial transaction card, Forgery and counterfeiting, Grand theft, Insurance fraud, Public assistance fraud, Attempt, conspiracy, accessory after the fact, or aiding and abetting.</p>	
<p><u>1 Year from the Date of Conviction</u></p>		

NOTES

\*For Nevada and Illinois, the time limit is 7 years.

\*\*In addition to the time-limited bans from the point of conviction, Michigan also imposes time-limited bans for certain crimes following completion of parole or probation.

Disqualifying crimes that trigger a 15-year ban on employment in long-term care facilities following completion of parole or probation are:

- • Felonies involving the use or threat of violence, e.g. felonious assault; Felonies that result in, or were intended to result in, death or serious injury, e.g. assault with intent to do great bodily injury (including 1<sup>st</sup> degree murder, assault, assault against a family member or family independence agency employee, assault and battery, opposing someone performing duty); Felonies involving cruelty or torture; Felonies involving abuse of vulnerable adults e.g. elder abuse; Felonies criminal sexual conduct (1<sup>st</sup>, 2<sup>nd</sup>, or 3<sup>rd</sup> degree); involving abuse or neglect, e.g. child abuse; involving the use of a firearm or dangerous weapon, e.g. armed robbery; involving the diversion or adulteration of medication, e.g. forging drug prescriptions.

Disqualifying crimes that trigger a 10-year ban after completion of parole or probation include:

- Other felonies not subject to the 15-year ban (see bullet above) or felonies listed in the matrix, which trigger either permanent or time-limited bans from the point of conviction. Felonies include larceny from a person, stealing the firearm from another person; larceny of money goods or chattel; bank note; bond; promissory note; due bill; bill of exchange; larceny from a motor vehicle; breaking and entering a coin-operated telephone; 1<sup>st</sup> degree retail fraud.