



## OFFICE OF CORPORATION COUNSEL

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DATE: November 1, 2017

TO: Chairman Theodore Lipscomb, Sr.

Cc: Chief of Staff Kelly Bablitch  
County Clerk George Christensen (c/o Janelle Jensen)  
Interested Parties

FROM: Deputy Corporation Counsel Colleen Foley 

RE: DHHS Rehabilitation Review Process/  
Milwaukee County Caregiver Resolution 99-233 (File 17-588)

File 17-588 came before the Judiciary, Safety and General Services Committee during the September 14, 2017 cycle, with referral back to committee at the Board's September 28, 2017 meeting. File 17-588 states:

From the Interim Director, Department of Health and Human Services (DHHS) requesting authorization to administer a new appeal process for individuals barred or restricted under the Milwaukee County Caregiver Policy.

The underlying Resolution (file 99-233) requires DHHS to restrict or deny any prospective providers from providing direct care to children and youth while working under a DHHS contract if an individual has a listed disqualifying criminal conviction. Unlike the State<sup>1</sup>, the County does not currently provide a rehabilitative review process. And Resolution 99-233 lists disqualifying crimes<sup>2</sup> that are not offenses barred by the State under DHS 12, titled "Offenses Affecting Caregiver Eligibility."

Questions arose at the October 19, 2017 Judiciary Committee meeting regarding:

- 1) What rules govern the formal record keeping process of the review panel?

<sup>1</sup> Wis. Stat. 50.065(5) includes a provision permitting the State DHS (Department of Health Services) and DCF (Department of Children and Families) to establish a rehabilitation review process allowing persons with barred convictions to appeal a decision against their contracting with the State.

<sup>2</sup> Homicide (all degrees); felony murder; mayhem; aggravated and substantial battery; 1<sup>st</sup> and 2<sup>nd</sup> degree sexual assault; armed robbery; administering dangerous or stupefying drugs; and all crimes against children as identified in Chapter 948 of the statutes.

- 2) What is the rationale as to why certain graded crimes and not others are eligible for the DHHS appeal process, e.g., lower graded child sexual assaults versus those of a higher grade?

Regarding question one concerning formal record keeping by the review panel, the DHHS Rehabilitation Review Process under section II-F requires that the panel issue a written determination no matter the outcome and by majority vote:

- If the Review Panel finds sufficient evidence of rehabilitation, the decision will provide the reasons for approval, and may specify any conditions or limitations that are imposed; and
- If the Review Panel does not find sufficient evidence of rehabilitation, the decision will provide the reasons for denial. Decision is final subject to judicial review.<sup>3</sup>

Regarding question two concerning the apparent inclusion of certain crimes for appeal to the exclusion of others, the rationale is to ensure a process that covers crimes listed in Resolution 99-233, inclusive of crimes against children and youth that are not offenses barred by State law. Where a crime is barred by *both* the State DHS/DCF under the Wisconsin Caregiver Law and Resolution 99-233, the County will defer to the State appeal process. Where a crime is *not* barred by the State DHS/DCF under the Wisconsin Caregiver Law, but *is* barred by Resolution 99-233, the County will provide the appeal process. In particular, Judiciary committee members raised the question concerning why a lower graded 3<sup>rd</sup> degree sexual assault of a child conviction does not appear to qualify for the rehabilitation review process in contrast to higher graded offenses, like 1<sup>st</sup> or 2<sup>nd</sup> degree sexual assault. The answer is that 3<sup>rd</sup> degree sexual assault of a child is *not* a barred offense under the Wisconsin Caregiver law. But it *is* a barred offense under Resolution 99-233 because it involves a crime against a child under Chapter 948 of the statutes - one of the enumerated crimes under Resolution 99-233 (*see* footnote 2). So, under the proposed resolution the County would provide for an appeal process for this crime, even though the State does not.

As noted in the attached comparison chart, all crimes against children and youth were reviewed to ensure they are addressed by either the State law, the County law, or both. The chart denotes by yellow highlighting those crimes addressed by Resolution 99-233, with a red check mark for crimes where the proposed County appeal process would apply where there is no State appeal process. For Chapter 948 crimes, 3<sup>rd</sup> degree sexual assault of a child would therefore be covered by the County review process, while 1<sup>st</sup> and 2<sup>nd</sup> degree sexual assault of a child is already covered by the State review.

In summary, the OCC and DHHS drafted the rehabilitation review procedure in consultation with State agencies and modeled on the State process. The OCC worked closely with DHHS to develop a process that comports with the law and due process requirements. This proposed resolution and procedure provide a legal and defensible review process for crimes against children and youth not covered by the State Caregiver Misconduct law.

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<sup>3</sup> Essentially, this is a Wis. Stat. Chapter 227 judicial review of an administrative determination.



### Comparison List of Offenses WI Caregiver Law and Milwaukee County Resolution 99-233

WI State Statue	Name of Offense	Checked if Barred per WI Caregiver Law	Checked if Barred per Milw Co Resolution 99-233 (highlighted reflects those barred by MC Resolution only)
<b>940, 941 and 943 crimes that are covered are listed below:</b>			
940.01	1st Degree Intentional Homicide	✓	✓
940.02	1st Degree Reckless Homicide	✓	✓
940.03	Felony Murder	✓	✓
940.05	2nd Degree Intentional Homicide	✓	✓
940.07	Homicide resulting from negligent control of vicious animal	-	✓
940.08	Homicide by negligent handling of dangerous weapon, explosives or fire	-	✓
940.09	Homicide by intoxicated use of vehicle or firearm	-	✓
940.1	Homicide by negligent operation of vehicle	-	✓
940.12	Assisting Suicide	✓	-
940.19 (2), (3), (4), (5), or (6)	Battery; substantial battery; aggravated battery (felony)	✓	✓
940.22 (2), Or (3)	Sexual exploitation by therapist; duty to report	✓	-
940.225 (1)	1st Degree Sexual Assault	✓	✓
940.225 (2)	2nd Degree Sexual Assault	✓	✓
940.225 (3)	3rd Degree Sexual Assault	✓	-
940.285 (2)	Abuse of individuals at risk	✓	-
940.29	Abuse of residents of mental facilities	✓	-
940.295	Abuse and neglect of patients and residents	✓	-
940.21	Mayhem	-	✓
941.32	Administering Dangerous or Stupefying Drugs	-	✓
943.32 (2)	Armed Robbery	-	✓
<b>948 crimes that are covered are listed below:</b>			
948.015	Other offenses against children	-	✓
948.02 (1)	1st Degree Sexual Assault of a child	✓	✓
948.02 (2)	2nd Degree Sexual Assault of a child	✓	✓
948.02 (3)	3rd Degree Sexual Assault of a child	-	✓
948.025	Engaging in repeated acts of sexual assault of the same child	✓	✓
948.03 (2) (a), (b), or (c)	Physical abuse of a child (intentional causation of bodily harm)	✓	✓
948.03 (3)	Physical abuse of a child - Reckless Causation of Bodily Harm	-	✓
948.03 (4)	Physical abuse of a child - Failing to Act to Prevent Bodily Harm	-	✓



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WI State Statute	Name of Offense	Checked if Barred per WI Caregiver Law	Checked if Barred per Milw Co Resolution 99-233 (highlighted reflects those barred by MC Resolution only)
948.04	Causing mental harm to a child	-	✓
948.05	Sexual exploitation of a child	✓	✓
948.051	Trafficking of a child	✓	✓
948.055	Causing a child to view or listen to sexual activity	✓	✓
948.06	Incest with a child	✓	✓
948.07	Child enticement	✓	✓
948.075	Use of a computer to facilitate a child sex crime	-	✓
948.08	Soliciting a child for prostitution	✓	✓
948.085	Sexual assault of a child placed in substitute care	✓	✓
948.09	Sexual intercourse with a child age 16 or older	-	✓
948.095	Sexual assault of a child by a school staff person or a person who works or volunteers with children	-	✓
948.1	Exposing genitals, pubic area, or intimate parts	-	✓
948.11	Exposing a child to harmful material or harmful descriptions or narrations.	✓	✓
948.11 (2)(a)	Whoever, with knowledge of the character and content of the material, sells, rents, exhibits, plays, distributes, or loans to a child any harmful material, with or without monetary consideration, is guilty of a Class I felony	-	✓
948.11 (am)	Any person who has attained the age of 17 and who, with knowledge of the character and content of the description or narrative account, verbally communicates, by any means, a harmful description or narrative account to a child, with or without monetary consideration, is guilty of a Class I felony	-	✓
948.12	Possession of child pornography	✓	✓
948.13	Child sex offender working with children	✓	✓
948.14	Registered sex offender and photographing minors	-	✓
948.2	Abandonment of a child	-	✓
948.21	Neglecting a child	✓	✓
948.22	Failure to support	-	✓
948.23	Concealing or not reporting death of a child; not reporting disappearance of a child	-	✓
948.24	Unauthorized placement for adoption	-	✓
948.25	Unauthorized interstate placements of children	-	✓
948.3	Abduction of another's child; constructive custody	✓	✓
948.31	Interference with custody by parent or others	-	✓
948.4	Contributing to the delinquency of a child	-	✓
948.45	Contributing to truancy	-	✓
948.50	Strip search by school employee	-	✓
948.51	Hazing	-	✓
948.53	Child unattended in child care vehicle	✓	✓
948.55	Leaving or storing a loaded firearm within the reach or easy access of a child	-	✓
948.60	Possession of a dangerous weapon by a person under 18	-	✓
948.605	Gun-free school zones	-	✓

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948.61	Dangerous weapons other than firearms on school premises	-	✓
948.62	Receiving stolen property from a child	-	✓
948.63	Receiving property from a child	-	✓
948.7	Tattooing of children	-	✓
<b>OTHER OFFENSES that are covered are listed below:</b>			
	Finding by a government agency of abuse or neglect of a client or of misappropriation of a client's property	✓	-
	Finding by a government agency of child abuse or neglect	✓	-