

2004 Review of the Human Services Background Study Process

DHS Licensing Division

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PURPOSE

The purpose of this report is to again review and evaluate the current background study process to determine if changes should be proposed to the 2005 Legislature. In addition to revisiting issues identified in a 2003 Legislative Report, this review provides information specifically addressing:

- statutory changes passed by the Legislature since the 2003 report was issued;
- administrative discretion to set aside disqualifications and to issue variances for disqualifications based on criminal sexual conduct;
- changes in protocol implemented as a result of this review; and
- family child care services that are licensed by the Licensing Division, but monitored by county employees. It should be noted that, while the 2003 Legislative Report focused only on background study issues related to services “directly licensed” by the Licensing Division and by the Minnesota Department of Health (MDH), this review and report focuses less on the work of other agencies, but is expanded to include family child care services.

This review was initiated on June 17, 2004. All decisions to set aside background study disqualifications and to grant variances related to background study disqualifications were temporarily suspended for two weeks to aid in evaluation of the program.

Information from various sources was obtained and reviewed so that all data reported in the 2003 Legislative Report that is relevant to background study decisions has been updated.

BACKGROUND

In January 2003, the Department of Human Services (DHS), Licensing Division, prepared a Legislative Report that reviewed the Background Study Process and Vulnerable Adults Act. The report was prepared pursuant to a directive under Laws of Minnesota 2002, chapter 292, section 3, which required:

- The Commissioner of Human Services to consult with the Commissioners of Health and Corrections, the Attorney General, and stakeholder groups involved with vulnerable adult maltreatment investigations and background studies and inform the Legislature about the issues reported to be most in need of a policy review by the Legislature.

- A report on available data regarding the background study set aside and variance processes and the subsequent maltreatment findings against people with criminal histories who have been allowed by a state agency to provide services to children and vulnerable adults.
- A report on the data regarding maltreatment investigations, rates of substantiation of maltreatment, appeals of findings, and appeal results.
- An examination of crimes that currently are considered disqualifying crimes and to recommend any change to current laws deemed appropriate.

Following the report to the Legislature, some changes were made to the background study law. The changes, described below, did **not** alter the most basic procedures of the background study system. The Legislature reviewed, but left intact, the requirement that each person studied, who is found to have a disqualifying characteristic, must be considered individually. Except for family child care settings (and some child foster care and some adult foster care settings not addressed in this report) all individuals discovered to have a disqualifying characteristic in their history must be offered an opportunity to demonstrate that they do not pose a risk of harm to people receiving services.

In regard to family child care settings, the background study law does treat some people categorically, in that certain criminal convictions may not receive a "set aside" by the Commissioner for specified periods of time.

GENERAL OVERVIEW

There are generally three different processes in place to complete background studies. These are:

1. DHS directly licensed programs – studies are completed and reconsiderations are processed by the Licensing Division.

DHS has been completing these background studies since March 29, 1991, and through June 30, 2004, 663,683 studies have been completed. There are approximately 4,000 directly licensed programs that receive these background studies.

2. DHS indirectly licensed programs (child and adult foster care and family child care) – studies are completed by counties, some reconsiderations are processed by counties and some by the Licensing Division.

Counties have been completing these studies since March 29, 1991. It is not known how many background studies have been completed by counties. There are approximately 24,000 licensed programs that receive these studies.

3. MDH and Department of Corrections (DOC) licensed programs – studies are completed by DHS and disqualification notices are issued by DHS, but reconsideration decisions are processed by MDH and DOC.

DHS has been completing the studies for MDH licensed programs since October 1, 1995, and for DOC licensed juvenile programs since August 1, 2001. Through June 30, 2004, DHS has completed 1,000,029 background studies for MDH licensed programs and 5,825 background studies for DOC licensed programs.

Through June 30, 2004, DHS has completed 1,669,537 background studies.

LEGISLATIVE CHANGES 2003 AND 2004

2003 Legislation

Laws of Minnesota 2003, First Special Session, chapter 14, article 6, section 6, amended the standards governing the reconsideration of disqualifications under Minn. Stat. § 245A.04, subdivision 3b, by clarifying the effect and scope of the Commissioner's set aside of a disqualification.

The amendment was proposed in response to the unpublished decision of the Minnesota Court of Appeals in *Blake Stephen Malloy v. Commissioner of Human Services*, (Minn. Ct. App. Docket No. C2-02-1335, filed March 18, 2003). In this case, the court reversed the Commissioner's decision and held that when the Commissioner of Human Services disqualifies an individual and later sets aside the disqualification, the Commissioner exceeds his/her authority if he reverses the set aside of the disqualification.

The amendment addressed the concerns presented by this decision by authorizing the Commissioner to rescind a previous set aside based on new information that indicates the individual may pose a risk of harm to persons receiving services. The amendment further clarified that the Commissioner's set aside of a disqualification is limited solely to the licensed program(s) identified in the set aside notice.

In 2003, the background study requirements contained in Minnesota Statutes, section 245A.04, were recodified into a separate chapter, Minnesota Statutes, chapter 245C, the Department of Human Services Background Studies Act.

2004 Legislation

Laws of Minnesota 2004, chapter 288, article 1, enhanced consumer protections under Minnesota Statutes, chapter 245C, as indicated below.

Section 38: Minn. Stat. § 245C.02.

Serious maltreatment is a disqualification. The 2004 amendment expands the definition of "serious maltreatment" to include neglect when it results in criminal sexual conduct against a child or a vulnerable adult. Prior to this amendment, a determination of neglect in this situation did not meet the definition of serious maltreatment and, therefore, was not a disqualification.

Section 54: Minn. Stat. § 245C.16, subd. 1.

Pursuant to § 245C.16, if the Commissioner determines that the individual studied has a disqualifying characteristic, the Commissioner reviews the information immediately available and makes a determination as to the subject's immediate risk of harm to persons served by the program where the individual studied will have direct contact. If, after evaluating the information immediately available, the Commissioner has reason to believe that the individual poses an imminent risk of harm to persons receiving services, the Commissioner may order the license holder to immediately remove the disqualified individual during the period in which the individual may request reconsideration of the disqualification. If the Commissioner determines that the individual poses a risk of harm requiring continuous, direct supervision while providing direct contact services, the Commissioner may order the license holder to provide this supervision during the time period in which the individual may request reconsideration of the disqualification.

The 2004 amendment requires that when determining whether an individual poses an immediate risk of harm, the Commissioner must consider whether the individual has a disqualification from a previous background study. The 2004 amendment also clarifies that the Commissioner may, pending the conclusion of a maltreatment investigation or criminal proceedings, order the immediate removal or continuous supervision of an individual if it is determined that the individual poses an imminent risk of harm based on arrest information or a pending maltreatment investigation.

The 2004 amendments in this section strengthen the Commissioner's ability to protect persons receiving services when individuals in direct contact may pose a risk of harm based on a previous disqualification, or when arrest information or a pending maltreatment investigation indicates the individual may pose an imminent risk of harm to persons receiving services.

Section 58: Minn. Stat. § 245C.20.

The 2004 amendment requires that licensed programs must document in personnel files the date the program initiates a background study and must contact the Commissioner to inquire about the status of the study if the program has not received a response from the Commissioner within 45 days of initiation of the study. This facilitates compliance with the requirement that individuals must not begin direct contact with individuals receiving services until a background study has been submitted.

Section 61: Minn. Stat. § 245C.22.

In reviewing a request for reconsideration under § 245C.22, the Commissioner must give preeminent weight to the safety of each person served by the license holder over the

interests of the license holder, and must consider the eight factors specified under subdivision 4 of this section.

The 2004 amendment strengthens consumer protections by clarifying that any single factor under subdivision 4 may be determinative of the Commissioner's decision whether to set aside, or not set aside, an individual's disqualification. The amendment further clarifies that it is the disqualified subject who has the burden of proof to demonstrate that the individual does not pose a risk of harm to persons receiving services.

This amendment was passed, in part, in response to *Johnson v. Commissioner of Health*, 671 N.W.2d 921 (Minn. Ct. App. Dec. 9, 2003). In this case, the Minnesota Court of Appeals reversed the Commissioner of Health's decision to deny Ms. Johnson's request for a set aside of her disqualification for a conviction of second degree assault, and remanded the matter to the Commissioner for written findings and reasons for the Commissioner's denial of the set aside, with regard to application of each of the eight statutory factors. While the Department of Human Services addresses each of the eight statutory factors in each decision it issues, these amendments make it clear that the Commissioner may decline to set aside a disqualification if any single factor is serious enough to pose a risk of harm to persons receiving services.

Section 73: Minn. Stat. § 245C.28.

When a licensing sanction is based on a disqualification which is not set aside, a contested case hearing is conducted by an administrative law judge. Disqualified individuals whose disqualifications are not set aside and who are public employees also have a right to a contested case hearing regarding the decision.

The 2004 amendment requires that when rendering a recommendation regarding the disqualification, the administrative law judge must consider all of the characteristics that cause the individual to be disqualified, including those characteristics that were not otherwise subject to review within the scope of the hearing (for example, convictions), in order to determine whether the individual poses a risk of harm. The amendment specifies that the administrative law judge's recommendation and the Commissioner's order to set aside a disqualification that is the subject of the hearing constitutes a determination that the individual does not pose a risk of harm and that the individual may provide direct contact services in the program specified in the set aside decision.

Section 77: Minn. Stat. § 256.045.

Individuals who are disqualified based on serious or recurring maltreatment, failure to report maltreatment, or a preponderance of evidence of a disqualifying crime, and whose disqualification is not consolidated with a licensing sanction, have the right to a fair hearing. Fair hearings are conducted by Human Services referees.

The 2004 amendment requires that when referees determine whether an individual poses a risk of harm, they must consider all of the characteristics that cause the individual to be disqualified, just as is required of administrative law judges under section 73.

2004 REVIEW BY LICENSING DIVISION

This review by the Licensing Division addresses the following list of items that are discussed in some detail. The items discussed are:

1. When a background study subject can begin to provide direct contact services;
2. Disqualification “look-back” periods;
3. Disqualifications for substantiated maltreatment – and timeliness of investigations;
4. State agency discretion to set aside a disqualification or grant a variance;
5. Subsequent maltreatment following a set aside or variance;
6. National record checks with the Federal Bureau of Investigation;
7. Changes to disqualification crimes;
8. Set asides and variances granted to individuals with histories of criminal sexual conduct; and
9. Updated data on maltreatment, on appeals of maltreatment findings, and on appeals of disqualifications.

The Licensing Division has reviewed tables prepared in the 2003 Report, updated that data, and has summarized its findings on the following pages. The 2004 review again addresses issues that were addressed in 2003.

1. When a Background Study Subject Can Begin to Provide Direct Contact Services. (Should license holders be required to wait until the background study is complete before assigning an individual to provide direct contact services?)

Currently, background study subjects can begin providing direct contact services as soon as a background study form is submitted to DHS. The employer is not required to wait until the results of the background study are received before assigning a new hire to provide direct contact services.

For the 2003 Legislative Report, a review of background studies data on individuals responsible for maltreatment in DHS-licensed programs showed that delaying a new employee’s direct contact until the program received background study results would not have prevented maltreatment.

2004 Review:

Timeframe requirements of background study law:

Within 15 working days after receipt of a background study form, the department is required to provide two notices: one to the background study subject and one to the facility that initiated the background study. The notice must provide the study results, or it must indicate that more time is needed to complete the study. Generally, when a background study yields no disqualifying information, the notices are sent very quickly. If some criminal information or maltreatment history is discovered, additional analysis is required to determine if the individual must be disqualified, and thus, the background

study results take a few additional days. Over the past year, the turnaround time for providing this notice by mail has varied from four to eleven days.

In July 2004, the Department implemented an Internet based background study system through which license holders may submit background study requests electronically, and receive back some of the results electronically. For background studies initiated over the new Internet system, recent turnaround times have been as short as 25 hours.

Despite reductions in personnel to meet legislative reductions, it is anticipated that the turnaround time will decrease with the increasing popularity of Internet based background study request submissions by license holders. Internet background studies are discussed more under the New Protocol heading below.

Maltreatment Occurrence:

In 2004, it was determined that there was one case in which a newly hired individual committed maltreatment before the facility received the final results of a background study that ordered his removal.

The individual in this case had two prior theft convictions that had caused him to be disqualified from a different licensed program. He requested a set aside of that disqualification, but the request was denied, and the facility was ordered to remove him from direct contact. He subsequently was hired at a second facility, where he committed the thefts.

The second facility hired the individual, submitted a request for a background study, and assigned him to provide direct contact services as permitted in the law. DHS received the background study request, and on the tenth working day, sent the program a notice stating that more time was needed to complete his background study. On the seventeenth working day, a notice was sent to the facility ordering his removal from any position allowing direct contact.

Between the time that the facility submitted the request for the background study and the facility's receipt of the order for removal of the individual, the individual stole checks from two vulnerable adults. The second theft actually occurred the day after the order for removal was sent, but the facility had not yet received it.

Discussion:

In 13 years and 1.67 million background studies, there has now been one case where the background study system failed to remove someone quickly enough to prevent maltreatment. While employers are always urged to check employment references before placing any new hire in any position of responsibility, it must be noted that some applicants are less than truthful in listing all previous employers. Given that this is the first and only known case where this occurred, it does not appear necessary to pursue a change to the background study law that would prohibit employers from making their

own decision about starting dates for new hires. Rather, it appears that the emphasis should be placed in speeding the background study results for employers.

New Protocol:

Beginning in June 2004, the Department initiated a Internet based background study system whereby license holders may submit requests for background studies and receive some results of these studies over the Internet. This new system significantly streamlines the background study process for DHS, and allows for a far more rapid turnaround time. As indicated above, some background study notices have been provided electronically (and the paper response also mailed) in as short a time as 25 hours. The working goal for these background studies is a 48 hour turnaround time. Currently, the electronic notice to providers is limited to whether the person is not disqualified or whether more time is needed to complete the study.

Beginning in early September 2004, the electronic communication back to the providers who initiate Internet based studies will be modified to also include orders to immediately remove the subject when appropriate. The routine electronic background study will continue to review whether the subject has had a previous study, but will also quickly determine whether the most recent study resulted in an order for the individual's removal.

With this type of information made available to license holders electronically within 48 hours from submission of the background study request, the opportunity for a disqualified person to commit maltreatment while jumping from one employer to the next, just ahead of the background study results, will be greatly minimized.

As the Internet system increases in popularity, refinements will be made to speed the process even further. Moreover, as the percentage of background studies submitted over the Internet increases, additional resources will become available to speed the processing of paper-based requests as well.

At some time in the near future, the Department may choose to pursue the statutory requirement for all license holders to submit background study requests electronically over the Internet.

2. Disqualification "Look-back" Periods

Currently, disqualifying characteristics are divided into four look-back periods: unlimited, 15 years, ten years, and seven years. The look-back period is unlimited for violent crimes, involuntary termination of parental rights, and some felonies; 15 years for other felonies; ten years for gross misdemeanors; and seven years for misdemeanors, serious or recurring maltreatment, and failure to report serious or recurring maltreatment.

The data review for the 2003 Legislative report found that there were no individuals responsible for maltreatment in DHS-licensed programs for whom an extension of the look-back period for felonies or maltreatment would have prevented the maltreatment.

2004 Review: For FY03 and FY04 there were 281 individuals determined through a DHS investigation to be responsible for substantiated maltreatment of a child or vulnerable adult and disqualified.

For this report, a review of the 281 individuals' criminal histories on file at the Bureau of Criminal Apprehension (BCA) was completed in August 2004 to determine whether any of the 281 individuals had a criminal history prior to their committing maltreatment. The review focused on whether any of these individuals had a criminal history prior to their committing maltreatment that would have caused them to be disqualified if the statutory disqualification look-back periods had been longer.

Of these 281 individuals, there was one individual who met this criteria. This individual had a misdemeanor theft conviction in 1952 and a felony burglary conviction in 1965 that were beyond the statutory disqualification look-back periods.

A 2003 investigation determined that this individual was responsible for non-disqualifying neglect when s/he failed to conduct hourly bed checks on an individual with a very high blood alcohol content who was admitted to a detox program. (The criteria that must be met to disqualify an individual for substantiated maltreatment are discussed in more detail in the next section below.) Shortly thereafter, another 2003 investigation concluded that this individual had committed sexual abuse when s/he touched a client's genitalia and had the client touch his/her genitalia at the vulnerable adult's apartment between detox admissions.

The background study law requires that DHS must offer disqualified individuals an opportunity to explain why, despite their past criminal behavior, they do not currently present a risk of harm to people receiving services. One of the variables that must be considered in this process is the length of time that has passed without re-offending since the disqualifying offense(s). Therefore, even if the law did require the disqualification of individuals regardless of the time that has passed since any disqualifying conviction, it is likely that a set aside would have been granted for a disqualification based on convictions for property crimes that were 35 and 48 years earlier.

With one case in 13 years and 1.67 million background studies, a change to the look-back period for disqualification does not appear necessary.

3. Disqualifications for Substantiated Maltreatment

Some individuals who are determined through investigation under the Vulnerable Adults Act (Minnesota Statutes, section 626.557) or the Maltreatment of Minors Act (Minnesota Statutes, section 626.556) to be responsible for substantiated maltreatment may be disqualified from providing direct contact services. The decision to disqualify is based on the additional statutory criteria that must be met. If the maltreatment meets the statutory definitions of "serious" or "recurring" the individual will be disqualified, but if the maltreatment incident does not meet these definitions, the individual is not be disqualified. If a finding of maltreatment does not disqualify an individual because it is not serious or

recurring, any subsequent finding of maltreatment within the next seven years will result in disqualification, because it will then be "recurring."

Data for the 2003 Legislative Report showed that from 1998 to 2001 there were no cases where individuals who maltreated in DHS, MDH, or DOC-licensed programs had a history of non-disqualifying maltreatment. In other words, the 2003 Legislative Report concluded that no individual who was determined to have committed maltreatment that did not meet the statutory definition of "serious" subsequently committed another act of maltreatment.

2004 Review:

Subsequent Maltreatment:

The 2003 Legislative Report stated that there were no individuals with a history of non-disqualifying maltreatment who again maltreated in DHS licensed programs. However, a more recent review of the data in the continuously improving Licensing Information System database shows that there was one person who meets this criteria. In fact, it is the same individual mentioned in item 2 above, who, due to the statutory disqualification look-back period, was not disqualified for convictions in 1952 and 1965. In 2000 the individual committed non-disqualifying neglect when s/he failed to provide necessary supervision (failed to conduct hourly bed checks) on a client with a very high blood alcohol level who was admitted to a detox program. In 2001 the individual was determined to have committed sexual abuse when s/he touched a client's genitalia and had the client touch his/her genitalia as well.

During the period of September 1, 1999, (the first date for which reliable data on individuals is available) to June 30, 2004, there have been 579 individuals determined through a DHS investigation to be responsible for substantiated maltreatment of either a vulnerable adult or a child. Of these 579 people, 254 individuals were not disqualified because their maltreatment did not meet the statutory definition to be serious or recurring. If the law had required disqualification of individuals who commit ALL maltreatment, all 254 of these people, only one of whom committed subsequent maltreatment, would have been disqualified. For this period, 253 additional individuals would have been disqualified to prevent maltreatment that does not appear likely to occur anyway.

Since 1991, for directly licensed programs, if the background study law been written to require disqualification of all individuals who commit maltreatment, regardless of whether it is serious or recurring, the data shows that one incident of genital touching described above may have been prevented.

Timeliness of Maltreatment Investigations:

In addition to the case described above, the data from January 2002 through June 2004 shows that there were 12 individuals who were disqualified for recurring maltreatment. These 12 individuals are distinguished from the case discussed above because in these 12 cases both the first and the second determinations of maltreatment – and the resulting disqualification – all occurred at the same time. In these 12 cases, the incidents of

maltreatment did not necessarily occur at the same time, but the investigations were concluded at the same time. In the case discussed above, the second incident of maltreatment occurred after the first incident was investigated and after the individual was informed that s/he was not disqualified.

A review was completed to determine whether the timeliness of the first maltreatment investigation could have had any influence on the occurrence of the second incident of maltreatment. Under the Vulnerable Adults Act, DIHS is required to complete maltreatment investigations within 60 days but, due to resource limitations, this does not regularly occur. At the close of FY04, the average length of time to complete a maltreatment investigation was around nine months.

For this review, the specific question asked was whether completing the investigation into the first incident within the statutory timelines would have caused the individual to be disqualified and removed, thereby preventing the second incident of maltreatment from occurring. A review of the data showed the following for the 12 individuals who were ultimately disqualified for recurring maltreatment:

1. In four cases, the two reports alleging maltreatment were received on the same day (so a more speedy investigation would not have impacted the second event).
2. In four other cases, the second report was received within 30 days of the first report (so an investigation completed at 60 days could not have resulted in removal of the individual BEFORE the second incident).
3. In the other four cases, the second report was received more than 60 days after the first report:
 - a. In three of these cases, the first incident was determined to have been non-disqualifying maltreatment, and therefore a speedier investigation would not have removed the individual from a position allowing direct contact with clients before the second incident occurred.
 - b. In the fourth case, the first incident was determined to be disqualifying maltreatment, in that it was recurring maltreatment in and of itself. Therefore, if the investigation had been completed more quickly, and the person had been disqualified and removed, the second incident of maltreatment (for which the report was received 11 months later) may have been prevented.

New Protocol:

To assist in assigning a higher priority to those cases where the Department may have an active investigation underway when a second report of possible maltreatment is received pertaining to the same "alleged perpetrator" a search of all open investigations is completed for every new report received. Every new report of possible maltreatment is carefully reviewed, and a database search is conducted to determine whether the person who is suspected of being responsible for the maltreatment has been identified as an

alleged perpetrator in any other report and whether or not that investigation has been concluded. All reports involving an individual who has been identified as an alleged perpetrator in more than one report are immediately raised to the highest priority level for completion.

Findings:

- If statutory language had required the disqualification of individuals for any incident of substantiated maltreatment (with no increased resources for speedier investigations), one incident of substantiated maltreatment may have been prevented. (The case described in "Prior Maltreatment" section above.)
- If investigation resources had been increased, so as to accomplish compliance with statutory 60 day investigation timelines only (with no change in disqualification criteria in statute), one incident of maltreatment may have been prevented. (The case described in "Timeliness of Maltreatment Investigations," paragraph 3, item b.)
- If BOTH the investigation resources had been available to complete speedier investigations within the statutory timelines AND the law provided for disqualification of all substantiated perpetrators of maltreatment, five incidents of maltreatment of the total 936 cases from July 1, 2000 to June 30, 2004, in directly licensed DHS programs may possibly have been prevented. (The case described in "Prior Maltreatment section above, and all four cases described in "Timeliness of Maltreatment Investigations, paragraph 3, items a and b.)

4. State Agency Discretion to Set Aside a Disqualification or Grant a Variance

Currently, there are some disqualifications for some individuals, which DHS may not set aside. This restriction on the Commissioner's discretion applies to persons providing services in family child care homes and child or adult foster care when services provided are in the license holder's home. This is referred to as a "permanent, ten year, or seven year bar." The effective date of these "bars" begins on the date that the individual is discharged from the sentence imposed for the offense. The Legislature has clarified that the Commissioner may grant variances to allow individuals with these convictions to provide services when the Commissioner determines that the variance will not jeopardize the health and safety of people receiving services.

2004 Review: See Tables 1, 2, 3, and 4. Tables 1 and 2 update the tables in the 2003 Legislative Report, while Tables 3 and 4 are new topics for this report.

Out of over 1.67 million background studies conducted by DHS since 1991, there have been 4,667 disqualifications set aside by DHS in directly licensed programs. Since 1995, MDH has set aside 9,273 disqualifications for MDH licensed programs. Additionally, there have been 144 variances granted by DHS for directly licensed programs and 156 variances granted by MDH for MDH licensed programs. For family child care (discussed in more detail later), since 1995, there have been 965 set aside decisions and 1,559 variance decisions by DHS.

None of the people who were granted variances in DHS directly licensed programs or MDH licensed programs went on to commit maltreatment.

Among all DHS directly licensed programs, family child care, and MDH licensed programs, for periods in which data is available, there have been 14,905 decisions to set aside disqualifications (4,667 + 9,273 + 965). There have been 1,859 decisions to grant variances (144 + 156 + 1,559). Of the total 16,764 decisions (14,905 + 1,859) that allowed an individual to provide direct contact services or reside in a home where the services are provided, 32 individuals have gone on to commit maltreatment. Conversely, 16,732 decisions, or 99.81 percent of the decisions, were NOT followed by maltreatment.

Each of these 32 cases has been very carefully reviewed to determine whether any predictive information was missed. While just .19 percent, or one out of every 524 decisions that were followed by maltreatment is a very small number, it is not acceptable to DHS. Predicting or controlling the behavior of individuals who provide direct contact services is a very challenging task. In an attempt to further influence these individuals to take additional responsibility for their behavior while working with children and vulnerable adults, set aside and variance letters issued to these individuals will begin reminding them of this responsibility in early September 2004. The letters will contain a paragraph with text similar to the following:

This decision to set aside your disqualification is a very serious decision for the Department of Human Services, and one that places additional significance on the quality of the services that you provide to children or vulnerable adults. The Department has accepted your assurance that you do not pose a risk of harm to children or vulnerable adults. If you subsequently commit any act of maltreatment, your case will be carefully reviewed within the Department and may be reviewed outside the department. It will call into question whether any individuals with histories like yours should ever be allowed to provide direct care to a vulnerable population in Minnesota. With this set aside, it is your duty to provide only the highest quality of services to those who will depend on you.

These cases will continue to be very closely reviewed, and all set aside and variance decisions will be made with a focus on the statutory direction to "give preeminent weight to the safety of each person served . . . over the interests of the license holder, applicant, or other entity as provided in this chapter"

5. Cases of Subsequent Maltreatment Following a Variance or Set Aside

a. Department of Human Services directly licensed programs and county monitored adult foster care licenses where people with developmental disabilities also received directly licensed MR/RC services

DHS has conducted a total of 663,683 background studies for DHS directly licensed programs from March 29, 1991, through June 30, 2004, and for non-licensed Personal Care Provider Organizations (PCPOs) since August 1, 1997, through June 30, 2004.

There were 11,863 disqualifications and 4,180 were set aside. During this period, DHS granted 144 variances to 91 people (variances are temporary and must be renewed). Of these 4,180 set aside cases, it was determined that 17 people were found culpable for maltreatment through DHS investigations after their disqualifications were set aside. None of the people who were granted variances went on to commit maltreatment. Table 1 below summarizes these cases:

Table 1. DHS AND NON-LICENSED PCPOs

Disqualifying Event	Disqualified	Date DHS Set Aside	Subsequent Maltreatment	Facility Type
1. 1985 Two counts Check Forgery	2/24/92	4/28/92	11/16/96 Disqualifying Neglect	DD Residential
2. 1982 Theft, Burg. 1985 Agg Robbery	5/20/94	7/7/94	*11/94 Disqualifying Sexual Abuse	Group Home for Children (Rule 8)
3. *2/25/93 Physical Abuse	5/25/93	6/6/93	*5/3/94 Disqualifying Physical Abuse	MI Residential for Children (Rule 5)
4. 7/28/95 Felony Drug	5/19/98	6/23/98	8/98 Disqualifying Neglect	CD Residential (Rule 35)
5. 11/12/91 5 th Degree Domestic Assault	10/5/98	11/2/98	7/8/99 Disqualifying Sexual Abuse	DD Day Training & Habilitation
6. 1994 Theft-Cash Forged Check	5/15/98	6/23/98	3/17/00 Disqualifying Physical Abuse	DD Adult Foster Care/Waivered Services
7. 1995 WOA – Theft	4/9/98	6/23/98	5/23/00 Disqualifying Physical Abuse	MI Residential for Children (Rule 5)
8. *1988 Theft-NSF Check	10/27/93	3/23/94	7/30/01 Disqualifying Financial Exploitation	DD Adult Foster Care/Waivered Services
9. 1989 2 nd Deg Rob. 1997 Dishonored Cks	3/15/00	4/11/00	1/01 Disqualifying Financial Exploitation	DD Adult Foster Care/Waivered Services
10. 1998 Theft	7/17/00	8/16/00	10/22/01 Non-Disqualifying Neglect	Child Care Center (Rule 3)
11. *1982 5 th Degree Assault	**6/24/91	7/26/91	*11/23/94 Disqualifying Verbal Abuse	DD Residential

12. *1982 Theft *1984 Theft 1989 Drug/Negligent Operation of Weapon	**5/20/94 8/18/94	9/2/94	9/1/01 Disqualifying Neglect	DD Adult Foster Care/Waivered Services
13. 1992 Check Forgery	5/1/96	8/14/96 MDH 4/18/97 DHS	9 & 11/01 Disqualifying Financial Exploitation	DD Adult Foster Care/Waivered Services
14. 1986 Forgery	12/23/98	3/27/00	10/23/00 Non- Disqualifying Neglect	Child Care Center (Rule 3)

Additions to Table 1 since the 2003 Report for January 1, 2003 – June 30, 2004

15. 1996 3 rd Degree Assault	11/24/97	12/19/97	4/28/00 Non-Disqualifying Neglect 3/17/03 Disqualifying Financial Exploitation	Family Foster Care Adult Foster Care/ Waivered Services
16. 1999 Theft	2/14/00	12/6/01	1/12/02 Disqualifying Neglect	Adult Foster Care/ Waivered Services
17. 1994 WOA – Theft	6/2/00	4/30/03	5/4/04 Disqualifying Neglect	Unlicensed Personal Care Provider Organization

WOA – Wrongfully Obtaining Assistance

*Look-back period for disqualification expired

**Look-back period at time of disqualification was 15 years for all crimes

b. Minnesota Department of Health licensed facilities

DHS has conducted a total of 1,000,029 background studies for MDH-licensed programs from October 1, 1995, through June 30, 2004. There were 18,749 disqualifications and 9,273 were set aside. During this period MDH granted 156 variances. Of these 9,273 set aside cases, it was determined that six people were found culpable for maltreatment through MDH investigations after their disqualifications were set aside. None of the people who were granted variances went on to commit maltreatment. Table 2 below summarizes these cases:

Table 2. DEPARTMENT OF HEALTH

Disqualifying Event	Disqualified	Date MDH Set Aside	Subsequent Maltreatment	Facility Type
1. 1992 3 rd Degree Burglary	10/29/97	12/14/01	6/1/02 Non-disqualifying Physical Abuse	Nursing Home
2. 1998 WOA – Theft	1/15/99	2/24/99 & 9/26/02	9/24/01 Non-disqualifying Physical Abuse	Nursing Home
3. 1996 Check Forgery	10/9/96	2/27/97	2-3/00 Disqualifying Financial Exploitation	Nursing Home
4. 1993 Aiding & Abetting Felony Drug	12/20/95	12/11/97	1-2/98 Disqualifying Financial Exploitation	Nursing Home

Additions to Table 2 since the 2003 Report for January 1, 2003 – June 30, 2004

5. 1995 Aggravated Forgery	12/23/96	9/16/02	6/28/03 Disqualifying Financial Exploitation	Nursing Home
6. 2002 Check Forgery and Theft	8/12/02	9/16/02	6/28/03 Disqualifying Physical Abuse	Home Care

c. County monitored family child care settings

Total set asides and variances: For family child care settings, from 1995 (the first year for which reliable data is available) through June of 2004, there have been a total of 965 set aside decisions and 1,559 disqualification-related variances granted to 964 people. (Variances are time limited and need to be renewed.) Table 3 shows the numbers of set aside, not set aside, and variance decisions issued for family child care each year since 1995:

Table 3. Family Child Care
Reconsideration of Disqualifications (CY 1995 to CY 2003)

Calendar Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
DISQUALIFICATIONS											
1. Set aside	60	85	67	162	126	147	82	106	96	34	965
2. Not set aside	25	26	27	19	25	29	54	46	38	31	320
3. Variance granted	136	138	149	131	120	169	147	235	239	95	1,559

Reconsideration data by rule number was not recorded outside of individual files before October 1994.

Subsequent Maltreatment:

The 1.67 million background studies reported in this section do not include background studies completed by counties and private licensing agencies on people providing services in family child care, child foster care, or most adult foster care settings. (Some counties have elected to have DHS complete the background studies for corporate adult

foster care providers who also are licensed directly by DHS as DD waived services providers.)

However, Table 4 shows all the known cases in which individuals who had been disqualified were allowed to either provide family child care services or to reside in the home where the family child care services were provided, and subsequently committed maltreatment, as determined by counties. The data is from January 1, 1993, the first year during which data is available, to June 30, 2004.

This data shows that since January 1, 1993, there have been a total of nine individuals who, after receiving a set aside of their disqualification or a variance that allowed direct contact, went on to commit maltreatment of a child in family child care. Table 4 below summarizes those nine cases:

Table 4. FAMILY CHILD CARE

(Cases where a variance or set aside was granted and the license holder later received a determination of maltreatment)

Original Disqualifying event	Variance Date(s)	Set Aside Date	Subsequent Malt. Date	Description of subsequent maltreatment	Subsequent action
1. Maltreatment 1997	3/30/1998 7/19/1999 8/30/2000 9/04/2001		9/27/2002	Maltreatment by LH when a child in care was hit with a fly swatter leaving a mark	TIS and Revocation
2. POE theft 1999	12/12/2002		07/03/2003	Maltreatment by LH when special needs child in care had ears pulled/grabbed causing bruising.	TIS and Revocation
3. Maltreatment 2000	12/28/2000		05/03/2001	Maltreatment by LH when a child in care was slapped/spanked	TIS and Revocation
4. Maltreatment 1992	06/17/1994 04/05/1995	05/11/1998	07/08/2002	Maltreatment by LH when an infant in care received fractures and injuries that were inconsistent with the explanation given by the LH	TIS and Revocation
5. Maltreatment (recurring neglect) 1997	01/28/1999	01/05/2000	03/21/2002	Neglect by the LH when an 11 year old grandchild sexually abused children in care	TIS and Revocation
6. POE * theft 1992		03/19/2001	03/12/2003	Neglect by the LH when a child in care was sexually abused by a household member	TIS and Revocation
7. Theft 1983		05/11/1998	06/28/2002	Maltreatment by LH when own child was spanked during hours of care	County issued a correction order on 6/28/2002; LH got additional training

8. Maltreatment 2000	09/11/2002 05/21/2003		04/20/2004	Maltreatment by LH when child in care was choked and slapped	TIS and Revocation
9. Theft 1998	01/30/2001 08/16/2002	01/08/2004	01/22/2004	Maltreatment determined when LH left an 8-month-old asleep in the house.	Fine and Suspension

* POE is an abbreviation that refers to disqualifications where there was no criminal conviction for a disqualifying crime, but there has been an administrative determination that there is a preponderance of evidence that the individual committed an act that meets the definition of a disqualifying crime.

Findings:

For all of these 2,524 set aside and variance decisions (965 set asides + 1,559 variances) that allowed individuals to either provide services or to continue residing in the home where services are provided (plus the unknown number of those who received a set aside or variance prior to 1995), there have been nine cases where the set aside or variance was followed by substantiated maltreatment of a child in family child care.

During this review, it was discovered that the Licensing Division unknowingly had concurrently reviewed one individual's request for a set-aside of a disqualification while also conducting an active investigation of alleged maltreatment by the individual. Regrettably, the disqualification was set aside on its own merits, and the maltreatment was subsequently substantiated. Because the maltreatment was not disqualifying maltreatment under the law, the individual was allowed to continue working under the set-aside of the disqualification. As described above in the summary of legislation, in March 2003 the Minnesota Court of Appeals determined that the law did not authorize DHS to rescind a decision to set aside a disqualification unless the background study subject committed a new disqualifying act.

To address these two issues, the Licensing Division initiated two changes: one through legislation and one through a protocol change, as described below:

Legislation:

The Licensing Division successfully proposed a legislative amendment during the 2003 legislative session that allows the Commissioner to rescind a set aside decision if the Commissioner receives new information indicating that the individual with a set aside disqualification may pose a risk of harm to persons receiving services.

New Protocols:

The Licensing Division has initiated a new internal protocol whereby the background study status of every alleged perpetrator is documented at the time a new report is received and at the time the investigation is concluded. Also, upon receipt of a request for reconsideration and at the time a decision is to be made on a request for reconsideration, there is a review of Licensing Division data to

determine whether the individual who has requested reconsideration of the disqualification has been reported as a possible perpetrator of maltreatment. (These protocol changes are in addition to the change mentioned above whereby there is a search of the database of open investigations to determine whether each new alleged perpetrator was named in any previously received maltreatment report, and whether or not the investigation has been completed.)

These new protocols, combined with the legislative change, will assure that all individuals with a set aside disqualification may be removed from direct contact with clients upon receipt of new complaint information about the individual that indicates that the individual may pose a risk of harm. Additionally, it assures that no decision to set aside a disqualification will be made while the Division is conducting an active investigation to determine whether this person is responsible for maltreatment.

6. National Record Checks with Federal Bureau of Investigation (FBI)

FBI records continue to be sought when there is reasonable cause to believe the FBI has information pertinent to a disqualification. The cost for DHS to process a FBI study is approximately \$30, and it may take as long as three months to get the FBI record.

The 2003 Legislative Report stated that there were over 515,500 background studies conducted from 2000 through 2002 and over 4,800 times that fingerprints were requested for a national record check with the FBI. There were 80 disqualifications as a result of information from FBI records out of over 12,600 total disqualifications.

2004 Review: Since the 2003 Legislative Report, there have been an additional 242,896 background studies completed, and fingerprints have been required for 3,006 of these studies. For this same period there have been a total of 8,050 disqualifications, and 303 of these were based on criminal history information from the FBI. Overall, the percentage of studies requiring an FBI record check is increasing, and the percentage of FBI record checks that result in disqualification is increasing.

Since the background study process was begun in 1991, there have been two cases where it was later learned that someone who committed maltreatment had a disqualifying criminal history on file with the FBI. The individuals had not been disqualified, however, because DHS was unaware of the FBI record. In these two cases, DHS had not been able to pursue the FBI record because there was no "reasonable cause" to pursue the record--as that reasonable cause standard for this situation is defined in statute. In both cases, the employer had been aware that the individual had a criminal history in another state, but the employer did not tell DHS this information. Had the employer informed DHS, the standard for reasonable cause would have been met, and DHS would have initiated a FBI record search.

In 2002 the Licensing Division successfully initiated a legislative change requiring license holders to inform DHS of any information about disqualifying criminal history. Since then, there have been no cases in which it was learned that a substantiated perpetrator of maltreatment had a previously unknown criminal record on file at the FBI.

7. Changes to Disqualification Crimes

The 2003 Legislative Report stated that there was some public interest in adding two relatively new crimes as disqualifying characteristics. These were: state lottery fraud (established in 1989) and identity theft (established in 1999).

The law gives DHS the authority to disqualify an individual when DHS determines that there is a preponderance of evidence that the individual committed an act that meets the definition of a disqualifying crime. As reported in 2003, while these convictions are not listed as disqualifiers, DHS can disqualify individuals who have been convicted of these crimes, because the elements of the crimes are essentially the same as a disqualifying theft crime.

A review of the data shows that since 1991, DHS has disqualified no one for lottery fraud, but has disqualified one person with a conviction for identity theft. The person was disqualified following a 2003 background study that showed a 2001 conviction. The individual also had six other disqualifying crimes.

There is no data to demonstrate the need to add identity theft as a disqualifying characteristic. Due to widespread public concern over identity theft, however, an amendment to add this crime as a disqualifier will be proposed to the 2005 Legislature.

8. Set asides and Variances Granted to Individuals with a History of Criminal Sexual Conduct:

The background study law prohibits the Commissioner from setting aside a disqualification for criminal sexual conduct in the first through fourth degree for people affiliated with family child care in the provider's own home. This restriction does not apply to fifth degree criminal sexual conduct. Under certain circumstances, however, those individuals who are prohibited from receiving a set aside of their disqualification may provide direct contact services or continue to reside in the home under a variance. Variances are permitted when there are conditions under which a disqualified individual may provide direct contact services or have access to people receiving services that minimize the risk of harm to people receiving services.

For directly licensed programs there is no restriction on the Commissioner's discretion to set aside disqualifications for any level of criminal sexual conduct by individuals who wish to provide direct contact services.

a. Directly Licensed Programs

Since 1991, and resulting from background studies completed by the Licensing Division, 268 individuals have been disqualified because of all levels of convictions for criminal sexual conduct. There have been few variances and set asides granted that allowed people who were disqualified for criminal sexual conduct to provide direct contact

services. In total, since 1991, there have been seven variances granted for two people and 13 set asides. (Variances need to be renewed every year.) One of the people who received a set aside had previously received a variance.

Of these variances and set asides, only one set aside and one variance remain active. The two cases are summarized below:

1. The one variance allows the individual to provide janitorial services in a state operated campus based mental health/chemical dependency treatment program. The only direct contact services provided by this person may involve a very rare need to perform some emergency crisis intervention. The individual was convicted of first degree criminal sexual conduct related to his having sexual contact with a relative who lived with the individual and his/her spouse over the summers of 1987 and 1988. The victim was 14 and 15 years old during the two summers. The variance was first issued in 1992, and has been renewed annually with no problems observed.
2. The individual with a set aside was convicted of third degree criminal sexual conduct in 1973, related to an incident in which he, along with two other men, had sexual contact with a woman they were drinking and taking drugs with at a party. He originally received a variance in 1996, but in 2000 he received a set aside to continue working in the same inpatient and outpatient chemical dependency treatment program serving adults. No problems have been reported.

One of the people who received a set aside for a criminal sexual conduct disqualification was allowed to provide direct contact services in a child care center. The individual was convicted of first degree criminal sexual conduct 16 years earlier related to sexual contact with his daughter. His criminal record was expunged, after the court reviewed many letters of support including information from the daughter who recanted her story. DHS also received several letters of recommendation, including one from his daughter, and set aside the disqualification so that he could complete a supervised internship in a child care center as part of his nursing school education. He is no longer providing direct contact services in any licensed program in Minnesota.

No person who received a set-aside of a disqualification for criminal sexual conduct and no person who received a variance related to a criminal sexual conduct disqualification has been determined to have committed maltreatment of a child or vulnerable adult in any directly licensed program.

b. Family Child Care:

Over all the years for which the Licensing Division has aggregate data to review (back to 1995), the Licensing Division has issued few variances and set asides to people with histories of criminal sexual conduct relative to family child care. For family child care settings, there have been 20 variances issued for a total of eight people. (Variances need to be renewed each year.) One person received a set aside.

Of the 20 variances issued, two remain active, and both involve the husbands of the providers. The one set aside also remains active, and involves the son of the provider. In none of these three cases does the subject provide any type of child care, and in all cases the person is away from the home during the hours that child care is provided. The variances and set aside allow the person to continue residing in the home where the services are provided.

Following are brief summaries of the cases:

1. Set Aside: the provider's son and the victim were both minors in 1998 when the incident occurred (he was 17 and she was a couple weeks shy of her seventeenth birthday). They had been sexually active in the past. On this occasion he attempted to have sex with her against her will, and he was charged with fifth degree criminal sexual conduct.
2. Variance: In 1999 the provider's husband was charged with attempted third and fourth degree criminal sexual conduct after he gave alcohol to his 20 year old niece and then attempted to have sex with her. He received a stayed sentence, a sex offender evaluation, and a chemical use evaluation, after which the conviction was reduced to fifth degree criminal sexual conduct.
3. Variance: The husband of the provider was disqualified based on the preponderance of evidence that he committed a disqualifying crime. In 1998 an anonymous caller stated that 15-20 years earlier, when the husband was age 15, he had sexual contact with a family member who was around 7 or 8 years old. He admitted to the incident and he underwent an evaluation at the local mental health center. The evaluation concluded that the incident many years earlier "did not suggest any sexual deviancy or sexual problems" and that it "was consistent with an isolated episode of sexual acting out, which is contrary to his value system," and the evaluator "failed to find indications suggesting a more extensive problem."

No person who received a set-aside of a disqualification for criminal sexual conduct and no person who received a variance related to a criminal sexual conduct disqualification has been determined to have committed maltreatment of a child in family child care.

9. Updated Data on Appeals of Disqualifications and Maltreatment Determinations

a. Maltreatment:

The 2003 Legislative Report stated that over the previous four years DHS, MDH, the Department of Children, Families, and Learning (now titled Department of Education), and counties completed over 73,500 maltreatment investigations, and about 40 percent of the investigations substantiated maltreatment.

2004 Review: Unlike the 2003 Legislative Report, this report reviews only DHS's completion of maltreatment investigations.

During the period of FY03 and FY04, DHS completed 1,403 maltreatment investigations. Of these, DHS substantiated 542 allegations in 362 reports of maltreatment.

Of the 542 substantiated allegations, 281 individuals (rather than facilities) were determined to have been responsible for the maltreatment. There were a total number of 432 substantiated allegations for these 281 individuals. (Some investigations determined that the substantiated perpetrator committed more than one act of maltreatment.)

For FY03 and FY04, DHS substantiated maltreatment in 26 percent of the investigations over this period.

In general over recent years, DHS determined that an individual was responsible for the substantiated maltreatment in about 80 percent of the cases, and the facility was responsible for the maltreatment in approximately 10 percent of the cases. In approximately 10 percent of the cases, responsibility for maltreatment could not be determined.

Table 5. DHS Maltreatment of Vulnerable Adults Investigations

Fiscal Year	investigations completed	reports substantiated	allegations substantiated	allegations for which a facility was responsible	allegations for which an individual was responsible	inconclusive responsibility
2000	489	119	219	24	155	40
2001	482	132	233	13	148	72
2002	299	57	91	1	72	18
2003	501	145	241	21	189	31
2004	537	116	171	18	141	12
Total	2308	569	955	77	705	173

Table 6. DHS Maltreatment of Minors Investigations

Fiscal Year	Investigations Completed	Reports Substantiated	Allegations Substantiated	Facility Responsible	Individual Responsible	Inconclusive Responsibility
2000	124	27	41	6	34	1
2001	195	50	69	17	50	2
2002	128	28	51	4	45	2
2003	211	60	79	9	63	7
2004	154	41	51	10	39	2
Total	812	206	291	46	231	14

**Table 7. DHS Disqualification (Only) Fair Hearings
(2003 Legislative Report)**

Year	Hearings	Affirmed	Reversed	Set Aside
2001				
1-11/2002	21	10	4	7

**Table 8. DHS-Investigated Maltreatment Fair Hearings
(2003 Legislative Report)**

Year	Hearings	Affirmed	Reversed
1998	15	8	7
1999	15	13	2
2000	5	2	3
2001	5	5	0

**Table 9. DHS-Investigated Maltreatment and Related Disqualification Fair Hearings
(by calendar year through June 30, 2004)**

CY	Maltreatment Hearings	Affirmed	Reversed	Awaiting Maltreat Decision	DQ Hearings	Affirmed	Reversed	Awaiting DQ Decision
2002	7	5	2	0	4	4	0	0
2003	6*	2	5	0	5	0	5	0
2004 (through June)	7	3	0	4	3	3	0	0

* 2003 hearing count reflects that there were two determinations of maltreatment heard in one hearing; one was affirmed and the other reversed.

**Table 10. DHS-Investigated Maltreatment Contested Case Hearings
(by calendar year through June 30, 2004)**

CY	OAH Maltreatment Hearings	Affirmed	Reversed	DQ	Affirmed	Reversed	Awaiting Decision
2002	0	0	0	0	0	0	0
2003	4	2	2	2	1	1	0
2004	2	2	0	2	2	0	0

Table 11. Family Child Care – Result of Contested Case Hearings
(in cases with Final Commissioner Orders Issued)
Calendar years 2002, 2003, and January through June 2004

Year	Number of Final Orders (excluding TIS)	Number rescinding action or issuing lesser action against license	Number involving a disqualification	Number that changed disqualification		Number involving maltreatment finding	Number that reversed maltreatment finding
				Rescinded	set aside		
CY 02	23	2	15	2		7	1
CY 03	34	5	17	1	2	7	1
CY 04 (Jan- June)	16	2	8	1	0	3	1

b. Appeals:

The 2003 Legislative Report stated that about one in three fair hearings, one in 14 Court of Appeals hearings, and five in eight Office of Administrative Hearings resulted in reversal of decisions on maltreatment or disqualifications.

The data from January 2003 through May of 2004 showed the following:

Table 12. DHS – Commissioner's Final Order Appealed to District Court
(by calendar year through June 30, 2004)

Year Commissioner's Order was Issued	Pending	Affirmed	Reversed
2002	1	1	
2003	1		1
2004 (through June)	1		
Total	3	1	1

A decision to not set aside a disqualification based on maltreatment or a preponderance of evidence is appealed by requesting a fair hearing before a DHS referee, who makes a recommendation to the Commissioner. The Commissioner then issues an order that is considered a final agency decision, which may then be appealed to the district court. Table 12 shows the number of Commissioner's final orders appealed to the District Court.

Table 13. DHS Disqualification Hearings at Court of Appeals
(2003 Legislative Report)

Year	Hearings	Affirmed	Reversed	Remanded
1996	5	3		2
1997	2	2		
1998	0			
1999	0			
2000	5	2	1	2
2001	1	1		
1-11/2002	1	1		
Total	14	9	1	4

Table 14. DHS Disqualification Hearings at Court of Appeals
(by calendar year through June 30, 2004)

Year Commissioner's Order was Issued	Pending	Affirmed	Reversed
2002			
2003	1		1
2004 (through June)	1		

A decision from the District Court may be appealed to the Court of Appeals. In addition, a decision to not set aside a disqualification based on a conviction is considered a final agency decision and may be appealed directly to the Court of Appeals, without a fair hearing and without an appeal to the district court.

SUMMARY RESULTS AND PERFORMANCE

Background Studies are conducted in DHS and MDH programs to protect children and vulnerable adults from individuals with certain events in their past who may pose a risk of harm to them. While data is available on the number of individuals who received background studies and who have disqualifying events in their past, data is not available on whether the background study process deters individuals with disqualifying events in their past from seeking work in DHS and MDH programs.

- **How much did we do?**

- For DHS directly licensed programs (from March 1991 through June 2004) and non-licensed Personal Care Provider Organizations (from July 1997 through June 2004), DHS has conducted a total of 663,683 background studies. There have been 11,863 disqualifications; 4,180 disqualifications set aside; and 144 variances granted (for 91 people).

- Of these totals, the child care center numbers are: 219,517 background studies; 1,443 disqualifications; 646 set asides; and 14 variances granted (for nine people).
 - For DHS/County-licensed family child care programs, the counties have conducted an unknown number of background studies that resulted in an unknown number of disqualifications. However, from January 1, 1995 through June 30, 2004, DHS has granted 965 set asides and 1,559 variances related to county disqualifications (for 964 people).
 - For MDH-licensed programs (from October 1995 through June 2004), DHS has conducted a total of 1,000,029 background studies. There have been: 18,749 disqualifications; 9,273 disqualifications set aside; and 156 variances granted.
 - Since 1991, in directly licensed programs, DHS has set aside 13 disqualifications for criminal sexual conduct and granted one variance. One set aside and one variance remain active.
 - For family child care settings, one disqualification for criminal sexual conduct was set aside, and 20 variances have been granted (for seven people). One set aside and two of the variances remain active.
- **How well did we do it?**
 - One individual committed maltreatment while the program was waiting for his background study results from DHS. A previous employer had been ordered to remove the individual due to theft convictions, but before the second facility received the removal order, the individual stole checks from two vulnerable adults. This is the first person in 13 years and 1.67 million background studies who is known to have committed maltreatment while the facility waited for the study results. One approach to preventing recurrence of this type of situation is through modification of the Internet based background study process. The electronic study results that are provided within the targeted turnaround time of 48 hours are being expanded to also include orders for immediate removal of individuals who were previously ordered out of other licensed facilities.
 - There have been no cases in which individuals who committed maltreatment were subsequently found to have disqualifying criminal histories on file at the FBI that the license holder (employer) did not know about. (There were two cases in which the employer was aware of an out-of-state conviction but did not tell DHS.) Since the law changed in 2002, requiring notification of DHS by the license holder, there have been no additional cases.
 - There was one case since the inception of background studies where a person who committed maltreatment had a criminal history that did not cause disqualification only because it was beyond the statutory look-back periods. The convictions were from 1952 (misdemeanor theft) and 1965 (felony burglary).

- A total of 30,611 background studies have resulted in disqualification in DHS and MDH programs (11,863 studies in DHS directly licensed and PCPOs programs and 18,748 studies in MDH-licensed programs).
 - 16,672 of these background studies have resulted in removal of the individual from direct contact with children and vulnerable adults in MDH and DHS directly licensed programs.
 - 4,667 disqualifications were set aside and 144 variances have been granted by DHS Licensing Division for directly licensed programs, and 965 disqualifications have been set aside and 1,559 variances have been granted by DHS Licensing Division for family child care. Of these 7,335 decisions (4,667 + 144 + 965 + 1,559), 26 of the individuals have gone on to commit maltreatment (17 individuals in directly licensed programs and nine individuals in family child care settings). There have been 7,315 decisions recorded over the past 13 years, or 99.7 percent of the decisions, that have not resulted in any harm to people receiving services.
 - Of the 9,273 disqualifications that were set aside by MDH, six individuals were found culpable for maltreatment after their disqualifications were set aside.
 - No individuals who ever received a set aside or a variance related to a disqualification for criminal sexual conduct have gone on to commit maltreatment of a person in care.
- **Is anyone better off?**
 - The system seeks balance, while focusing the preeminent weight of all decisions on what is in the best interest of people served by licensed programs.
 - Thousands of children and vulnerable adults who receive services everyday in DHS and MDH programs are less likely to be victims of criminal acts or maltreatment as a result of the background study process and the ability to remove individuals from positions allowing direct contact or access to them.
 - The process also allows individuals with disqualifying events to demonstrate that they do not pose a risk of harm to children and vulnerable adults, requiring that each case be reviewed individually. It also allows for people who commit a non-serious act of maltreatment to learn from their mistakes, and continue in their careers unless and until they commit a second act of maltreatment within seven years.

The Licensing Division will propose an amendment to the Human Services Background Study Act by the 2005 Legislature to require disqualification of individuals who have committed identity theft. The Department will continue to promote Internet based background studies to decrease background study costs and to speed the results of the background studies to license holders. Moreover, the Department has implemented or will soon implement the changes identified in the text above and will continue to carefully review every case of substantiated maltreatment by disqualified individuals with a set aside or variance. Through these actions the Department will continue striving to improve the background study system in Minnesota and to provide increased protections for people receiving licensed care.