

980451

INTERIM REPORT TO THE
1998 MINNESOTA LEGISLATURE

**RELATED TO THE
LEGISLATIVE TASK FORCE TO REVIEW THE BACKGROUND STUDY PROCESS**

Pursuant to
Laws of Minnesota 1997, Chapter 248, Section 50

Prepared by the
DEPARTMENT OF HUMAN SERVICES
Division of Licensing

May 1998

DHS Background Studies
1998 Legislative Report

RECEIVED

SEP 08 1998

LEGISLATIVE REFERENCE LIBRARY
STATE OFFICE BUILDING
ST. PAUL, MN 55155

COST OF PREPARING THE REPORT

The cost of preparing this report is provided to comply with the requirements of Minnesota Statutes, section 3.197 which states:

3.197 Required reports. A report to the legislature must contain, at the beginning of the report, the cost of preparing the report, including any costs incurred by another agency or another level of government.

This report has been prepared by staff from the Department of Human Services Division of Licensing. No outside consultants assisted in the development of this report.

It took approximately 50 staff hours to prepare the report. Based on average staff costs of \$30 per hour, including benefits, the staff costs for preparing the report is \$1,500.

The cost of printing and distributing fifty copies of the report is estimated to be \$115.

The cost of preparing, printing, and distributing this report is \$1,615.

TABLE OF CONTENTS

I. BACKGROUND	Page 2
II. LEGISLATIVE DIRECTIVE	Page 2
III. EXECUTIVE SUMMARY	Page 3
IV. DEPARTMENT RECOMMENDATIONS	Page 5
V. DATA PRIVACY ISSUES RELATED TO BACKGROUND STUDIES	Page 14
VI. OTHER BACKGROUND STUDY ISSUES	Page 15
APPENDIX	Page 16

I. BACKGROUND

In 1991 the Department of Human Services (DHS) began conducting background studies on individuals providing direct contact services in DHS-licensed facilities. In October 1995 the Minnesota Department of Health (MDH) began contracting with DHS to conduct background studies on individuals providing direct contact services in MDH-licensed facilities. Beginning in August 1997 the Department of Human Services began conducting background studies on individuals providing direct contact services for unlicensed Personal Care Provider Organizations (PCPOs).

The statutory requirements for background studies found in Minnesota Statutes, Chapter 245A, have been amended every year by the legislature since the DHS studies were begun in 1991. The 1997 Legislature standardized disqualifying characteristics across all services licensed by DHS and MDH and for unlicensed PCPOs. The 1997 Legislature also required that a legislative task force be convened to review the background study process. The legislature specified that the following were to be included in the evaluation of the current system for individuals providing services in facilities and programs licensed by either DHS or MDH and in unlicensed PCPOs:

- A. the appropriateness of disqualifying an individual when a state or county agency has determined that, in the absence of a criminal conviction, there is a preponderance of evidence the individual committed a disqualifying crime;
- B. the appropriateness and effectiveness of the due process available to a disqualified individual; and
- C. the appropriateness of standardizing disqualifying crimes across all services licensed by DHS and MDH (as was done by the 1997 Legislature in response to the recommendations of a 1996 Legislature-directed task force).

II. LEGISLATIVE DIRECTIVE

Laws of Minnesota 1997, Chapter 248, section 50, [LEGISLATIVE TASK FORCE TO REVIEW THE BACKGROUND STUDY PROCESS] directed that:

The task force must consist of at least six legislators and other members appointed by the commissioner of human services, which may include representatives from the departments of human services, health, corrections, and public safety, the ombudsman for older Minnesotans, the ombudsman for mental health and mental retardation, representatives from the attorney general's office, and county agencies, persons receiving services in licensed facilities, families of persons receiving services in licensed facilities, representatives from consumer and advocacy groups, representatives of agencies that provide services, representatives of individuals and professionals who provide services within the agencies, and representatives of employee bargaining units.

The speaker of the house and the rules and administration subcommittee on committees in the senate shall appoint at least three members from each body to constitute a legislative task force to

review the background study process for individuals providing services in facilities and programs licensed by either the department of human services or the department of health. At least one of the members from each body shall be from the minority party. Members shall be appointed before July 1, 1997, and shall convene as soon as possible during the 1997 interim at the call of the chairs. The task force expires June 30, 1998.

Members shall evaluate the current systems for background studies completed under Minnesota Statutes, section 144.057, and chapter 245A, specific to, but not limited to, the appropriateness of the authority to disqualify individuals based on a commissioner's determination that, absent a criminal conviction, there is a preponderance of evidence that the individual committed an act that meets the definition of a disqualifying crime under Minnesota Statutes, section 245A.04, the appropriateness and effectiveness of the due process available to disqualified individuals, and the appropriateness of standardizing disqualifying crimes across all services licensed by the department of human services and the department of health.

The deliberations of the task force shall include consideration of the privacy issues related to background studies, specifically the efficient and effective dissemination of information while protecting individual privacy rights, and issues related to rehabilitation and present fitness to perform the duties of employment, and be based upon the recognition that the background study process exists to protect vulnerable children and adults receiving services in licensed programs and facilities and that the safety of these persons shall be given preeminent weight over the interests of persons subject to the background study process.

The task force shall present a report containing any recommendations for change, with draft legislation, to the legislature by February 1, 1998.

This report also addresses two additional topics which were not directed by the legislature. An advisory group consisting of representatives from state, county, and private licensing agencies; county attorney, provider, parent, resource and referral, and advocate organizations and agencies; and other relevant state agencies, made recommendations regarding the background study process which are contained in this report. The report also makes a recommendation regarding the definition of "serious maltreatment."

III. EXECUTIVE SUMMARY

The Commissioner of Human Services appointed 53 people to the task force who are representatives of the stakeholders identified in the above legislation. The Speaker of the House and the Rules and Administration Subcommittee on Committees in the Senate appointed three members from each body to the task force. However, the task force was not convened by the chairs.

This report is, therefore, limited to the perspective of the commissioner of human services and is intended to serve as background information on these topics. The report also includes information regarding court decisions made on these issues. The commissioner does not recommend any changes in the current systems for background studies.

A. Disqualifications Based on a Preponderance of Evidence of a Disqualifying Crime

The commissioner has the authority to disqualify background study subjects when, absent a criminal conviction, it has been determined that there is a preponderance of evidence that the individual committed an act that meets the definition of a disqualifying crime. While disqualifications based on a preponderance of evidence are not frequent, it is a critical tool, particularly in light of the frequency of plea bargaining in the overloaded criminal justice system. The appeal process in place minimizes the occurrence of an incorrect disqualification, and at the same time disqualifications based on a preponderance of evidence provide a method for protecting vulnerable adults and children from caregivers who have engaged in conduct that victimized others.

B. Due Process Available to a Disqualified Individual

The internal review process, in combination with the availability of appeal to the Minnesota Court of Appeals, provides an effective means for individuals to challenge disqualification decisions. The Minnesota Court of Appeals has determined that the current system complies with due process requirements and makes available a meaningful opportunity to challenge disqualification decisions. DHS does not recommend changing the due process provided to a disqualified individual.

C. Standardizing Disqualifying Crimes Across all Licensed Services

Through on-going contact with agencies and individuals affected by the changes, it appears that the impact of standardization on providers and employees since its inception on August 1, 1997, has been minimal while affording the benefit of "portability." DHS does not recommend changes to the 1997 legislation which standardized disqualifying crimes across all care settings.

D. Data Privacy Issues Related to Background Studies

The deliberations of the task force were to include the privacy issues related to background studies, specifically the efficient and effective dissemination of information while protecting individual privacy rights. The current background study process is in compliance with the applicable laws regarding data and accommodates the needs of individuals and programs whenever legally possible. Individuals who are the subjects of DHS background studies remain in control of sensitive private information about them.

E. Other Background Study Issues

A county/state advisory group made recommendations regarding the background study process for child and adult foster care and family child care, which are licensed by county and private licensing agencies. The recommendations include establishing an accessible state central registry of substantiated perpetrators of maltreatment; requiring notification by license holders when there are changes in the status of individuals which will affect the individual's background study status; allowing for broader access to juvenile records; and

changing the age requirement for background studies of persons living in the home from over 13 years of age to 10 years of age and older. DHS plans further review and action on the advisory group's recommendations.

Another issue that warrants further discussion is the definition of serious maltreatment. There are some advocates for persons receiving services who would like to make it easier to disqualify individuals for serious maltreatment by making the definition of serious maltreatment more broad.

IV. DEPARTMENT RECOMMENDATIONS

A. Preponderance of Evidence of a Disqualifying Crime

1. Background and Need for Preponderance of Evidence Reviews

The Human Services Licensing Act provides for disqualification of an individual who has committed a disqualifying crime, and in addition, an individual may be disqualified if she or he "has admitted to or a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition" of any of the disqualifying crimes. See Minn. Stat. § 245A.04, subd. 3d (Supp. 1997). The legislature requested that this report address the appropriateness of disqualifying an individual based on a preponderance of evidence of an act that meets the definition of a disqualifying crime.

a. Plea Bargaining

There are a number of reasons that support the use of a preponderance of evidence review or an admission, rather than requiring a conviction in order to disqualify an individual. One of the primary reasons is that the criminal justice system is overloaded and under significant strain. This means that in most instances a plea agreement is reached, the result of which may not be a conviction. A plea involving a continuance for dismissal or a diversion program, for instance, is not at all unusual, particularly in situations involving fifth degree assault and domestic assault. Another possible situation involves domestic assault where the victim has made statements to police but then refuses to testify, in which case there is no trial and thus no conviction. Additionally, charges may be pled down to a crime that is not a disqualifying crime, such as fifth degree assault pled down to disorderly conduct. These are situations where, if there is a preponderance of evidence of the conduct, potential caregivers who have engaged in violent behavior can be disqualified in spite of the lack of a conviction. The preponderance of evidence review is not limited, of course, to acts of violence, but rather can be applied to conduct that meets the definitions of any of the disqualifying crimes.

b. Acquittal or Lack of Prosecution Due to Mental Illness

There are also situations involving individuals with mental illness who have committed crimes but are not convicted due to mental illness. An example of this is an individual who killed and disemboweled another person, but was acquitted due to mental illness, presumably because she or he was unable to appreciate that her or his actions were wrong. Without the ability to do a preponderance of evidence review, this person, who does not have a conviction, would be allowed to work with vulnerable adults and children. Instead, because the conduct met the definition of second degree murder, this person was disqualified.

Similarly, in Bouta v. Commissioner of Human Services, No. C3-95-2250 (Minn. Ct. App. Apr. 16, 1996) (unpublished) a case discussed in section IV, B, 3, of this report, an individual was disqualified on a preponderance of evidence of terroristic threats and fifth degree assault. Bouta had not been criminally prosecuted due to his mental illness. This disqualification was upheld by the Minnesota Court of Appeals.

c. Criminal Versus Civil Evidentiary Burdens

Another reason that there may not be a conviction but that a preponderance of evidence review must be relied on is that a prosecutor may decide, in spite of significant evidence, not to prosecute a matter because of concern over meeting the stiff evidentiary burden involved in criminal cases. While a prosecutor must meet the standard of proof beyond a reasonable doubt, civil matters require a preponderance of evidence. Thus, for example, maltreatment of a minor or of a vulnerable adult is substantiated when there is a preponderance of evidence of maltreatment; it is not necessary to establish proof beyond a reasonable doubt. Similarly, when there is a preponderance of evidence of a crime which the legislature has determined should prevent an individual from working with vulnerable adults or children, it is appropriate to disqualify that individual.

Thus, there are numerous situations in which the ability to disqualify an individual based on a preponderance of evidence has protected vulnerable adults and children from potential caregivers that pose a risk of harm. As long as the criminal justice system remains so overburdened that it is not possible to take cases to trial even with strong evidence, there will be a need for the ability to disqualify individuals for conduct for which there is not a conviction.

2. Process for Disqualifying Individuals Based on a Preponderance of Evidence of a Disqualifying Crime

a. Family Systems Programs

For family systems services (family child care, child foster care and adult foster care), the Commissioner has delegated to the counties much of the licensing work. Included in this is the authority to conduct background studies and to make disqualification decisions. See Minn. Stat. § 245A.16 (Supp. 1997) & Minn. R. 9543.0030-.0040.

Whether and to what extent counties disqualify based on a preponderance of evidence of a disqualifying crime varies greatly by county. For example, one county has stated that it does not use preponderance of evidence reviews at all. Another county did not indicate that it refuses to do such reviews, but has never disqualified someone on a preponderance of evidence basis. Other counties, particularly those in the metro area, disqualify somewhat regularly for a preponderance of evidence, though it appears that the vast majority of disqualifications are for maltreatment or convictions.

The types of conduct for which a preponderance of evidence review are utilized also varies. One county that rarely disqualifies on this basis stated that when it has, it has been for criminal sexual conduct or an assault or weapons charge. A metro county provided information that it uses preponderance of evidence to disqualify primarily for conduct that meets the definition of fifth degree assault/domestic assault, and also does so for wrongfully obtaining assistance (which is not a disqualifying crime but meets the definition of theft, which is a disqualifying crime). Another county which rarely does preponderance of evidence disqualifications has done so for wrongfully obtaining assistance.

b. DHS Programs

At DHS, where background studies are conducted on individuals who work at programs directly licensed by DHS, preponderance of evidence reviews are utilized but are somewhat limited. Although there are a variety of disqualifying crimes, at this time due to resource limitations DHS only does preponderance of evidence reviews on conduct that may meet the definition of a crime of violence, a crime involving a vulnerable adult or child, or a crime involving drug dealing.

In the period from January 1997 to February 1998, a total of 14 individuals were disqualified on a preponderance of evidence basis. Two other individuals would have been disqualified, but they were no longer providing direct contact services. Of these 16, 8 were for domestic assault or fifth

degree assault, 3 were for some type of theft from a vulnerable adult, and there was one each for a violation of an order for protection, second degree murder (acquittal due to mental illness), second degree assault, third degree assault, and criminal sexual conduct in the fifth degree. In contrast to the 16 disqualifications based on preponderance of evidence, in 1997 there were 1,034 disqualifications for convictions, and 75 individuals were disqualified for maltreatment.

3. Review of Preponderance of Evidence Disqualifications

As addressed in section IV, B, 2, of this report, individuals who are disqualified on the basis of a preponderance of evidence may challenge the disqualification through the disqualification correctness review process. The results of the reviews are discussed in more detail in that section. In total, since the more thorough correctness review process has been instituted, as of April 30, 1998, there have been 46 reviews of preponderance of evidence decisions completed. Of these 46, 27 of the disqualifications were affirmed and 19 were rescinded.

If a disqualification is upheld in the correctness review, an individual can appeal to the Minnesota Court of Appeals. Two of the appellate cases discussed in section IV, B, 2 and 3, of this report involved individuals who had been disqualified on a preponderance of evidence basis or on an admission. In Keys v. Commissioner of Human Services, No. C1-97-713 (Minn. Ct. App. Dec. 9, 1997) (unpublished) the Commissioner found a preponderance of evidence of theft and offering a forged check, both involving the misappropriation of funds of a vulnerable adult. The preponderance of evidence decision was upheld by the court. In Dozier v. Commissioner of Human Services, 547 N.W.2d 393 (Minn. Ct. App. 1996) the Commissioner relied on Dozier's plea as an admission to fifth degree possession of crack cocaine, the disqualification for which was also upheld by the Minnesota Court of Appeals.

4. Conclusion

While disqualifications based on a preponderance of evidence are not frequent, DHS and the county attorneys consulted all view this as a critical tool, particularly in light of the frequency of plea bargaining in the overloaded criminal justice system. The appeal process in place minimizes the occurrence of an incorrect disqualification, and at the same time disqualifications based on a preponderance of evidence provide a method for protecting vulnerable adults and children from caregivers who have engaged in conduct that has been deemed by the legislature to be dangerous or inappropriate for vulnerable adults and children served by licensed programs and by unlicensed personal care provider organizations. DHS does not recommend changing the due process provided to a disqualified individual.

B. Due Process Available to a Disqualified Individual

1. Overview

A disqualified person can request reconsideration of her/his disqualification on two grounds—that the information relied upon to disqualify him/her is incorrect and/or that s/he does not pose a risk of harm to clients receiving services. DHS processes reconsideration requests for persons in DHS-licensed programs and for unlicensed personal care provider organizations, and Minnesota Department of Health (MDH) processes reconsideration requests for persons in MDH-licensed programs.

In addition to being disqualified for a conviction or an admission to or a preponderance of evidence of an act meeting the elements of a disqualifying crime, a person can be disqualified for maltreatment that is serious or recurring. See Minn. Stat. § 245A.04, subd. 3d (4) (Supp. 1997). When the basis of the person's request is that the information used to disqualify her/him for serious or recurring maltreatment or for a preponderance of evidence or admission that s/he committed a disqualifying crime is incorrect or inaccurate, a "correctness review" is conducted. After the person requests reconsideration, s/he is given an opportunity to submit additional information. When all the information is received, a review of the record is conducted to determine if the information is correct. This review is to be done within 30 days of the receipt of all relevant information. See Minn. Stat. § 245A.04, subd. 3b(d) (Supp. 1997). The person can appeal the decision through a Petition for a Writ of Certiorari filed with the Minnesota Court of Appeals.

When the basis of the person's request is that s/he does not pose a risk of harm to clients, a determination is made within 15 days. The following factors are considered: the consequences of the event or events that lead to disqualification; whether there is more than one disqualifying event; the vulnerability of the victim at the time of the event; the time elapsed without a repeat of the same or similar event; documentation of successful completion of training or rehabilitation pertinent to the event; and any other information relevant to the reconsideration. Preeminent weight is given to the safety of each person to be served over the interests of the license holder or the disqualified person. See Minn. Stat. § 245A.04, subd. 3b(b) (Supp. 1997). If the disqualification is not set aside, the person can appeal the decision through a Petition for a Writ of Certiorari filed with the Minnesota Court of Appeals.

There have been a number of challenges to disqualification decisions. As is discussed in the following sections, the Minnesota Court of Appeals has determined that the correctness review procedure complies with due process requirements.

2. The Disqualification "Correctness Review" Process

As discussed above, individuals who are disqualified are entitled to a "correctness review" to determine the correctness of the disqualification decision. See Minn.

Stat. § 245A.04, subd. 3b(a) (Supp. 1997). Prior to the Minnesota Court of Appeals' decision in Rodne v. Commissioner of Human Services, 547 N.W.2d 440 (Minn. Ct. App. 1996), DHS performed a more perfunctory review and advised disqualified individuals that they could more fully challenge the information underlying the disqualification decision by challenging the accuracy or completeness of data pursuant to the Minnesota Government Data Practices Act. See Minn. Stat. § 13.04, subd. 4(a). The Rodne court decided that this procedure deprived the individual of "a meaningful opportunity" to have his disqualification reconsidered, and instructed the Commissioner to consider information submitted by Rodne and to determine if the information relied upon to disqualify him was incorrect.

As a result of the Rodne decision, DHS and MDH made significant changes to each of their correctness review procedures. DHS and MDH each instituted an internal correctness review process that allows for submission to the Commissioner of all information underlying a disqualification decision when that decision is based on: (1) maltreatment of a vulnerable adult that occurred before October 1, 1995; (2) maltreatment of a minor that occurred before July 1, 1997; and (3) a preponderance of evidence or admission that a disqualifying crime has been committed. The Commissioner then conducts an independent and neutral review of all information and issues a detailed decision with cites to the record supporting the decision. This decision can be appealed to the Minnesota Court of Appeals.

a. Review of Maltreatment Determinations

The reason that the correctness reviews are date-limited is as follows. The Vulnerable Adults Act (VAA) was amended effective October 1, 1995, to allow appeals by persons or facilities determined to have committed maltreatment for incidents occurring after October 1, 1995. Individuals first must submit to the investigating agency (MDH, DHS, or county adult protection) a request for reconsideration of the maltreatment determination, and they have the opportunity to provide information as part of this request. If individuals are not satisfied with the result of that review, they may request a fair hearing before a DHS referee pursuant to Minn. Stat. § 256.045. The Maltreatment of Minors Act was amended effective July 1, 1997, allowing a similar appeal process as that provided in the VAA. For earlier incidents that did not have the fair hearing appeal available, a full review of all information related to the disqualification and the underlying maltreatment determination is conducted. See J.L.H., slip op. at 7.

For incidents that occurred after the above dates, there is a more limited correctness review conducted. This is because the Commissioner relies on the factual findings from the fair hearing (or from the maltreatment reconsideration process if no hearing was requested) to determine the correctness of disqualification based on maltreatment determinations. The correctness review would consist of a determination as to whether or not there was serious maltreatment or recurring maltreatment, either of which

would require a person to be disqualified. See Minn. Stat. § 245A.04, subd. 3d(4) (Supp. 1997).

The Minnesota Court of Appeals has agreed that the post-Rodne correctness review process instituted by the Commissioner meets minimum due process standards. In J.L.H. v. Commissioner of Human Services, No. C2-97-316 (Minn. Ct. App. Aug. 5, 1997) (unpublished), the court rejected J.L.H.'s argument that the correctness review procedure did not comply with due process requirements. The court noted that the disqualification procedures "provide procedural safeguards that protect against the risk of an erroneous maltreatment determination and disqualification."

Similarly, in Keys v. Commissioner of Human Services, No. C1-97-713 (Minn. Ct. App. Dec. 9, 1997) (unpublished), the Minnesota Court of Appeals upheld the Commissioner's disqualification decision. The court reasoned that "the Commissioner's representative set forth in detail, with specific cites to the record, both the information and explanation offered by Keys in his request for reconsideration The Commissioner's representative then went on to note, again with specific cites to the record, the evidentiary basis for her conclusions. . . . The Commissioner's representative considered and analyzed all information before her and the explanations offered by Keys. Her decision is supported by substantial evidence in the record and is not arbitrary and capricious." Keys, slip op. at 6 & 7.

Thus, the J.L.H. and Keys courts determined that the correctness review process instituted in response to Rodne provided disqualified individuals with a meaningful opportunity to have their disqualifications reconsidered and that the process complied with due process requirements. Furthermore, in both Rodne and J.L.H., the court has rejected the argument that a contested case hearing is required as part of a request for reconsideration.

b. Results of "Correctness Reviews"

As of April 30, 1998, the Commissioner had completed 99 correctness reviews since the time the new process was instituted. In total, 53 of the disqualification decisions were affirmed and 46 were rescinded. Of the 99 reviews conducted, 53 of the reviews were of maltreatment determinations and 46 were of preponderance of evidence of a disqualifying crime determinations.

Of the 53 maltreatment determinations reviewed, 26 disqualification decisions were affirmed and 27 were rescinded. The majority of those rescinded were county maltreatment investigations (counties investigate incidents that occur in family child care and child foster care): 14 county disqualification decisions in family settings were affirmed, while 20 were rescinded. Eleven DHS disqualification decisions (DHS investigates

incidents that occur in programs directly licensed by DHS, such as child care centers, and in adult foster care) were affirmed, and 6 were rescinded. For private agencies, 1 disqualification decision was affirmed and 1 was rescinded. For MDH, 3 disqualification decisions were affirmed and 2 were rescinded.

Of the 40 requests for reconsideration of a disqualification due to a preponderance of evidence of a disqualifying crime determination, 23 were affirmed and 17 were rescinded. Again, the majority of those rescinded were preponderance of evidence reviews conducted by counties: of the 36 reviews of county decisions, 21 were affirmed and 15 were rescinded. For programs directly licensed by DHS, where individuals were disqualified due to a preponderance of evidence review, 2 were affirmed and 1 was rescinded. There was only one involving a private agency, and it was rescinded.

The significant number of rescissions of disqualifications indicates that the internal review process is effective and that a neutral and independent review is being conducted. Inappropriate decisions are being corrected at this earlier stage, rather than requiring incorrectly disqualified individuals to resort to the Minnesota Court of Appeals.

3. "Set Aside" of Disqualifications

Even if a disqualification is upheld (not rescinded), disqualified individuals may request that the disqualification be set aside by arguing that today the individual presents no risk of harm. See Minn. Stat. § 245A.04, subd. 3b(b) (Supp. 1997). There have been four appellate cases where individuals challenged the Commissioner's decision to not set aside the disqualification based on a conviction. In all four cases, the Commissioner's decision has been upheld. See Dozier v. Commissioner of Human Services, 547 N.W.2d 393 (Minn. Ct. App. 1996) (the Commissioner assessed all of the risk factors and the decision to not set aside the disqualification is supported by substantial evidence); J.L.H. (at least two of the risk of harm factors were considered and although contrary inferences about the risk of harm could be made, there was sufficient evidence to support the Commissioner's determination); Matejka v. Commissioner of Human Services, No. C9-95-2253 (Minn. Ct. App. May 14, 1996) (unpublished) (the Commissioner considered the required factors and, although "there is room for two opinions" on whether Matejka continued to pose a risk of harm, the Commissioner's decision was affirmed); Bouta v. Commissioner of Human Services, No. C3-95-2250 (Minn. Ct. App. Apr. 16, 1996) (unpublished) (the Commissioner's conclusion that Bouta poses a risk of harm is supported by substantial evidence).

Thus, all of the court decisions that address the Commissioner's risk of harm decisions have concluded that the Commissioner has properly weighed the applicable factors and has reached an appropriate conclusion. There have not been

any decisions that have reversed the Commissioner on his decision not to set aside a disqualification.

4. Conclusion

The results of the disqualification correctness reviews indicate that the internal review process provides an effective means for individuals to challenge disqualification decisions. Additionally, the Minnesota Court of Appeals has determined that this process complies with due process requirements. Disqualified individuals who are not satisfied with the outcome of that decision also can request that their disqualification be set aside based on their current risk of harm to clients. Each time this has been presented to the court it has determined that the Commissioner properly weighed the relevant factors and reached an appropriate conclusion. Thus, all indications are that the current system complies with due process requirements and makes available a meaningful opportunity to challenge disqualification decisions.

For these reasons, the Department of Human Services does not recommend changing the due process provided to a disqualified individual.

C. Standardizing Disqualifying Crimes Across all Licensed Services

The 1997 Legislature standardized disqualifying crimes across all settings for which DHS background studies are conducted. Standardization of disqualifying crimes is based on the premise that if a person puts his/her own needs before the needs of others by committing a disqualifying crime, s/he may pose a potential risk of harm in any licensed service. The effect of these changes varies across settings, with some settings having additional disqualifying crimes, some having some crimes deleted from the list of disqualifying crimes, and some experiencing both.

A benefit of standardizing the disqualifying crimes is the "portability" of an individual's background study clearance. As the health care and human services delivery systems are rapidly evolving, more agencies are seeking to provide a broader continuum of health and human services, often using the same employees to provide a more seamless delivery of services. Once the person is cleared for one type of setting, s/he knows that s/he will be cleared for other types of care. Programs that provide services in multiple care settings will know that if an employee is clear for one of their programs, s/he will be cleared for all of their programs.

The biggest effect of the standardization is the increased number of disqualifying crimes which now apply to licensed non-residential programs (child care centers, day training and habilitation programs, and out-patient chemical dependency treatment programs). Prior to August 1, 1997, theft and "property crimes" were not disqualifiers in non-residential programs. From August 1, 1997 through January 31, 1998, 30 persons were disqualified for the additional crimes. Fourteen asked for reconsideration of their disqualification, and all but one disqualification was set aside. A variance was granted for the sole disqualified individual whose disqualification was not set aside to enable him or her to provide direct

contact services in a specified program. The following table details this information for the time period when standardization became effective on August 1, 1997, through January 1998.

**DISQUALIFICATIONS FOR NEW CRIMES AND RECONSIDERATIONS FOR DHS
 NON-RESIDENTIAL PROGRAMS**

Crime	Disqualified	Requested Reconsideration	Disqualification Set Aside	Disqualification Not Set Aside	Variance Requested	Variance Granted
Theft/Larceny/Fraud	17	10	9	1	1	1
Possession of Shoplifting Gear	-0-					
Burglary	7	3	3			
Aggravated Forgery	3	1	1			
Forgery	1					
Check Forgery Offering Forged Check	2					
Obtaining Signature by False Pretense	-0-					
Totals	30	14	13	1	1	1

DHS has not received any negative feedback about the standardization of disqualifying characteristics from sources with whom DHS has the most contact—service providers and persons who have been disqualified.

The impact of standardization on providers and employees since its inception on August 1, 1997, has been minimal while affording the benefit of “portability.” DHS does not recommend changes to the 1997 legislation which standardized disqualifying crimes across all care settings.

V. DATA PRIVACY ISSUES RELATED TO BACKGROUND STUDIES

The statute requires that facilities be notified whether a person has a disqualifying characteristic. DHS cannot notify the facility of the information in the person’s background study, unless: the only basis for disqualification is failure to cooperate with the background study process; the Minnesota Government Data Practices Act provides for release of the information; or the person studied authorizes the release of the information in writing.

Some representatives of unlicensed PCPOs have commented that consumers of their services have a “right” to know the information in a person’s background study. While not a right, this desire is accommodated by obtaining written authorization from the background study subject for DHS to release

the study subject's information to the consumer through the unlicensed PCPO. Individuals who are the subject of DHS background studies remain in control of sensitive private data about them.

OTHER BACKGROUND STUDY ISSUES

A. County/State Advisory Group Recommendations

An advisory group consisting of representatives from state, county, and private licensing agencies which met eight times in 1997 focused on the county/state licensing relationship. Following are final recommendations the advisory group made regarding the background study process. These recommendations apply to the background study process for child and adult foster care and family child care, which are licensed by county and private licensing agencies.

1. Establish a state central registry of substantiated perpetrators of maltreatment to which counties will have access when conducting background studies.
2. Require license holders to notify the licensing agency when there are changes in the status of individuals which may affect their background study status. For example, a change in status is when an individual is convicted of a disqualifying crime since the last background study.
3. Allow for broader access to juvenile records than what is currently in statute, including access to juvenile records for staff and employees, rather than only when a juvenile is living in the home.
4. Change the age requirement for background studies of persons living in the home from over 13 years of age to 10 years of age and older.

B. Definition of "Serious Maltreatment"

An individual can be disqualified from providing direct contact services for "serious" or "recurring" maltreatment. The 1997 Legislature moved most of the background study process and requirements from administrative rule into statute. A minor change in the wording resulted in a significant change in the definition of serious maltreatment that was corrected by the 1998 Legislature in Laws of Minnesota 1998, Chapter 407, Article 9, Section 7.

DHS also recommends that there be further discussion of the definition of serious maltreatment, as there are some advocates for persons receiving services who would like to make it easier to disqualify individuals for serious maltreatment by making the definition of serious maltreatment more broad to take into account emotional distress and trauma that may be experienced by a child or vulnerable adult in cases where there is no observable physical injury.

APPENDIX

Legislative Task Force Appointees

I. Appointed by the Speaker of the House

Representative Fran Bradley
Representative Lee Greenfield
Representative Linda Wejcman

II. Appointed by the Senate Rules and Administration Subcommittee on Committees

Senator Leo T. Foley
Senator Sheila M. Kiscaden
Senator David J. Ten Eyck

III. Appointed by the Commissioner of Human Services

Bert Bailey
Wright County Human Services

Dan Cain
Eden Programs, Inc.

Darcel Battern
Consumer

Alyce Dillon
Parents In Community Action

Deena Behnke
Family of Consumer

Donna Forester
Minnesota Licensed Family Child Care
Association

Allison Boisvert
Catholic Charities

Patricia Franklin
Minnesota Medical Association

Denise Bond
Minnesota Indian Women's Resource
Center

Iris Freeman
Advocacy Center for Long-Term Care

Kate Brennan
Office of the Attorney General

Marlene Garvis
Attorney at Law

Gertrude Buckanaga
Volunteers of America Family Treatment
Program

Bill Guelker
Minnesota Department of Corrections

Kim Buechel Mesun
Office of the Attorney General

Ghlee Hanson
Hennepin County
Department of Community Corrections

Mary Hedges
Minnesota Department of Health
Facility and Provider Compliance

Diane McGowan
Family Alternatives

Councilman Brian Herron
Minneapolis City Council

Mike Morrell
AFSCME Council 6

Helen Hyllested
Consumer

Jerry Mueller
Minnesota Developmental Achievement
Association

Bill Ingebrigtsen
Minnesota State Sheriffs Association

Rich Neumeister
Data Practices Advocate

Frederick Isham
Minnesota Chippewa Tribe
Human Services Division

Roberta Opheim
Office of Minnesota Ombudsman for Mental
Health and Mental Retardation

Jerry Kerber
Minnesota Dept. of Human Services
Licensing Division

Samuel Orbovich
Orbovich and Gartner Chartered

Mike Kirkeberg
Create, Inc./EPIC

Nicole Otto
Minnesota Health and Housing Alliance

Kathy Kosnoff
Minnesota Disability Law Center

Bill Pearson
UFCW Local 789

Ken Lahti
Minnesota Habilitation Coalition

Laurie Possin
Greater Minneapolis Day Care Association

Lavon Lee
American Indian Family Center

Mary Regan
Minn. Council of Child Caring Agencies

Jacki McCormack
ARC of Anoka and Ramsey Counties

David Roos
Prevention Alliance

Karen McDonald
Minnesota Department of Public Safety
Bureau of Criminal Apprehension

Sheva Sanders
Minnesota Home Care Association

Don McGillis
Mahube Community Council, Inc.

Glenn Smoot
Consumer

Jackie Spies
Minnesota Dept. of Human Services
Licensing Division

Vicki Vial-Taylor
Minnesota County Attorneys Association

Karla Stewart
Resources for Child Caring

John Whalen
Alliance for the Mentally Ill of Minnesota

Susan Stout
Minnesota Nurses Association

Lori Wething
Care Providers of Minnesota

Michael Tripple
Minnesota Department of Health
Facility and Provider Compliance

William Yang
Hmong American Partnership

Nita Truitner
Metro Licensing Supervisors Association

