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BACKGROUND CHECKS FOR DAYCARE LICENSEES AND WORKERS

House Bill 5741 as passed by the House
Sponsor: Rep. Gary Woronchak

House Bill 5742 as passed by the House
Sponsor: Rep. Jennifer Faunce

House Bill 5743 as passed by the House
Sponsor: Rep. Janet Kukuk

Committee: Family and Children Services
Second Analysis (7-31-00)

THE APPARENT PROBLEM:

It is illegal in the state of Michigan for a person to care for unrelated children in his or her home without being licensed or registered by the Department of Consumer and Industry Services (CIS). As part of the licensing and registration process, an applicant must sign a form stating that he or she has not been convicted of a criminal offense, nor has a record of substantiated child abuse. Before issuing a license or registration, CIS is also required to use the good moral character standard guidelines contained in Public Act 381 of 1974 (regarding occupational licenses for former offenders) and departmental rules @ 400.1152). The Family Independence Agency requires persons enrolling to be a child care aide or relative care provider to sign a similar statement before providing daycare for children of low-income families who receive an FIA subsidy for child care. The FIA also runs a central registry check on the person to determine if he or she has a substantiated record of child abuse or neglect. However, except for the director of a licensed child care center, none of these people approved by either department are required to be fingerprinted and undergo a criminal history check, and persons employed by licensees and registrants are not held up to the good moral character guideline.

Increasingly over the past few years, attention has been focused on providing a safe environment for children, whether through making schools safer for older children or for refining laws regulating child care practices. From time to time reports surface in the media of a young child being abused sexually or physically by a care giver. Earlier this year, an audit by the state Auditor General revealed that approximately

one-third of FIA enrolled child care aides and relative care providers had something in their backgrounds that should have disqualified them from caring for children. This finding, added to the growing demand for providing safe places for children, has spurred many to believe that criminal background checks should be conducted on all persons caring for unrelated children, and that those with certain criminal offenses or central registry cases should be banned from working with young children.

THE CONTENT OF THE BILLS:

House Bill 5741 would create an act to require background checks to be conducted on persons applying for licensure or registration as child care providers or those seeking employment as child care workers. House Bills 5742 and 5753 would amend related acts to incorporate references to the new act. House Bills 5741 and 5743 are tie-barred to each other and both would take effect September 1, 2000. House Bill 5742 is tie-barred to House Bill 5741. Specifically, the bills would do the following:

House Bill 5741 would create the Child-Related Employment Background Check Act. All applicants seeking to provide child care services would have to undergo a background check. An "applicant" would include a person seeking employment with a licensed child care organization or registered family day care home, a person applying through the Department of Consumer and Industry Services (CIS) for a license to operate a child care organization or registered family day care home, and a person applying through the

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Family Independence Agency (FIA) to become an enrolled relative care provider. The bill would not apply to persons seeking employment with a foster family home or foster family group home. The background check would comprise a fingerprint check of state criminal records by the Department of State Police, a check of FBI records, and a check by the FIA of the central registry that tracks reports and investigations of incidents of child abuse and neglect.

Criminal history checks. Under the bill, an applicant or current employee would have to provide written consent for the employer or CIS (in the case of licensees and registrants) to conduct a background check, along with information needed by the Department of State Police to conduct the check, such as a birth date, two sets of fingerprints and information needed by FIA to conduct a Central Registry check. (Refusal to sign the consent form could constitute grounds for dismissal for current employees and would prohibit the hiring of a new person.) An applicant and employee would also have to sign a statement attesting to whether he or she had resided in the state for the five years preceding the date of the statement. Beginning in the year of the bill's effective date, all persons applying for or who have started jobs with licensed or registered child care providers, or persons enrolled with the FIA to provide child care to low-income families, would have to undergo a background check. Background checks could be conducted on current employees, but the bill would set limits on how many years back a check could be conducted for employees starting in those years. (For example, if the bill took effect in 2000, background checks could be done on employees or volunteers who started work in 1998 and 1999. As written, the language pertaining to subsequent years is unclear, but appears to mean that if the employer did not conduct the checks in the year 2000 for current employees and volunteers, but waited until 2001 or after, the checks could only be done for those employees or volunteers who started in 1999.)

Criminal history checks and central registry checks would have to be completed by DSP and FIA, respectively, within 30 days. Results would be provided to the employer requesting the background check or CIS. The criminal check of the state repository of criminal history records would yield a conviction record, which includes the arrest, the most serious charge from the warrant, the final conviction charge, and the sentence. Results of an FBI check could not be provided to a nongovernmental entity, only whether or not the person had a violation on his or her record. If the background check revealed a conviction for a crime against a child that involved

homicide, murder, manslaughter, or criminal sexual conduct; a conviction within the preceding ten years for any crime listed in section 3(1) of the bill (see below); or a record of a central registry case, the child care provider could not hire the applicant, and could dismiss a current employee. The bill would prohibit a person who was applying for licensure or registration to operate a child care organization from being issued a license or registration for a central registry case or a conviction within the preceding 10 years of a crime listed in Section 3(1). The DSP could not charge an applicant or employer a fee to complete a background check that is required under the bill.

An applicant, child-related employee, or volunteer who complied fully with the conditions of the bill could ask his or her employer for (and would have to receive) a copy of his or her background and central registry checks.

Good moral character. An applicant would have to provide, and a current employee could be requested to provide, a signed statement of whether he or she had ever been convicted of any of the offenses specified in Section 3(1) of the bill. (Note: The list of offenses is identical to that contained in R 400.1152 of the Michigan Administrative Rules, known as the Good Moral Character standard. The Bureau of Regulatory Services within the Department of Consumer and Industry Services currently uses the list of offenses as a guideline for determining whether to issue or renew a child care license or registration to an applicant, but states on its website that "criminal convictions do not in and of themselves indicate a lack of good moral character nor represent risk and predictable harm." Other factors, such as extenuating circumstances, length of time since the offense, and evidence of rehabilitation are also considered.) The list of offenses ranges from violent crimes and prostitution to crimes involving money (fraud, bribery) and misdemeanor and felony drug charges. Making a false statement or withholding information in connection with the signed statement would be a misdemeanor, punishable by imprisonment for up to 180 days, a fine up to \$1,000, or both. Further, falsifying information on the above statement would also subject an employee or applicant for licensure to immediate disciplinary action (including discharge for the employee and license sanctions for a licensee such as denial or refusal to renew a license).

Current employees who were found to have a conviction within the preceding ten years for an offense listed in Section 3(1) or a record of a central registry case could be retained, but only if each parent of a

child utilizing the services of the licensed child care provider was notified of the fact of the conviction or central registry record and the nature of the conviction or central registry record. Further, no payment from the state (for example, FIA child care subsidies for low-income families) could be used to pay an employee or FIA enrolled child care aide and enrolled relative care provider who had convictions of Section 3(1) offenses in the preceding decade.

Background checks could also be done on a parent or guardian of a child who participates in or attends the child care setting if the parent or guardian has the care of, or supervisory or disciplinary powers over, another child. Licensees and registrants would be required to develop and implement policies relating to background checks for volunteers. In addition, any parent or guardian of a child could request a similar background check before hiring a person to care for his or her child. A person who was required to undergo the criminal history check under the Revised School Code (teachers and certain school staff), would not be subject to the bill's requirement, if the results of the check were available to the day care provider.

Except for "a knowing or intentional release of false information," the Department of State Police, a law enforcement agency, the Family Independence Agency, and any of their employees would be free from liability in connection with a background check conducted under the bill. A person would be prohibited from intentionally disclosing, unless authorized by law or rule, any information obtained from a background check required under the bill. Violations would constitute a misdemeanor punishable by a fine of not more than \$5,000.

House Bill 5742 would amend Public Act 116 of 1973 (MCL 722.115 and 722.121), which provides for the licensing of child care organizations and registration of family day care homes. The Department of Consumer and Industry Services would be required to comply with the provisions of the Child-Related Employment Background Check Act in addition to other requirements before licensing child care organizations or registering family day care homes. The department could deny, revoke, or refuse to renew a license or certificate of registration for an applicant who failed to comply with the provisions of the Child-Related Employment Background Check Act.

House Bill 5743. Under current law, the Family Independence Agency must maintain a central registry of information regarding child abuse and neglect cases. Certain specified entities are allowed access to the

information contained in the registry; for instance, law enforcement and child placement agencies. House Bill 5743 would amend the Child Protection Law (MCL 722.627) to also allow access by a person requesting a central registry check for a record of a central registry case under the Child-Related Employment Background Check Act. However, the person could only receive information on whether a central registry case existed for the applicant. The department could not release any information, report, or documentation regarding the details of the central registry case to a person making a request for a central registry check under the bill.

FISCAL IMPLICATIONS:

According to information supplied by the House Fiscal Agency, CIS has estimated that there are roughly 88,200 child care employees working in licensed and registered facilities. Furthermore, the FIA has 6,400 enrolled relative care providers and day care aides affiliated with such facilities. Therefore, there would be about 94,600 current child care positions for which new applicants would be covered by the bill. The National Child Care Information Center's Child Care Bulletin (July/August 1997, issue 16) estimates that roughly one-third of all child care workers leave their centers each year, and CIS puts the figure at about 40 percent. Using a turnover rate between 35 and 40 percent, about 33,000 to 38,000 positions would need to be filled each year.

Based on these figures, and using a cost of \$15 per DSP fingerprint check and \$37 for a combined DSP/FBI check (U.S. Bureau of Census data suggests that around eight percent of applicants would have less than five years of state residency), the House Fiscal Agency reports in a fiscal note dated 7-28-00 that House Bill 5741 could increase state costs between \$500,000 and \$550,000. If all applicants were subjected to national fingerprint checks, the cost could run between \$1.1 million and \$1.3 million.

Further, the agency reports that the bill would likely impose new administrative costs on FIA to conduct central registry checks on these same individuals. However, these costs should be significantly lower than the costs of the criminal history checks. Likewise, the bill would likely impose additional costs on CIS in administering the process. These costs would be indeterminate at this time.

Also in a fiscal note dated 7-28-00, the House Fiscal Agency reports that House Bill 5742, which requires CIS to comply with the provisions of the Child-Related Employment Background Check Act, would have no

additional fiscal impact beyond the fiscal impact noted in the HFA analysis of HB 5741.

In a separate fiscal note dated 5-16-00, the agency reports that House Bill 5743, which would allow access to information in the FIA-maintained Central Registry by a person requesting a check under the provisions of House Bill 5741, would have no fiscal impact at local or state level.

ARGUMENTS:

For:

Almost weekly, headlines reveal yet another tragic tale of children hurt or endangered by those entrusted with their care. Most recently, an audit conducted by the Michigan Auditor General revealed that close to one-third of the persons approved to be FIA enrolled child care aides or relative care providers should not have been approved. Currently, CIS and FIA rely on an honor system by which applicants voluntarily disclose whether they have been convicted of a crime or been the subject of an FIA central registry case. The FIA reportedly automatically disqualifies anyone with a central registry case, but CIS only requires the signed statement regarding criminal backgrounds from persons applying to be licensed or registered to operate a child care facility. Employees of licensees and registrants do not have to be screened for past criminal behavior. Even if a CIS check reveals that an applicant for a license or registration has a criminal background, the person is not automatically disqualified, as the department has the discretion to look at various factors in its determination. The result is that children in the state are exposed to unnecessary risk.

Many people feel that all persons caring for the children of others should be subject to criminal background checks and FIA central registry checks to expose those with a history of abusing or neglecting children. Under the bill, new applicants applying to work in child care centers or to be licensed or registered to provide child care would have to be screened for past criminal activity and central registry cases. The bill would use the good moral character standard that CIS currently uses in its review of license applications. However, since people can be rehabilitated and many turn their lives around, the bill would have a ten-year “look back” for the offenses listed in the good moral character standard. Only offenses constituting the most heinous of crimes toward children, including murder and sexual assault, along with a central registry case showing past abuse or neglect of a child, would permanently exclude a person from ever providing child care in the state.

Current child care workers would be subject to background checks at the discretion of their employer. Though they would not be automatically fired if a criminal or abusive background was found, the employer would have to notify each parent whose child attended the child care center. In that way, parents could make informed choices of who watches over their children. Further, at any time the employee left his or her current place of employment and applied for a position at another child care facility, he or she would be subject to the bill’s requirement for a background check, and could not be rehired by another facility if there were an offense that disqualified the person from being hired. Likewise, though current licensees would not instantly be subjected to a background check, they could not have their license or registration renewed without clearing the background check. Therefore, within a relatively short frame of time, persons who pose a potential risk of harm to young children in their care could be weeded out.

Against:

The bill package is an example of a good idea that does not translate easily into law. No one disputes the advisability of enacting laws to protect children. Unfortunately, in order to weed out some disreputable characters who have no business being entrusted with the care of children, some care givers who have made past mistakes, but who now are excellent and trustworthy care givers, may be driven out of the child care business. For instance, the long list of offenses listed in the bill, which would prevent a person from being hired for a ten-year period, could result in major staffing problems. Most child care workers receive minimum wage and no benefits, so child care organizations, like nursing homes, have a high turnover rate. This means that many agencies struggle to meet required staffing levels. As staff levels go down, so do available spots for children. Parents could be forced to place their children in unlicensed homes if openings in licensed organizations or registered family day care homes are decreased. Therefore, an unintended consequence of the bills may be that some parents’ access to quality care would be compromised.

Against:

House Bill 5742 would set up several conflicts with existing law. Currently, the Department of Consumer and Industry Services, among other criteria, must determine if applicants for licensure as child care organizations or registration as family day care homes have a “good moral character” as defined in Public Act 381 of 1974. The definition contained in PA 381 states that the term is construed “to mean the propensity on the part of the person to serve the public in the licensed

area in a fair, honest, and open manner.” The act also specifies that a “judgment of guilt in a criminal prosecution . . . shall not be used, in and of itself, by a licensing board or agency as proof of a person’s lack of good moral character.” (emphasis added) The act goes on to say that convictions can be used as evidence in the determination of good moral character, but the person has the ability to rebut the evidence and show that at the present time, he or she has the ability to serve the public honestly, that he or she is rehabilitated, or that the conviction has little or no relation to the profession he or she is applying for licensure to engage in.

House Bill 5742, in conjunction with House Bill 5741, would directly contradict PA 381 on several counts. House Bill 5741 would place in statute the list of offenses currently listed in departmental rules to be used when determining an applicant’s good moral character. However, House Bill 5742, along with provisions in House Bill 5741, would require CIS to automatically reject (in direct contradiction to PA 381) an applicant who had a conviction of any of the listed offenses within the preceding ten years. Further, PA 381 states that records of an arrest or conviction for a misdemeanor or felony that was unrelated to the person’s ability to serve the public (in the capacity of a licensee) cannot be “used, examined, or requested by a licensing board or agency in a determination of good moral character . . .” Again, the two bills would contradict this provision, as well as provisions prohibiting the request to view or use records relating to a conviction for misdemeanors that do not result in jail or prison sentences. Finally, PA 381 allows a person denied a license on the basis of not having a good moral character to have a hearing before the licensing board and also permits the person to bring an action in circuit court to contest the determination; neither of these would be available under the two bills under consideration. CIS should be allowed to continue to issue licenses under the guidelines established in PA 381 and related departmental rules, exercising discretion rather than a strict ban that provides no leeway to approve a license even in the face of evidence that the person poses no risk of harm to children.

Against:

House Bill 5741 contains several inconsistencies and contradictions. Some of the more problematic provisions are as follows:

- Though the bill specifies that only applicants with less than five years of residency in the state would be subjected to FBI fingerprint checks, the definition of

“criminal history checks” would require national fingerprint checks of all applicants, greatly increasing the cost and burden to the Department of State Police (DSP). Even if amended to clarify that only those with less than five years residency would be subject to FBI checks, many intended to be screened out could slip through, as a statewide check only reveals Michigan convictions. A 10- or 20-year resident who had a disqualifying conviction in Indiana or Ohio would not be “captured” and revealed; therefore, potentially dangerous individuals could still be hired as child care workers, licensed as providers, or enrolled by the FIA to provide services to low-income families.

- The bill requires the DSP to complete criminal background checks, whether national or statewide only, within 30 days. Currently, turnaround time is 90 days. Though the department is working on a system to electronically transmit fingerprints (which would speed up the process somewhat), there is no guarantee as to when the system would be functional statewide. And, by putting a time line in the bill, DSP would have to push other requests for job-related background checks to the back burner, rather than processing requests on a first-come, first-serve basis. This could greatly delay the processing time for other persons waiting for results of background checks before being able to be hired.

- The bill does not clearly specify who would shoulder the burden of the cost of the background checks. The bill appears to place the burden on DSP, but there is nothing in the language to prevent DSP from shifting the cost of fingerprint checks for licensees and their workers to CIS. According to DSP, the cost to do a statewide fingerprint check is \$15.50, and the FBI fingerprint check is an additional \$26. There are currently about 88,000 employees who work in licensed or registered child care facilities. With a 40 percent yearly turnover rate, there could be at least 35,000 new openings for child care workers, all who would need fingerprint checks at the state level and some nationally. In addition, if more than one person applied for each job, this number could increase. The cost for criminal background checks could easily top half a million dollars to more than a million dollars annually.

- Current law prohibits an employer from requiring a newly hired employee to pay the cost of being fingerprinted. Yet, as written, an applicant or current employee is responsible for going to a local police department to be fingerprinted. Reportedly, though some law enforcement agencies do not charge for job-related prints, most do. Fees vary from \$3 to \$10. Though it could be argued that job applicants and

existing employees fall outside the purview MCL 750.354a, such an interpretation seems to go against the spirit of the law. Considering that child care is considered to be a low-paying occupation, this could act as a deterrent to individuals seeking employment in child care.

- The bill is silent on who would be responsible for requiring FIA enrolled childcare aides and providers to be fingerprinted. The bill clearly specifies that licensed employers and CIS are responsible for requesting DSP to do criminal checks and FIA to do central registry checks on applicants, but though FIA enrolled providers are included in the definition of “applicant”, nothing specifically requires them to be fingerprinted, nor does the bill say to whom the results of the fingerprint checks are to be sent.

- The bill specifies that a licensee, registrant, or employee of a licensee or registrant cannot be paid with state money (which would include FIA child care subsidies for low-income families) if he or she has a central registry case or a conviction within the preceding ten years of the offenses in Section 3(1). This is a bit confusing. For instance, a large child care organization could have 20 employees, perhaps with one or two who had a conviction under Section 3(1). This raises the question of whether or not the worker with a past conviction could care for any children enrolled in the facility who were receiving FIA subsidies or if the agency would have to fire the worker in order to continue to be able to enroll children of families with FIA subsidies.

- The bill would create a loophole by which applicants for a license or certificate of registration as a child care provider who had a conviction for a crime against a child involving homicide, murder, manslaughter, or a sexual assault could still receive a license after the ten-year period expired, where employees of a licensee would be prohibited forever from working in a licensed agency.

- A person currently employed in a licensed child care agency who had a conviction for one of the listed offenses within the preceding ten years could be retained as long as all parents were notified of the person’s offense and the details of that conviction. However, the FBI and state police are prohibited from disclosing any details of an FBI criminal background check; they are only allowed to disclose whether or not the person had a conviction of one of the listed offenses (but cannot even say which offense). Requiring a person to disclose details publicly that state

and federal law enforcement agencies are prohibited from disclosing raises serious privacy issues.

- The provision regarding the time frame within which employers can require current employees to submit to a background check is confusing and should be amended for clarity.

POSITIONS:

The Family Independence Agency supports the concept of the bills. (5-17-00)

The Michigan Coalition for Children and Families supports the concept of the bills. (5-19-00)

Michigan’s Children supports the concept of the bills. (5-19-00)

The Michigan Federation of Private Child & Family Agencies supports the concept of the bills. (5-19-00)

The Michigan Association for the Education of Young Children supports the concept of the bills but opposes the bills as written. (5-16-00)

The Michigan Association for Child Care Providers, Inc. supports the concept of the legislation but opposes the bills as written. (5-16-00)

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.