

N.M. Admin. Code 8.8.3

8.8.3. GOVERNING BACKGROUND CHECKS AND EMPLOYMENT HISTORY VERIFICATION

8.8.3.1 ISSUING AGENCY: Children, Youth and Families Department

[8.8.3.1 NMAC - Rp, 8.8.3.1 NMAC, 03/31/06]

8.8.3.2 SCOPE: This rule has general applicability to operators, volunteers, including student interns, staff and employees, and prospective operators, staff and employees, of child-care facilities, including every facility, CYFD contractor, program receiving CYFD funding or reimbursement, the administrative office of the courts (AOC) supervised visitation and safe exchange program, or other program that has or could have primary custody of children for twenty hours or more per week, juvenile treatment facilities, and direct providers of care for children in including, but not limited to the following settings: Children's behavioral health services and licensed and registered child care, including shelter care.

[8.8.3.2 NMAC - Rp, 8.8.3.2 NMAC, 03/31/06; A, 07/31/09; A, 05/31/11]

8.8.3.3 STATUTORY AUTHORITY: The statutory authority for these regulations is contained in the Criminal Offender Employment Act, Section 28-2-1 to 28-2-6 NMSA and in the New Mexico Children's and Juvenile Facility Criminal Records Screening Act, Section 32A-15-1 to 32A-15-4 NMSA 1978 Amended.

[8.8.3.3 NMAC - Rp, 8.8.3.3 NMAC, 03/31/06]

Credits

8.8.3.4 DURATION: Permanent

[8.8.3.4 NMAC - Rp, 8.8.3.4 NMAC, 03/31/06]

8.8.3.5 EFFECTIVE DATE: March 31, 2006, unless a later date is cited at the end of a section.

[8.8.3.5 NMAC - Rp, 8.8.3.5 NMAC, 03/31/06]

8.8.3.6 OBJECTIVE:

All new rules, amendments, and repeals effective prior to May 1, 2014

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A. The purpose of these regulations is to set out general provisions regarding background checks and employment history verification required in settings to which these regulations apply.

B. Background checks are conducted in order to identify information in applicants' backgrounds bearing on whether they are eligible to provide services in settings to which these regulations apply.

C. Abuse and neglect screens are conducted by licensing authority staff in order to identify those persons who pose a continuing threat of abuse or neglect to care recipients in settings to which these regulations apply.

[8.8.3.6 NMAC - Rp, 8.8.3.6 NMAC, 03/31/06; A 07/31/09; A, 05/31/11]

8.8.3.7 DEFINITIONS:

A. AOC means administrative office of the courts.

B. ADMINISTRATIVE REVIEW means an informal process of reviewing a decision that may include an informal conference or hearing or a review of written records.

C. ADMINISTRATOR means the adult in charge of the day-to-day operation of a facility. The administrator may be the licensee or an authorized representative of the licensee.

D. ADULT means a person who has a chronological age of 18 years or older, except for persons under medicaid certification as set forth in Subsection J below.

E. APPEAL means a review of a determination made by the children, youth and families department, which may include an administrative review.

F. APPLICANT means any person who is required to obtain a background check under these rules and NMSA 1978, Section 32A-15-3.

G. ARREST means notice from a law enforcement agency about an alleged violation of law.

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H. **BACKGROUND CHECK** means a screen of the department's information databases, state and federal criminal records and any other reasonably reliable information about an applicant.

I. **CARE RECIPIENT** means any person under the care of a licensee.

J. **CHILD** means a person who has a chronological age of less than 18 years, and persons under applicable medicaid certification up to the age of 21 years.

K. **CONDITIONAL EMPLOYMENT** means a period of employment status for a new applicant prior to the licensing authority's final disposition of the applicant's background check.

L. **CRIMINAL HISTORY** means information possessed by law enforcement agencies of arrests, indictments, or other formal charges, as well as dispositions arising from these charges.

M. **DIRECT, PHYSICAL SUPERVISION** means continuous visual contact or live video observation by a direct provider of care who has been found eligible by a background check of an applicant during periods when the applicant is in immediate physical proximity to care recipients.

N. **DIRECT PROVIDER OF CARE** means any individual who, as a result of employment or, contractual service or volunteer service has direct care responsibilities or potential unsupervised physical access to any care recipient in the settings to which these regulations apply.

O. **ELIGIBILITY** means the determination that an applicant does not pose an unreasonable risk to care recipients after a background check is conducted.

P. **EMPLOYMENT HISTORY** means a written summary of the most recent three-year period of employment with names, addresses and telephone numbers of employers, including dates of employment, stated reasons for leaving employment, and dates of all periods of unemployment with stated reasons for periods of unemployment, and verifying references.

Q. **LICENSED** means authorized to operate by the children, youth and families department by issuance of an operator's license or certification certificate.

R. **LICENSEE** means the holder of, or applicant for, a license, certification, or registration pursuant to 7.20.11 NMAC, 7.20.12 NMAC, 8.16.2 NMAC, 7.8.3 NMAC; 8.17.2 NMAC or other program or entity within the scope of these regulations, including AOC supervised visitation and safe exchange program providers. **CYFD LICENSEE** means program or entity within the scope of these regulations except the AOC supervised

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visitation and safe exchange program providers.

S. LICENSING AUTHORITY means the children, youth and families department.

T. MORAL TURPITUDE means an intentional crime that is wanton, base, vile or depraved and contrary to the accepted rules of morality and duties of a person within society. In addition, because of the high risk of injury or death created by, and the universal condemnation of the act of driving while intoxicated, a crime of moral turpitude includes a second or subsequent conviction for driving while intoxicated or any crime involving the use of a motor vehicle, the elements of which are substantially the same as driving while intoxicated. The record name of the second conviction shall not be controlling; any conviction subsequent to an initial one may be considered a second conviction.

U. RELEVANT CONVICTION means a plea, judgment or verdict of guilty, no contest, nolo contendere, conditional plea of guilty, or any other plea that would result in a conviction for a crime in a court of law in New Mexico or any other state. The term RELEVANT CONVICTION also includes decrees adjudicating juveniles as serious youthful offenders or youthful offenders, or convictions of children who are tried as adults for their offenses. Successful or pending completion of a conditional discharge under NMSA 1978, Section 31-20-13 (1994), or NMSA 1978, Section 30-31-28 (1972), or a comparable provision of another state's law, is not a relevant conviction for purposes of these regulations, unless or until such time as the conditional discharge is revoked or rescinded by the issuing court. The term RELEVANT CONVICTION does not include any of the foregoing if a court of competent jurisdiction has overturned the conviction or adjudicated decree and no further proceedings are pending in the case or if the applicant has received a legally effective pardon for the conviction. The burden is on the applicant to show that the applicant has a pending or successful completion of any conditional discharge or consent decree, or that the relevant conviction has been overturned on appeal, or has received a legally effective pardon.

V. UNREASONABLE RISK means the quantum of risk that a reasonable person would be unwilling to take with the safety or welfare of care recipients.

[8.8.3.7 NMAC - Rp, 8.8.3.7 NMAC, 03/31/06; A, 07/31/09; A, 05/31/11]

8.8.3.8 APPLICABILITY: These regulations apply to all licensees and direct providers of care in the following settings:

A. behavior management skills development;

B. case management services;

C. group home services;

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D. day treatment services;

E. residential treatment services;

F. treatment foster care services agency staff;

G licensed child care homes;

H. licensed child care centers;

I. registered child care homes;

J. licensed shelter care;

K. licensed before and after school care;

L. non-licensed or exempt after school programs participating in the at risk component of the child and adult care food program;

M. comprehensive community support services;

N. CYFD contractors and any other programs receiving CYFD funding or reimbursement; and

O. AOC supervised visitation and safe exchange program providers.

[8.8.3.8 NMAC - Rp, 8.8.3.8 NMAC, 03/31/06; A, 07/31/09; A, 05/31/11]

8.8.3.9 NON-APPLICABILITY:

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A. These regulations do not apply to the following settings, except when otherwise required by applicable Certification Requirements for Child and Adolescent Mental Health Services 7.20.11 NMAC or to the extent that such a program receives funding or reimbursement from CYFD:

- (1) hospitals or infirmaries;
- (2) intermediate care facilities;
- (3) children's psychiatric centers;
- (4) home health agencies;
- (5) diagnostic and treatment centers;
- (6) unlicensed or unregistered child care homes.

B. These regulations do not apply to the following adults:

- (1) treatment foster care parents;
- (2) relative care providers who are not otherwise required to be licensed or registered;
- (3) foster grandparent volunteers;
- (4) volunteer parents of a care recipient if the parent is under direct physical supervision;
- (5) all other volunteers for any program or entity within the scope of these regulations if the volunteer spends less than six hours per week at the program, is under direct physical supervision, and is not counted in the facility ratio.

[8.8.3.9 NMAC - Rp, 8.8.3.9 NMAC, 03/31/06; A, 07/31/09; A, 05/31/11]

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8.8.3.10 COMPLIANCE:

A. Compliance with these regulations is a condition of licensure, registration, certification or renewal, or continuation of same or participation in any other program or contract within the scope of these regulations.

B. The licensee is required to:

(1) submit two completed FBI-approved fingerprint cards for all direct providers of care by the end of the next day following of commencement of service, whether employment or, contractual, or volunteer; EXCEPTION: In the case of licensed child care homes, the licensee must submit fingerprint cards, within five working days, for any adult who resides in the home or any persons residing in the home who reaches 18 years of age;

(2) submit the FBI-approved fingerprint cards to CYFD along with the specified fee;

(3) submit the name, address, date of birth and any aliases of the direct care provider for a child abuse and neglect screen;

(4) verify the employment history of any prospective direct provider of care by contacting references and prior employers/agencies to elicit information regarding the reason for leaving prior employment or service; the verification shall be documented and available for review by the licensing authority; EXCEPTION: verification of employment history is not required for registered home providers, child care homes licensed for six (6) or fewer children, or relative care providers;

(5) submit an adult household member written statement form for each adult household member in a registered home setting in order to conduct criminal history and child abuse and neglect screens on such household members; an adult household member is an adult living in the household or an adult that spends a significant amount of time in the home;

(6) provide such other information department staff determines to be necessary; and

(7) maintain documentation of all applications, correspondence and eligibility relating to the background checks required; in the event that the licensee does not have a copy of an applicant's eligibility documentation and upon receipt of a written request for a copy, the department may issue duplicate eligibility documentation to the original licensee provided that the request for duplicate eligibility documentation is made within one year of the applicant's eligibility date.

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C. If there is a need for any further information from an applicant at any stage of the process, the department shall request the information in writing from the applicant. If the department does not receive the requested information within fifteen calendar days of the date of the request, the department shall deny the application and send a notice of background check denial.

[8.8.3.10 NMAC - Rp, 8.8.3.10 NMAC, 03/31/06; A, 07/31/09; A, 05/31/11]

8.8.3.11 COMPLIANCE EXCEPTIONS:

A. An applicant may not begin providing services prior to obtaining background check eligibility unless all of the following requirements are met:

(1) the CYFD licensee may not be operating under a corrective action plan (childcare), sanctions, or other form of disciplinary action;

(2) until receiving background eligibility the applicant shall at all times be under direct physical supervision; this provision does not apply to registered child care home applicants;

(3) by the end of the next day after the applicant begins providing supervised services, the licensee or applicant shall send the licensing authority a completed application form and fingerprint cards; and

(4) no more than 45 days shall have passed since the date of the initial application unless the department documents good cause shown for an extension.

B. If a direct provider of care has a break in employment or transfers employment more than 180 days after the date of an eligibility letter from the licensing authority, the direct provider of care must re-comply with 8.8.3.10 NMAC. A direct provider of care may transfer employment for a period of 180 days after the date of an eligibility letter from the licensing authority without complying with 8.8.3.10 NMAC only if the direct provider of care submits a preliminary application that meets the following conditions:

(1) the direct provider of care submits a statement swearing under penalty of perjury that he or she has not been arrested or charged with any crimes, has not been an alleged perpetrator of abuse or neglect and has not been a respondent in a domestic violence petition;

(2) the direct provider of care submits an application that describes the prior and subsequent places of employment, registration or certification with sufficient detail to allow the licensing authority to determine if further background checks or a new application is necessary; and

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(3) the licensing authority determines within 15 days that the direct provider of care's prior background check is sufficient for the employment or position the direct provider of care is going to take.

[8.8.3.11 NMAC - Rp, 8.8.3.11 NMAC, 03/31/06; A, 04/15/08; A, 07/31/09; A, 05/31/11]

8.8.3.12 PROHIBITIONS:

A. Any CYFD licensee who violates these regulations is subject to revocation, suspension, sanctions, denial of licensure, certification, or registration or termination of participation in any other program within the scope of these regulations. AOC supervised visitation and safe exchange program providers will be monitored and sanctioned by the AOC.

B. Licensure, certification, registration or participation in any other program within the scope of these regulations is subject to receipt by the licensing authority of a satisfactory background check for the licensee or the licensee's administrator.

C. Except as provided in 8.8.3.13 NMAC below, licensure, certification, registration or participation in any other program within the scope of these regulations may not be granted by the licensing authority if a background check of the licensee or the licensee's administrator reveals an unreasonable risk.

D. A licensee may not retain employment, volunteer service or contract with any direct provider of care for whom a background check reveals an unreasonable risk. The department shall deliver one copy of the notice of unreasonable risk to the facility or program by U.S. mail and to the appropriate staff at the department or the AOC by facsimile transmission or hand delivery.

E. A licensee shall be in violation of these regulations if it retains a direct provider of care for more than ten working days following the mailing of a notice of background check denial for failure to respond by the licensing authority.

F. A licensee shall be in violation of these regulations if it retains any direct provider of care inconsistent with Subsection A of 8.8.3.11 NMAC.

G. A licensee shall be in violation of these regulations if it hires, contracts with, uses in volunteer service, or retains any direct provider of care for whom information received from any source including the direct provider of care, indicates the provider of care poses an unreasonable risk to care recipients.

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H. Any firm, person, corporation, individual or other entity that violates this section shall be subject to appropriate sanctions up to and including immediate emergency revocation of license or registration pursuant to the regulations applicable to that entity or termination of participation in any other program within the scope of these regulations.

[8.8.3.12 NMAC - Rp, 8.8.3.12 NMAC, 03/31/06; A, 07/31/09; A, 05/31/11]

8.8.3.13 ARRESTS, CONVICTIONS AND REFERRALS:

A. For the purpose of these regulations, the following information shall result in a conclusion that the applicant is an unreasonable risk:

(1) a conviction for a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to whether the applicant can provide a safe, responsible and morally positive setting for care recipients;

(2) a conviction for a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to whether the applicant can provide a safe, responsible and morally positive setting for care recipients if the department determines that the applicant so convicted has not been sufficiently rehabilitated;

(3) a conviction, regardless of the degree of the crime or the date of the conviction, of trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse; or

(4) a substantiated referral, regardless of the date, for sexual abuse or for neglect characterized by a failure to protect against sexual abuse.

B. A disqualifying conviction may be proven by:

(1) a copy of the judgment of conviction from the court;

(2) a copy of a plea agreement filed in court in which a defendant admits guilt;

(3) a copy of a report from the federal bureau of investigation, criminal information services division, or the national criminal information center, indicating a conviction;

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(4) a copy of a report from the state of New Mexico, department of public safety, or any other agency of any state or the federal government indicating a conviction;

(5) any writing by the applicant indicating that such person has been convicted of the disqualifying offense, provided, however, that if this is the sole basis for denial, the applicant shall be given an opportunity to show that the applicant has successfully completed or is pending completion of a conditional discharge for the disqualifying conviction.

C. If a background check shows pending charges for a felony offense, any misdemeanor offense involving domestic violence or child abuse, an arrest but no disposition for any such crime, or a pending referral with the department, there shall be a determination of unreasonable risk. An arrest or criminal charge for any felony offense or for any misdemeanor offense involving domestic violence or child abuse shall result in the immediate suspension of the applicant's background check status until such time as the charges are disposed of. It is the duty of the administrator of a facility or the licensee, upon learning of any such arrest or criminal charge, to notify the licensing authority immediately. A suspension of background check status shall have the same effect as a determination of unreasonable risk until the charges are disposed of. If an arrest or criminal charge results in a conviction, the applicant may reapply for background check eligibility and shall be subject to all applicable criminal records check provisions and may be determined to be an unreasonable risk. If an arrest or criminal charge results in an acquittal, conditional discharge, suspension of proceedings based on participation in a pre-prosecution diversion program or dismissal of the charges, or any other disposition that is not a criminal conviction, the applicant may thereafter reapply and be considered for a determination that the applicant is eligible.

D. If a background check shows that an applicant is wanted for any offense by any law enforcement agency due to a warrant having been issued, or if the applicant is shown to have failed to appear for any pending criminal court proceeding, there shall be a determination of unreasonable risk. If such information shall be reported to the licensing authority after an initial determination that the applicant is eligible, the applicant's background check status shall be suspended until such time as the matter is disposed of. After the matter has been disposed of, the applicant shall be subject to all of the background check provisions set forth in Subsections A, B, and C above.

[8.8.3.13 NMAC - Rp, 8.8.3.13 NMAC, 03/31/06; A, 07/31/09]

8.8.3.14 UNREASONABLE RISK:

A. The department may, in its discretion, weigh the evidence about an applicant to determine whether the applicant poses an unreasonable risk to care recipients. The department may also consult with legal staff, treatment, assessment or other professionals in the process of determining whether the cumulative weight of credible evidence establishes unreasonable risk.

B. In determining whether an applicant poses an unreasonable risk, the department need not limit its reliance on formal convictions or substantiated referrals, but nonetheless must only rely on evidence with indicia of reliability such as:

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- (1) reliable disclosures by the applicant or a victim of abuse or neglect;
- (2) domestic violence orders that allowed an applicant notice and opportunity to be heard and that prohibits or prohibited them from injuring, harassing or contacting another;
- (3) circumstances indicating the applicant is or has been a victim of domestic violence;
- (4) child or adult protection investigative evidence that indicates a likelihood that an applicant engaged in inappropriate conduct but there were reasons other than the credibility of the evidence to not substantiate;
or
- (5) any other evidence with similar indicia of reliability.

[8.8.3.14 NMAC - N, 03/31/06; A, 07/31/09; A, 05/31/11]

8.8.3.15 REHABILITATION PETITION: Any applicant whom the department concludes is an unreasonable risk on any basis other than those described at Paragraphs (3) or (4) of Subsection A of 8.8.3.13 NMAC, may submit to the department a rehabilitation petition describing with specificity all information that tends to demonstrate that the applicant is not an unreasonable risk. The petition may include, but need not be limited to, a description of what actions the applicant has taken subsequent to any events revealed by the background check to reduce the risk that the same or a similar circumstance will recur.

[8.8.3.15 NMAC - N, 03/31/06]

8.8.3.16 APPEAL RIGHTS:

A. Any CYFD licensee who is denied licensure, certification, registration or is sanctioned or terminated from participation in any program pursuant to these regulations may appeal that decision to the children, youth and families department. A previously cleared direct provider of care whose eligibility has been suspended may appeal that decision to the children, youth and families department. If a CYFD licensee or a previously cleared direct provider of care alleges facts in good faith that demonstrate a conclusion of unreasonable risk will substantially affect a present vested right such as current employment or other similar currently vested rights the CYFD licensee or a previously cleared direct provider of care shall be entitled to a hearing. The request for appeal shall be in writing and the party requesting the appeal shall cause the department to receive it within fifteen days of the date of the department's written notice of a determination of unreasonable risk.

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B. Any direct provider of care who is found ineligible after completion of background check may request an administrative review from the children, youth and families department. The request for an administrative review shall be in writing and the party requesting the appeal shall cause the department to receive it within fifteen days of the date of the department's written notice of a determination of unreasonable risk.

C. The administrative review shall be completed by a review of the record by a hearing officer designated by the cabinet secretary. The hearing officer's review is limited to: (1) whether the licensing authority's conclusion of unreasonable risk is supported by any section of these regulations; and (2) whether the applicant has been erroneously identified as a person with a relevant conviction or substantiated referral. The review will be completed on the record presented to the hearing officer and includes the applicant's written request for an administrative review and other relevant evidence provided by the applicant. The hearing officer conducts the administrative review and submits a recommendation to the cabinet secretary no later than 60 days after the date the request for administrative review is received unless the department and the applicant agree otherwise. The appeal that is a hearing under this section shall be pursuant to the department's administrative hearing regulations at 8.8.4 NMAC.

[8.8.3.16 NMAC - Rp, 8.8.3.15 NMAC 03/31/06; A, 07/31/09; A, 05/31/11]