

Abuse and Background Checks

301 Background Checks for Child-Serving Entities

1.0 Legal Base

The legal base for these regulations is in 31 **Del.C.** §309.

2.0 Purpose

The overall purpose of these regulations is to protect children who are in the care or custody of child-serving entities. Therefore, persons seeking employment who have regular direct access to children or provide services to a child or children at a child-serving entity must have a background check completed before employment or during a conditional period of employment. In addition, foster, respite, and adoptive parents must have a background check before approval or during a period of temporary approval with the Department or contracted providers. Unless a person is prohibited under law, employers may use their own employment and acceptance criteria which may be stricter than those described in these regulations.

3.0 Definitions

"Active on the child protection registry" means substantiated by the Division of Family Services for abuse or neglect at level II, III, or IV and reportable to employers.

"Administrative review" means a review provided to persons that are determined ineligible or prohibited on the basis of the background check results.

"Background check" means a State of Delaware and federal (national) fingerprinted report of a person's entire criminal history, a Department of Services for Children, Youth and Their Families child protection registry check and other checks as required by State or federal law.

"Child protection registry" means a central registry of information about persons the Division of Family Services has found cause to believe or a court has substantiated through court adjudication as having committed child abuse or neglect since August 1, 1994. Each substantiated incident shall be designated at one of three levels: II, III, IV.

"Child protection registry check" means a computer search of the child protection registry to determine if a person is active on the registry as a perpetrator in any substantiated case of child abuse or neglect.

"Child-serving entity" means any of the following: The Department of Services for Children, Youth and Their Families; which includes any employee of the Department or one of its contractors; residential child care facilities in Delaware which are under contract with or operated directly by the Department; child care providers as defined in 31 **Del.C.** §342(1); youth camps or summer schools that are exempt from licensing requirements; or facilities and individuals registered and eligible for Federal Child Care Development Block Grant funds through the Delaware Department of Health and Social Services.

"Conditional employee" means a person who has been offered a position, or has agreed to volunteer, or provide foster care on a temporary basis until the determination of eligibility is made by the Department.

"Contractor" means a person, not an employee, providing services within a child-serving entity who has regular direct access to children, or provides services directly to a child or children.

"Conviction" or **"Convicted"** means as defined in 16 **Del.C.** §902(6).

"Criminal history specialist" means the Department staff member, located in the Office of Child Care Licensing, who is responsible for processing and reviewing background check information consistent with departmental policies, procedures, and regulations.

"Criminal history supervisor" means the Department staff member, located in the Office of Child Care Licensing, who is responsible for the implementation of the background check policies, procedures, and regulations.

"Criminal History Unit" means the Department unit, located in the Office of Child Care Licensing that is responsible for completing background checks.

"Delaware Justice Information System" or **"DELJIS"** means the central state agency responsible for the database which contains Delaware's criminal justice information including arrests and convictions.

"Department" means the Department of Services for Children, Youth and Their Families.

"Direct access" means the opportunity to have personal unsupervised contact with children receiving care.

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"Employee" means any person seeking paid employment with a child-serving entity, or any person who for any reason has regular direct access to children such as a volunteer, or provides services directly to a child or children at a child-serving entity. This definition shall also include adult household members in licensed and license exempt child care homes and applicants wishing to become foster, respite, or adoptive parents and their adult household members.

"Employer" means any child-serving entity.

"Felony convictions involving physical or sexual assault crimes" means as defined in 31 **Del.C.** §309.

"Foster parents" means foster, respite, and adoptive parents and all household members 18 years of age or older.

"Licensed child care" means as defined in 31 **Del.C.** §342(1).

"License exempt child care" means provider types that are exempt from licensure as defined in the Office of Child Care Licensing's Delacare regulations and the Department of Health and Social Services' policies.

"Misdemeanor convictions against children" means as defined in 31 **Del.C.** §309.

"Office of Child Care Licensing" or **"OCCL"** means the entity within the Department authorized under 31 **Del.C.** §§341-345 to promulgate and enforce regulations and standards for the conduct of child care, including the licensing thereof, and the development and implementation of policies and procedures.

"Prohibited" means a person has a prohibited conviction or child protection registry substantiation that prevents them from employment, volunteering, contracting, or being a foster parent as designated under 31 **Del.C.** §309, The Adoption and Safe Families Act of 1997 and The Child Care Development Block Grant Act of 2014.

"Prohibited child protection registry substantiation" means a child abuse or neglect substantiation that prevents a person from employment, volunteering, contracting, or being a foster parent as designated under 16 **Del.C.** §923.

"Prohibited conviction" means a felony or misdemeanor conviction that prevents a person from employment, volunteering, contracting, or being a foster parent as designated under 31 **Del.C.** §309, The Adoption and Safe Families Act of 1997 and The Child Care Development Block Grant Act of 2014.

"Regular direct access" means the opportunity to have personal contact for five days or 40 hours in a calendar year with children receiving care. Employers must ensure that employees and contractors will be supervised at all times. If supervision is not possible, a background check must be completed before allowing direct access.

"Residential child care facility" means any facility that provides care or treatment for children overnight or is a 24-hour facility. This facility is State owned and operated or is licensed by the OCCL to provide services.

"Youth camp" means a child-serving entity having custody or control of one or more school-age children, unattended by parent or guardian, for the purpose of providing a program of recreational, athletic, educational and/or religious instruction or guidance and operates for up to 12 weeks for three or more hours per day, during the months of May through September or some portion thereof, or during holiday breaks in the course of a school year, and is operated in a space or location that is not subject to licensing pursuant to 31 **Del.C.** §344.

4.0 Persons Subject to the Law

- 4.1 Generally, employees subject to a background check shall be those specified in subsections 4.2-4.7 who are in a position which involves:
 - 4.1.1 The opportunity to have regular direct access to children receiving care or providing services directly to a child or children.
 - 4.1.2 For limited, occasional, sporadic, one-time direct access that lasts less than five days or 40 hours, a background check is not required. However, employers must ensure these employees and contractors will be supervised at all times. If supervision is not possible, a background check must be completed before allowing direct access.
- 4.2 Department contractors. Background checks shall be conducted on contractor employees that have regular direct access or provide services directly to a child or children.
- 4.3 Foster parents as defined in Section 3.0
 - 4.3.1 Background checks shall be conducted on:
 - 4.3.1.1 Applicants for foster and respite care within the Department and in licensed child placing agencies providing foster care.

- 4.3.1.2 Applicants for adoption within the Department and in licensed child placing agencies providing adoption services.
- 4.3.1.3 Petitioners in relative adoptions.
- 4.3.1.4 Applicants for interstate adoption or foster placement when a child is from another state and is being placed in Delaware and when a Delaware child is being placed in another state.
- 4.3.1.5 Household members 18 years of age and older in foster, respite, and adoptive homes. The Department may, when there is cause to believe the health, safety, or welfare of a child in care may be at risk, request consent from a parent/guardian for a background check on a household member under 18 years of age.
- 4.4 Department employees. Background checks shall be conducted on all Department employees.
- 4.5 Licensed child care
 - 4.5.1 Background checks shall be conducted on:
 - 4.5.1.1 Employees and contractors within family child care, large family child care, early care and education centers, school age centers, child placing agencies, and residential child care facilities.
 - 4.5.1.2 Household members 18 years of age and older in family child care and large family child care. The Department may, when there is cause to believe the health, safety, or welfare of a child in care may be at risk, request consent from a parent/guardian for a background check on a household member under 18 years of age.
- 4.6 License exempt child care
 - 4.6.1 Background checks shall be conducted on:
 - 4.6.1.1 Employees and contractors within child care facilities and youth camps receiving Federal Child Care Development Block Grant funds through the Delaware Department of Health and Social Services.
 - 4.6.1.2 Applicants and household members 18 years of age and older in relative care homes receiving Federal Child Care Development Block Grant funds through the Delaware Department of Health and Social Services. The Department may, when there is cause to believe the health, safety, or welfare of a child in care may be at risk, request consent from a parent/guardian for a background check on a household member under 18 years of age.
- 4.7 Youth camps
 - 4.7.1 Background checks shall be conducted on employees and contractors at youth camps. Such checks shall be valid for a 5 year period.
 - 4.7.2 Youth camps not receiving Federal Child Care Development Block Grant Funds may elect not to go through the fingerprinting process, but instead choose to perform all of the following:
 - 4.7.2.1 a name-based Delaware criminal background check and child protection registry check for prospective employees and contractors through the DELJIS;
 - 4.7.2.2 a name-based child protection registry check through the Department; and
 - 4.7.2.3 an out-of-state criminal record check using private third party providers including a social security number trace search and county-based criminal record search in the counties in which the individual has resided within the past 10 years.

5.0 Background Check Process

- 5.1 The employer shall require each person subject to the law, either as soon as that person has accepted a position, or has agreed to serve as a volunteer, to schedule a fingerprint appointment before the start of employment. In the case of foster parents, fingerprinting must be completed before completing pre-service training or the home study process.
 - 5.1.1 Department employees, contractors, foster parents, applicants for licensed center child care, applicants for licensed family child care and their adult household members, applicants for license exempt relative child care and their adult household members must be fingerprinted before employment or approval and provide the State Bureau of Identification receipt of fingerprinting to the employer or the OCCL for licensed child care or the Department of Health and Social Services for license exempt child care before starting employment or providing child care.

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5.1.2 Licensed child care employees, license exempt child care employees, and youth camp employees as required must be fingerprinted within 30 days of the start of employment and provide the State Bureau of Identification receipt of fingerprinting to their employer.

5.1.2.1 Youth camps not receiving Federal Child Care Development Block Grant funds may elect not to go through the fingerprinting process as specified in subsection 4.7.2.

5.2 The person goes to a designated Delaware State Police Troop and has two sets of fingerprints taken.

5.3 The Delaware State Police follow established procedures to obtain criminal history information from the State Bureau of Identification and Federal Bureau of Investigation. A report of the person's criminal history record or a statement that there is no criminal history information relating to that person is forwarded to the Criminal History Unit. The Delaware State Police also forward the person's Delaware criminal history record or a statement that there is no criminal history information relating to that person to the child-serving entity.

5.4 After receipt of the criminal history results, Criminal History Unit staff conduct a child protection registry check and all other checks required by State and federal law.

5.5 The criminal history specialist reviews the background check results from the State Bureau of Identification, child protection registry, Federal Bureau of Investigation, "Background Check Request" form, and all other checks required by State and federal law. This review is guided by the criteria specified in subsections 6.1-7.2.

5.6 When the background check review is completed and all further investigation is conducted, the criminal history specialist shares the results with the criminal history unit supervisor when the recommendation is ineligible or prohibited. The supervisor makes the eligibility determination based on the criteria specified in subsections 6.1-7.2. Upon making a determination of ineligible or prohibited, the Criminal History Unit shall provide notification to the child-serving entity, OCCL for licensed child care, the Department of Health and Social Services for license exempt child care, and the employee or contractor.

5.7 In the event the employee or contractor has reason to challenge the accuracy or completeness of background check results, an administrative review will be provided, as explained in Section 8.0.

6.0 Criteria for Prohibited Convictions and Child Protection Registry Substantiations

6.1 People convicted of a prohibited offense or active on the child protection registry for a prohibited substantiation shall be prohibited from employment, volunteering, contracting, or residing in a licensed or license exempt family child care home, or providing foster care, respite care or adoption without consideration of other criteria.

6.2 If a person has more than one prohibition, the higher level prohibition shall apply.

6.3 The Adoption and Safe Families Act of 1997 prohibits people from becoming foster or adoptive parents if they have the following felony convictions:

6.3.1 Child abuse or neglect, spousal abuse, crimes against children (including child pornography), and crimes involving violence including rape, sexual assault, and homicide committed at any time.

6.3.2 Physical assault, battery, and drug related offenses committed within the past five years.

6.4 The Child Care Development Block Grant Act of 2014 prohibits child care persons from employment, volunteering, substituting, contracting, or living in licensed child care centers, family child care homes, and license exempt facilities and homes if such person:

6.4.1 Refuses to consent to the background check;

6.4.2 Knowingly makes a materially false statement in connection with the background check;

6.4.3 Is registered, or is required to be registered, on a State sex offender registry or repository or the National Sex Offender Registry; or

6.4.4 Has been convicted of a felony consisting of murder, child abuse or neglect, a crime against children, including child pornography, spousal abuse, a crime involving rape or sexual assault, kidnapping, arson, physical assault or battery committed at any time; or

6.4.5 Has been convicted of a felony drug-related offense committed during the preceding 5 years; or

6.4.6 Has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes: child abuse, child endangerment, sexual assault or child pornography at any time.

7.0 Criteria for Ineligibility

7.1 Information received from the background check shall be reviewed by the criminal history specialist to determine eligibility for employment, contracting, and foster care based on the following criteria:

7.1.1 Types of criminal convictions;

- 7.1.1.1 Criminal convictions other than those that are prohibited shall be reviewed in consideration of the criteria below. Other convictions for offenses which may make an employee or contractor ineligible for employment or may make a prospective foster parent ineligible are those in the Delaware Code, which may contain (but are not limited to) the following characteristics:
 - 7.1.1.1.1 Criminal conviction against a person where physical harm or death has taken place;
 - 7.1.1.1.2 Criminal conviction involving weapons, explosive devices, or threat of harm;
 - 7.1.1.1.3 Criminal conviction involving public indecency and obscenity which may have been the result of plea bargain situations;
 - 7.1.1.1.4 Criminal conviction that shows a disregard of others, such as reckless endangering, arson;
 - 7.1.1.1.5 Criminal conviction of cruelty to animals or deviant behavior such as abusing a corpse; or
 - 7.1.1.1.6 Criminal conviction against the Uniform Controlled Substances Act.
- 7.1.1.2 The criminal convictions contained in subsection 7.1.1.1 involving the employee, contractor, or foster parent shall be reviewed in consideration of other criteria below.
- 7.1.2 Number of convictions;
- 7.1.3 Length of time since the conviction or convictions;
- 7.1.4 Severity of the conviction or convictions;
- 7.1.5 Criminal record since the conviction or convictions;
- 7.1.6 Relationship of the conviction or convictions to the type of job assignment or responsibilities of the person;
- 7.1.7 Current probation or parole status; and
- 7.1.8 Policies of the Department.
- 7.2 Failure by a person to disclose relevant criminal history or child protection registry information on the "Background Check Request" form that is subsequently disclosed as a result of the background check may be grounds for immediate termination of an employee or contractor, or denial of approval for licensure or foster, respite, or adoptive care.

8.0 Administrative Review

- 8.1 The background check is only one factor being considered in the hiring or approval process. If the employer makes an adverse judgment before the check is completed or based on any criterion other than the background check, this administrative review does not apply.
- 8.2 Any person who is determined ineligible or prohibited as a result of an adverse judgment made by the Criminal History Unit on the basis of the criminal background check results, shall be entitled to an administrative review for reconsideration.
- 8.3 If the person believes the criminal background check information resulting in a determination of ineligible or prohibited is inaccurate or incomplete, the person may request an administrative review. The request must be submitted in writing to the Criminal History Unit within 10 business days of receiving notification of the determination of ineligible or prohibited.
- 8.4 When a person has requested an administrative review, the following shall apply:
 - 8.4.1 The person shall be removed from direct access to children or provisions made for on-site supervision of the person during working hours pending the results of the review.
 - 8.4.2 In the case of foster parents, children may be removed from the home or no further placements shall be made pending the results of the review.
 - 8.4.3 In the case of adoptive parents, the application shall remain active, but children may be removed from the home pending results of the review.
 - 8.4.4 The employer shall notify the criminal history specialist of the action taken with the person pending the review results. This notification is in addition to following established procedures and regulations already governing State personnel or individual facilities or agencies.
- 8.5 In the case of an administrative review of a decision involving a Department operated facility or Department employee, the applicable division director or designee shall conduct the review in conjunction with personnel and within the context of these regulations, merit rules and labor agreements, and the employment status of the person.
- 8.6 When the administrative review involves a Division of Family Services approved foster parent, the director of the Division of Family Services or designee shall conduct the review.

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- 8.7 In the case of an administrative review of a decision involving a contracted facility or child placing agency, the division director or designee of the contracting division shall conduct the review.
- 8.8 In the case of an administrative review of a decision involving a licensed center, family child care, or youth camp, OCCL administrator or designee shall conduct the review.
- 8.9 In the case of an administrative review of a decision involving a license exempt home, facility, or youth camp receiving Child Care Development Block Grant funds, the Department of Health and Social Services senior administrator or designee shall conduct the review.
- 8.10 The employer and the person shall be bound by the final decision of the administrative review which is made by the person that conducted the review. If the employer does not accept and follow the decision, sanctions shall apply.

9.0 Subsequent Criminal History Information

Subsequent criminal history information received after the initial background check, shall be reviewed by the Criminal History Unit and shared with the child-serving entity when there are concerns with a person's continued eligibility for employment, volunteering, contracting, foster care, respite care and adoption.

10.0 Employer Responsibilities

- 10.1 The employer shall direct persons working or volunteering in a child-serving entity to the State Police to have fingerprints taken. Employer shall ensure the completion of this process by receiving an SBI receipt of fingerprinting from the person who was fingerprinted.
 - 10.1.1 The employer, whenever possible, will notify the criminal history specialist if a person is terminated before the background check process is completed.
 - 10.1.2 The employer shall require employees to notify the employer of any subsequent charges and subsequent allegations of child abuse or neglect against them as a condition of continued employment or approval.
- 10.2 When the employer is notified that a person is determined prohibited, the employer shall immediately take steps to remove the person from direct access to children pending the results of an administrative review. The employer shall abide by the review decision.
- 10.3 In the event that a person does not request an administrative review for a prohibited determination, the employer must terminate the employee, volunteer or contractor.

11.0 Sanctions

- 11.1 Sanctions against employers (division/facility/agency) shall be applied and enforced in the following circumstances:
 - 11.1.1 An employer fails to require background checks for affected employees.
 - 11.1.2 An employer knowingly hires or approves a person who is prohibited as a result of a conviction or child protection registry substantiation for a prohibited offense.
 - 11.1.3 An employer does not comply with the final recommendation of an administrative review.
- 11.2 Sanctions applied to contracted agencies, residential facilities, licensed family child care homes, child care centers, and child placing agencies for violation of the law or the regulations may include:
 - 11.2.1 Amendment or termination of any agreements with the Department to provide the contracted service;
 - 11.2.2 Removal of children from placement;
 - 11.2.3 Suspension of future child referrals; or
 - 11.2.4 Enforcement action by OCCL including license revocation.
- 11.3 Sanctions against Department divisions for violation of the law or regulations shall be applied to responsible staff by the Secretary on a case-by-case basis and may include:
 - 11.3.1 Involuntary reassignment; or
 - 11.3.2 Discipline up to and including dismissal.

12.0 Confidentiality

- 12.1 11 Del.C. §8513(c)(1) permits the State Bureau of Identification to furnish information concerning the identification and conviction data of any person seeking employment as long as the information is only used for the purpose it was given.

- 12.2 The Department shall ensure written and electronically recorded background check information shall be stored in a systematic manner, to provide for the security and confidentiality of records and to protect against any anticipated threats to their security and integrity.
- 12.3 The Department shall ensure the use of the background check information is restricted to its purpose of determining eligibility for employment or approval to provide child care services.
- 12.4 As stipulated in Public Law 92-544 and 28 CFR 50.12, the Department shall not release copies of actual Federal Bureau of Investigation criminal history records to employers as defined in these regulations.
- 12.5 Background check information shall not be shared with any persons other than the employee whose record is being sought, the employer, the Department, the Department of Health and Social Services for license exempt care and authorized federal and State officials in compliance with 11 **Del.C.** §8513(d).

5 DE Reg. 1828 (3/1/02)

17 DE Reg. 331 (09/01/13)

19 DE Reg. 1023 (05/01/16)