

DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES
DIVISION OF FAMILY SERVICES
OFFICE OF CHILD CARE LICENSING
CRIMINAL HISTORY UNIT

Statutory Authority: 31 Delaware Code, Section 309 (31 Del.C. §309)
9 DE Admin. Code 301

FINAL

ORDER

301 Criminal History Record Checks for Child Care Persons

NATURE OF PROCEEDINGS

The Department of Services for Children, Youth and Their Families ("DSCYF") initiated proceedings to adopt State of Delaware DELACARE Regulations - Background Checks for Child-Serving Entities to comply with changes in Delaware and Federal Code. On March 1, 2016 the proposed changes were published in the Delaware *Register of Regulations*. Written comments were accepted until March 31, 2016. Several regulations were revised based on the comments received. The results of the evaluation of the comments received are summarized in the accompanying "Summary of Evidence."

SUMMARY OF EVIDENCE

In accordance with Delaware law, the Office of Child Care Licensing (OCCL) published in the Delaware *Register of Regulations* DELACARE Regulations - Background Checks for Child-Serving Entities in March 2016. The period of public comment ended March 31, 2016. Comments were provided by the following:

- Dafne Carnwright, Autism Delaware
- Daniese McMullin-Powell, Chairperson, State Council for Persons with Disabilities
- Robert Overmiller, The Governor's Advisory Council for Exceptional Citizens (GACEC)

Comments included here are those that pertain directly to the proposed regulations. Those that did not address the actual regulations have not been incorporated. In some cases, it was necessary to summarize comments. The agency appreciates and acknowledges the comments.

Dafne Carnwright, Autism Delaware

We recommend the addition of a regulation which would clearly describe how often camps should background check returning employees.

Agency Response: The agency revised regulation 4.7.1 to include language that "Such checks shall be valid for a 5 year period."

As the intent of 4.7.2 and 5.1.2.1 seems to be that camps have an option to do other checks instead of fingerprinting, we would suggest clarifying in each section of 5.0 the differences for youth camps not using the fingerprinting process. This will enable youth camps to clearly understand what is expected.

Agency Response: Regulations 4.7.2 and 5.1.2.1 explain that youth camps not receiving Federal Child Care Development Block Grant Funds are permitted to opt out of fingerprinting. The "opting out" is not mentioned in the other regulations under 5.0 because those regulations define other child-serving entities and the process they must follow for fingerprinting. The regulations under 5.0 will remain unchanged.

We would also recommend revising the way the information in 4.7.2 is presented. Many specific requirements are included in the one long sentence that makes up 4.7.2.

Agency Response: The agency added regulations 4.7.2.1, 4.7.2.2 and 4.7.2.3 to help clarify all of the name-based checks required whenever a youth camp elects not to go through the fingerprinting process.

Daniese McMullin-Powell, Chairperson, State Council for Persons with Disabilities and Robert Overmiller, The Governor's Advisory Council for Exceptional Citizens (GACEC)

While the definition of "employee" covers a long list of persons, many regulatory sections refer to employees as distinct from volunteers, foster parents, etc. Compare, e.g., §3.0, definition of "child-serving entity", §4.6.1.1, §4.7.1, and §5.1.1.

Agency Response: The agency revised regulation 3.0 "Child-serving entity" by removing volunteers. The agency also revised regulations 4.6.1.1 and 4.7.1 by removing applicants, substitutes and volunteers. The revision of all three regulations removes the distinction of employee types from the definition of "employee." Regulation 5.1.1 will remain unchanged because a distinction of employee types is necessary to explain when fingerprinting is needed for each type of employee.

The regulation sometimes refers to "employment" as distinct from volunteering or serving as a respite, foster parent, or adoptive parent. Compare §§4.2, 4.4, 4.6.1.1, 4.7.1, 7.1, 7.1.1.1.

Agency Response: The agency revised these regulations to remove employee types such as volunteer, respite and adoptive parent which are already covered under the definition of "employee."

The title to the regulation still refers to "child care persons" which was the term used in the prior regulation (§4.1). This term is preferable to "employee" since a variety of persons can be listed under this definition without the term being counterintuitive and confusing.

Agency Response: The term "child care persons" is no longer used in the law. The title to the revised regulations is Background Checks for Child-Serving Entities. The agency agrees that the definition of "employee" is used in different ways, but it is understood to mean those people who work (for money) in a child-serving entity or those who work (not for money) in a child serving entity, as well as any others who would have regular direct access to children, therefore no change was made to this definition.

FINDINGS OF FACT

The public was given the required notice of the Department's intention to adopt the proposed revised regulations and was given ample opportunity to provide the Department with comments opposing the Department's adoption of the proposed revised regulations. The required Regulatory Flexibility Analysis and Impact Statement for the proposed revised regulations was submitted. Public comments were received and considered, as discussed in the summary of evidence. The Department finds that the proposed revised regulations, as set forth in the attached copy, should be adopted as in the best interest of the children in the State of Delaware.

THEREFORE, IT IS SO ORDERED, this 14th day of April, 2016, that the proposed Department of Services for Children, Youth and Their Families DELACARE Regulations - Background Checks for Child-Serving Entities is adopted and shall become effective ten (10) days from the date of its publication in the Delaware *Register of Regulations*, in accordance with 29 **Del.C.** §10118(e) and (g).

Carla Benson-Green
Secretary, Department of Services for Children, Youth and Their Families

~~301 Criminal History Record Checks for Child Care Persons~~

4.0 Legal Base

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

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

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

2.0 Purpose

~~The overall purpose of these regulations is the protection of children who are in the care or custody of the Department. To this end, persons in residential child care facilities and/or employees or volunteers of the Department or a Department contractor will have their criminal history checked prior to employment or during a conditional period of employment. In addition, foster/respite/adoptive parents will have their criminal history checked prior to approval or during a period of provisional approval with the Department or contracted providers. Each employer may use his/her own employment/acceptance criteria which may be stricter than those described herein.~~

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

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

3.0 Definitions

~~"Child Care Person" means any person who seeks employment for compensation, volunteers to provide direct child care service, or, for any reason, has regular direct access to children and/or adolescents under the~~

age of 18 years. This definition shall include any employee or volunteer of the Department of Services for Children, Youth and Their Families or one of its contractors who has regular direct access to children and/or adolescents under the age of 18 years and foster parents.

"Conditional Child Care Person" means a child care person who has been offered a position or has agreed to volunteer with the Department or one of its contractors or in a residential child care facility. Under the provisions of the law, a child care person may be hired on a temporary basis until the determination of suitability is made by the Department. Foster parents may be provisionally approved prior to the results of the criminal background check and in accordance with the Division of Family Services policy. If a determination of unsuitability is made, the child care person will be dismissed and in the case of foster parents the conditional placement will be rescinded.

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

"Criminal History Specialist" means the Department staff member, located in the Office of Child Care Licensing, who is responsible for processing and reviewing criminal history information consistent with Departmental policies, procedures and regulations.

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

"Direct Access" means the opportunity to have personal contact with persons receiving care.

"Employer" means any of the following:

- The Divisions within the Department of Services for Children, Youth and Their Families (PLEASE NOTE: The Divisions within the Department do not "employ" foster/adoptive parents or volunteers, but for purposes of this document, the Divisions are referred to as employer.)
- Any Delaware contractor who operates a program that provides regular direct access to children.
- Any Delaware contractor who provides foster care or adoption services.

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

"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 Department to provide services.

"Volunteer" means any person who has direct access to children in the performance of unpaid duties and who will be in a facility or in the service of the Department for five (5) or more days in a fiscal year. Student interns, regularly scheduled volunteers, and volunteer counselors will be required to have a criminal history check under these regulations. (For limited, occasional, sporadic, one-time volunteer efforts that last less than five (5) days or 40 hours, employers must ensure that these volunteers will be supervised during any activities with children.)

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

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

4.0 Individuals Subject To The Law

4.1 Generally, child care persons subject to a criminal history record check shall be:

4.1.1 persons employed or volunteering in a residential child care facility; or

4.1.2 persons employed or volunteering with the Department; or

4.1.3 foster/adoptive parents; or

4.1.4 persons employed or volunteering at an agency that contracts with the Department; who are in a position which involves:

4.1.4.1 The opportunity to have direct access to or contact with a child without the presence of other employees or adults.

4.2 Residential Child Care Facilities and Department Contractors

4.2.1 Criminal history record checks shall be conducted on the following child care persons of licensed residential child care facilities and Department contractors. This list is not necessarily all-inclusive, due to the various titles used in different facilities.

4.2.1.1 Child care workers;

4.2.1.2 Child care supervisors;

4.2.1.3 Maintenance, transportation, kitchen, clerical workers;

4.2.1.4 Teachers, aides, principals;

4.2.1.5 Administrators, coordinators, directors, and administrative staff;

4.2.1.6 Volunteers as defined in 3.0;

4.2.1.7 Social Workers;

4.2.1.8 Recreation staff;

4.2.1.9 Medical staff.

4.3 Foster/Adoptive Parents as defined in 3.0

4.3.1 Criminal history record checks shall be conducted on:

4.3.1.1 Applicants for foster/respice 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 Interstate applicants for 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.

4.4 Department Employees

4.4.1 Criminal history record checks shall be conducted on all Department employees and volunteers.

4.5 Individuals subject to the law shall be those individuals who are hired or apply for the status described in 4.1 to 4.4 on or after September 1, 1990 or have less than one year service prior to that date.

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

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

5.0 Criminal History Record Check Process

5.1 The employer shall require each individual subject to the law, either as soon as that individual has accepted a position, or has agreed to serve as a volunteer, or no later than the fifth working day to complete the Criminal History Record Request form and be fingerprinted. In the case of foster parents, the Criminal History Record Request form and fingerprinting must be completed prior to completion of pre-service training or the home study process.

5.2 The child care person or foster parent goes to a designated Delaware State Police Troop and has two sets of fingerprints taken.

5.3 The Delaware State Police follow established State Bureau of Identification procedures to obtain criminal history information from the State Bureau of Identification and Federal Bureau of Investigation. A report of the child care person's or foster parent'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.

5.4 Simultaneously, the Criminal History Specialist conducts a review of the Child Protection Registry to determine if the child care person is named as a perpetrator in a substantiated report of child abuse or neglect.

5.5 When the Criminal History Specialist receives the information from the State Bureau of Identification, Child Protection Registry, and Federal Bureau of Investigation she/he reviews that information, along with the Criminal History Record Request form. This review is guided by the criteria specified in sections 6.1-7.2.

5.6 When there is no record, the Criminal History Specialist provides notification to the appropriate Division Director, who notifies the employer or child placing agency and the child care person or foster parent.

5.7 When there is a criminal history, the Criminal History Specialist provides a written summary of the findings of the check with a recommendation to the appropriate Division Director.

5.8 The appropriate Division Director makes the determination of suitability for employment, volunteering or foster parenting and notifies the child care person or foster parent and employer or child placing agency, with a copy of the findings attached.

5.9 In the event that the child care person or foster parent has reason to provide additional information regarding the information in her/his criminal history check, an administrative review will be held, as delineated in sections 9.1-9.10.

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

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

6.0 Criteria For Prohibited Offenses

6.1 Child care persons or foster parents convicted of a sexually related offense(s) or other offenses against children shall be prohibited from employment, volunteering, or foster care/adoption without consideration of other criteria.

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

6.2.1 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.

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

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

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

7.0 Criteria For Unsuitability

7.1 Information received from the criminal history record and Child Protection Registry checks shall be reviewed by the Criminal History Specialist and Division Director on the basis of the following criteria for a determination of suitability for employment, volunteering, or foster care/ adoption.

7.1.1 Types of criminal conviction(s) and/or substantiation(s)

7.1.1.1 Criminal convictions other than those that are prohibited shall be reviewed in consideration of other criteria below. Other convictions for offenses which may make a child care person unsuitable for employment or volunteering, or may make a prospective foster parent unsuitable for foster parenting, are those in the Delaware Code, Titles 11 and 16 which may contain (but are not limited to) the following characteristics:

7.1.1.1.1 Criminal conviction(s) against the person where physical harm or death has taken place

7.1.1.1.2 Criminal conviction(s) involving weapons, explosive devices or threat of harm

7.1.1.1.3 Criminal conviction(s) involving public indecency and obscenity which may have been the result of plea bargain situations

7.1.1.1.4 Criminal conviction(s) that show a disregard of others, such as reckless endangering, arson

7.1.1.1.5 Criminal conviction(s) cruelty to animals or deviant behavior such as abusing a corpse

7.1.1.1.6 Criminal conviction(s) against the Uniform Controlled Substances Act

7.1.1.2 The criminal conviction(s) contained in section 7.1.1.1. and/or existence of a substantiated case of child abuse or neglect involving the child care person or foster parent as perpetrator shall be reviewed in consideration of other criteria below.

7.1.2 Frequency of conviction(s)/substantiation(s)

7.1.3 Length of time since the conviction(s)/substantiation(s)

7.1.4 Age at the time of the conviction(s)/substantiation(s)

7.1.5 Severity of the conviction(s)/substantiation(s)

7.1.6 Record since the conviction(s)/substantiation(s)

7.1.7 Relationship of the conviction(s)/substantiation(s) to the type of job assignment and/or responsibilities of the child care person or foster parent

7.1.8 Policies of the Department

7.2 Failure by a child care person or foster parent to disclose relevant criminal history or child protection registry information on the Criminal History Record Request form that is subsequently disclosed as a result of the criminal history record check may be grounds for immediate termination of an employee or denial of approval for foster or adoptive care.

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

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

8.0 Sanctions

8.1 Sanctions against employers (division/facility/ agency) shall be applied and enforced in the following circumstances:

8.1.1 An employer fails to require criminal history record checks for affected employees, volunteers, or applicants for foster care or adoption.

8.1.2 An employer knowingly hires or approves a child care person who is prohibited from employment or foster care or adoption as a result of a conviction for a prohibited offense.

8.1.3 An employer does not comply with the final recommendation of an administrative review.

8.2 Sanctions applied to contracted agencies, residential facilities, and child placing agencies for violation of the law or the regulations may include:

8.2.1 Amendment or dissolution of any agreements with the Department to provide the contracted service

8.2.2 Removal of children from placement

- 8.2.3 Suspension of future child referrals
- 8.2.4 Revocation of licensure
- 8.3 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:
 - 8.3.1 Involuntary reassignment
 - 8.3.2 Discipline up to and including dismissal

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

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

9.0 Administrative Review

~~Criminal history is only one factor being considered in the hiring or approval process. If the employer makes an adverse judgment based on any criterion other than criminal history, this administrative review process does not apply.~~

- 9.1 ~~Any child care person or foster parent who is denied, recommended for termination, terminated from employment, volunteering or foster care as a result of an adverse judgment made on the basis of a criminal history record check shall be entitled to an administrative review.~~
- 9.2 ~~The child care person will be notified of the right to an administrative review when a determination of unsuitability has been made.~~
- 9.3 ~~If the child care person believes the criminal history information is incorrect or incomplete, she/he shall submit a request for a review of the facts of the criminal history to the Criminal History Specialist in writing or reduced to writing within five (5) working days of the receipt of the decision for denial/recommending termination/termination of employment, volunteering, foster care or adoption resulting from a determination of unsuitability. When the corrected information is obtained by the child care person, it will be reviewed by the Criminal History Specialist's Supervisor and the Criminal History Specialist. A recommendation will be issued to the appropriate Division Director based on the corrected information. The Division Director makes a final decision and notifies the child care person, foster or adoptive parent and copies the employer or child placing agency and the Criminal History Specialist.~~
- 9.4 ~~If the child care person believes that additional information regarding the circumstances of the particular offense(s) would clarify the situation, she/he shall submit a written or reduced to writing request for an administrative review and the written documentation to be considered in the review to the appropriate Division Director with a copy to the employer and the Criminal History Specialist. This shall be submitted within 10 working days of the receipt of the decision for denial, recommendation to terminate employment, volunteering, foster care, or adoption resulting from a determination of unsuitability. The Division Director makes a final decision and notifies the child care person or foster parent and copies the employer or child placing agency and the Criminal History Specialist.~~
- 9.5 ~~If the individual had previously requested a review of the facts of the criminal history, the request for an administrative review shall be submitted within five (5) working days of the receipt of the decision based on the results of that review.~~
 - 9.5.1 ~~The child care person may also request to give an oral presentation at her/his administrative review.~~
- 9.6 ~~When a child care person has requested a review of the facts of the criminal history and/or an administrative review, the following shall apply:~~
 - 9.6.1 ~~The child care 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.~~
 - 9.6.2 ~~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.~~
 - 9.6.3 ~~In the case of adoptive parents, the application shall remain active, but children may be removed from the home pending results of the review.~~
 - 9.6.4 ~~The employer shall notify the Criminal History Specialist of the action taken with the child care person pending the results of the administrative review. (This notification is in addition to following established procedures already governing state personnel or individual facilities or agencies.)~~
- 9.7 ~~In the case of a review of a decision involving a Department operated facility or Department staff, the Division Director (or designee) shall conduct the review in conjunction with Personnel and within the context of these regulations, merit rules/labor agreements and the employment status of the child care person. The Criminal History Specialist shall be present as a witness.~~

- 9.8 When the review involves a Division of Family Services approved foster parent, the Director of the Division of Family Services (or designee) shall conduct the review with the County Foster Home Coordinator staffing the review and the Criminal History Specialist present as a witness.
- 9.9 In the case of a review of a decision involving a contracted facility or child placing agency, the Director (or designee) of the contracting Division shall conduct the review with the employer staffing the review and the Criminal History Specialist present as a witness.
- 9.10 The employer and the child care person shall be bound by the final decision of the administrative review which is made by the Division Director or designee. If the employer does not accept the decision, sanctions shall apply.

~~5 DE Reg. 1828 (3/1/02)~~
~~17 DE Reg. 331 (09/01/13)~~

10.0 Employer Responsibilities

- 10.1 The employer (division/facility/agency) shall ensure that a Criminal History Record Request has been completed as specified by law and that the employer copy is maintained in the personnel/application file. Employers shall direct child care persons to the State Police to have fingerprints taken and shall ensure the completion of this process.
- 10.1.1 The employer whenever possible, will notify the Criminal History Specialist if a child care person is terminated prior to completion of the criminal history check process.
- 10.1.2 The employer shall require all child care persons and foster parents to notify the employer of any subsequent arrests or charges as a condition of continued employment or approval.
- 10.2 When the employer is notified of a history of prohibited convictions/substantiations, the employer shall immediately take steps to terminate the child care person. A copy of this letter shall be sent to the Criminal History Specialist and a copy maintained in the personnel/application file.
- 10.3 In the event that a child care person requests an administrative review, the employer shall notify the Criminal History Specialist of the action taken to remove the child care person from direct access to children pending the results of the review. The employer shall abide by the decision of the administrative review. Copies of written documentation related to the administrative review shall be maintained in the personnel/application file.

~~5 DE Reg. 1828 (3/1/02)~~
~~17 DE Reg. 331 (09/01/13)~~

11.0 Confidentiality

~~Title 11, subsection 8513 (c) (1) of the Delaware Code~~ permits the State Bureau of Identification to furnish information pertaining to the identification and conviction data of any person of whom the Bureau has record individuals and agencies for the purpose of employment of the person whose record is sought, provided the use of the conviction data is limited to the purpose for which it was given.

- 11.1 The Department shall ensure that written and electronically recorded criminal history record 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.
- 11.2 The Department shall ensure that the use of the criminal history record information is restricted to its purpose of determining suitability for employment or approval to provide child care services for child care persons or foster parents as defined in these regulations.
- 11.3 The Department shall not release to employers as defined in these regulations copies of actual Federal Bureau of Investigation criminal history records.
- 11.4 The Department shall provide to employers and child care persons or foster parents written summaries of criminal record information for a child care person or foster parent whose criminal history record check results in a finding of prohibited offense(s), other arrests and convictions, or information that the individual is named in the Child Protection Registry as the perpetrator of a substantiated report of child abuse or neglect.
- 11.5 The following procedure shall be established to permit the review of criminal history record files by the child care person or foster parent:
- 11.5.1 An individual shall submit a request in writing to the Criminal History Specialist for the on-site review of his/her criminal history record file.
- 11.5.2 An appointment shall be made for the individual to review the record in the offices of the Office of Child Care Licensing. Identification will be required at the time of the review.
- 11.5.3 The record shall be reviewed in the presence of the Criminal History Specialist.

- 11.5.4 ~~Written documentation of the date and time of the review and the name of the reviewer shall be filed in the criminal history record file for the child care person or foster parent.~~
- 11.5.5 ~~The Department shall ensure that criminal history record files (written and computer-generated) shall not be removed from the secure files for any purpose other than to permit review by the named child care person or foster parent.~~
- 11.6 ~~Criminal history record information shall not be disseminated to any persons other than the child care person or foster parent whose record is being sought and his/ her employer, the Division Director or Foster Home Coordinator, in compliance with 11 Del.C. §8513(d).~~

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

~~17 DE Reg. 331 (09/04/13)~~

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 ~~[or volunteer]~~ 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.

"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 Delaware 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 [~~42 USC §106~~] and The Child Care Development Block Grant Act of 2014 [~~42 USC §658H~~].

"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 [~~42 USC §106~~] and The Child Care Development Block Grant Act of 2014 [~~42 USC §658H~~].

"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.

~~["Volunteer" means any person who has regular direct access to children in the performance of unpaid duties at a child-serving entity.]~~

"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 ~~[and volunteers]~~ 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 ~~[and volunteers]~~.

4.5 Licensed child care

4.5.1 Background checks shall be conducted on:

4.5.1.1 ~~[Applicants, or]~~ employees ~~[, substitutes, volunteers,]~~ 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 ~~[Applicants, or]~~ employees ~~[, substitutes, volunteers,]~~ 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 ~~[applicants,]~~ employees ~~[, substitutes, volunteers,]~~ 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 ~~[a name-based Delaware criminal background check and child protection registry check for prospective employees, substitutes, volunteers, and contractors through the DELJIS and the Department and 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,~~ 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.

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 ~~98~~.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 ~~[(42 USC §106)]~~ 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 ~~[(42 USC §658H)]~~ 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 ~~[Mm]~~urder, 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 ~~[Dd]~~rug-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, ~~volunteering,~~ contracting, ~~and~~ foster care~~, respite care and adoption~~ 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~~, volunteer,~~ or contractor ineligible for employment ~~or volunteering,~~ or may make a prospective foster parent ineligible are those in the Delaware Code, ~~Titles 11 and 16~~ 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, ~~volunteer,~~ 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~~, volunteer,~~ or contractor, or denial of approval for licensure~~, or~~ foster, respite, or adoptive care.

8.0 Administrative Review

- 8.1 The background check~~s~~ 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 ~~staff, 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.
- 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, ~~the~~ 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 ~~to determine~~ 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. 821 (03/01/16)

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