

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

Proposed amended Regulation 301 relating to Criminal History Record Checks for Child Care Persons was published in the *Delaware Register of Regulations* on May 1, 2013. The comment period remained open until May 31, 2013. There was no public hearing held. Public notice of the proposed amended Regulation 301 in the *Register of Regulations* was in conformity with Delaware Law.

SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

Comments were received on the proposed amended Regulation from the Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities. The Office of Child Care Licensing (OCCL), Department of Services for Children, Youth and Their Families (DSCYF), Division of Family Services (DFS) has considered each comment and revised the draft as shown below.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the 301 Criminal History Record Checks for Child Care Persons as published below is adopted and shall be effective October 1, 2013.

Jennifer Ranji, Secretary

301 Criminal History Record Checks for Child Care Persons

1.0 Legal Base

- 1.1 ~~(Rule 4)~~The legal base for these regulations is in ~~[the]~~ 31 Del.C. §309.
5 DE Reg. 1828 (3/1/02)

2.0 Purpose

- 2.1 ~~(Rule 2)~~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)

3.0 Definitions

~~(Rule 3)~~ "Child Care Person" means any person ~~[employed in a residential child care facility and/or employed by the Department or one of its contractors in a position which involves supervisory or disciplinary authority over a child or in a position which provides the opportunity to have direct access to/contact with (see "Direct Access" below) (Since definitions are not numbered we would have to use the definition title) a child without the presence of other employees or adults. This definition includes foster parents and volunteers. (See definitions "Foster Parents" and "Volunteer" below.) (Since definitions are not numbered we would have to use the definition title)~~ 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.]

~~(Rule 4)~~ **"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.

~~(Rule 5)~~ **"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, ~~and~~ procedures, and regulations.

~~(Rule 6)~~ **"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.

~~(Rule 7)~~ **"Department"** means the Department of Services for Children, Youth and Their Families.

~~(Rule 8)~~ **"Direct Access"** means the opportunity to ~~[approach children without the presence of] other adults in the course of one's assigned duties and responsibilities [another child care person, have personal contact with persons receiving care.]~~

~~(Rule 9)~~ **"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.

~~(Rule 10)~~ **"Foster Parents"** means foster/respite/adoptive parents and all household members 18 years of age or older.

~~(Rule 11)~~ **"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.

~~(Rule 12)~~ **"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)

4.0 Individuals Subject To The Law

4.1 ~~(Rule 13)~~ 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 by 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 ~~Supervisory or disciplinary authority over children, or~~

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 ~~(Rule 14)~~ Criminal history record checks shall be conducted on the following **[employees 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 ~~(Rule 15)~~ Criminal history record checks shall be conducted on:
 - 4.3.1.1 Applicants for foster/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 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.
 - 4.3.1.5 ~~A criminal history check will not be required in a stepparent adoption.~~
- 4.4 Department Employees
 - 4.4.1 ~~(Rule 16)~~ Criminal history record checks shall, ~~at the discretion of the Cabinet Secretary, be conducted on individuals filling the following positions within the Department:~~ be conducted on all Department employees and volunteers.
 - 4.4.1.1 ~~all Division of Management Support Services employees~~
 - 4.4.1.2 ~~all Division of Family Services employees~~
 - 4.4.1.3 ~~all Division of Youth Rehabilitative Services employees~~
 - 4.4.1.4 ~~all Division of Child Mental Health employees~~
- 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)

5.0 Criminal History Record Check Process

- 5.1 ~~(Rule 17)~~ 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 ~~(Rule 18)~~ The child care person or foster parent goes to a designated Delaware State Police ~~Barack Troop~~ and has two sets of fingerprints taken.
- 5.3 ~~(Rule 19)~~ 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 ~~Specialist Unit~~.
- 5.4 ~~(Rule 20)~~ Simultaneously, the Criminal History Specialist conducts a review of the Child Abuse 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 ~~(Rule 21)~~ When the Criminal History Specialist receives the information from the State Bureau of Identification, Child Abuse 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 Regulations 6.1-7.2.
- 5.6 ~~(Rule 22)~~ 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 ~~(Rule 23)~~ 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 ~~(Rule 24)~~ 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 (Rule—25) 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 regulations 9.1-9.10.

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

6.0 Criteria For Prohibited Offenses

6.1 (Rule 26) 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. ~~[The prohibited offenses shall include but not be limited to:~~

~~6.1.1 Incest~~

~~6.1.2 Unlawful sexual contact~~

~~6.1.3 Rape~~

~~6.1.4 Continuous sexual abuse of a child~~

~~6.1.5 Sexual exploitation of a child~~

~~6.1.6 Abandonment of child~~

~~6.1.7 Sexual solicitation of a child~~

~~6.1.8 Unlawful dealing with a child~~

~~6.1.9 Unlawfully dealing in material depicting a child engaging in a prohibited sexual act~~

~~6.1.10 Murder of a child.~~

~~6.1.11 Endangering the welfare of a child]~~

6.2 (Rule 27) 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)

7.0 Criteria For Unsuitability

7.1 (Rule 28) Information received from the criminal history record and Child Abuse 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 Type[s] of ~~[offense(s)/child abuse or neglect activity~~ **criminal conviction(s) and/or substantiation(s)]**

7.1.1.1 ~~[Offenses Criminal convictions]~~ other than those that are prohibited shall be reviewed in consideration of other criteria below. Other convictions ~~[and arrests]~~ 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 ~~[Offenses Criminal conviction(s)]~~ against the person where physical harm or death has taken place

7.1.1.1.2 ~~[Offenses Criminal conviction(s)]~~ involving weapons, explosive devices or threat of harm

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

7.1.1.1.4 ~~[Offenses 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 ~~[Offenses 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 ~~[report 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 ~~[offense(s) conviction(s)/substantiation(s)]~~

7.1.3 Length of time since the ~~[offense(s) conviction(s)/substantiation(s)]~~

7.1.4 Age at the time of the ~~[offense(s) conviction(s)/substantiation(s)]~~

7.1.5 Severity of the ~~[offense(s) conviction(s)/substantiation(s)]~~

- 7.1.6 Record since the **[offense(s) conviction(s)/substantiation(s)]**
- 7.1.7 Relationship of the **[offense(s) 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 **[agency Department]**
- 7.2 (~~Rule 29~~) Failure by a child care person or foster parent to disclose relevant criminal history or child **abuse 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)

8.0 Sanctions

- 8.1 (~~Rule 30~~) 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 (~~Rule 31~~) 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 (~~Rule 32~~) 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)

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 (~~Rule 33~~) 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 (~~Rule 34~~) The child care person will be notified of the right to an administrative review when a determination of unsuitability has been made.
- 9.3 (~~Rule 35~~) 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 (~~Rule 36~~) 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[4] 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.[21] The child care person may also request to give an oral presentation at her/his administrative review.
- 9.6 (~~Rule 37~~) 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 (~~Rule 38~~) 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 (~~Rule 39~~) 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 (~~Rule 40~~) 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 (~~Rule 41~~) 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)

10.0 Employer Responsibilities

- 10.1 (~~Rule 42~~) 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 **[them the employer]** of any subsequent arrests or charges as a condition of continued employment or approval.
- 10.2 (~~Rule 43~~) When the employer is notified of a history of prohibited **[offense(s) 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 (~~Rule 44~~) 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)

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 (~~Rule 45~~) 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 ~~(Rule 46)~~ 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 ~~(Rule 47)~~ The Department shall not release to employers as defined in these regulations copies of actual ~~written reports of criminal history records prepared by the State Bureau of Identification, Federal Bureau of Investigation or Division of Family Services~~ criminal history records.
- 11.4 ~~(Rule 48)~~ 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 Abuse Protection Registry as the perpetrator of a substantiated report of child abuse or neglect.
- 11.5 ~~(Rule 49)~~ 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 ~~(Rule 50)~~ 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 **[County]** Foster Home Coordinator, in compliance with 11 **Del.C.** §8513(d).

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

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