

This is an amendment to 8.8.3 NMAC Sections 6, 7, 11, 13, and 16 effective October 1, 2019.

8.8.3.6 OBJECTIVE:

- A.** The purpose of these regulations is to set out general provisions regarding background checks and employment history verification required in settings to which these regulations apply.
- B.** Background checks are conducted in order to identify information in applicants' backgrounds bearing on whether they are eligible to provide services in settings to which these regulations apply.
- C.** Abuse and neglect screens of databases in New Mexico are conducted by BCU staff ~~[and include a screen of abuse and neglect information in databases in New Mexico and in each state where the applicant resided during the preceding five years]~~ in order to identify those persons who pose a continuing threat of abuse or neglect to care recipients in settings to which these regulations apply. Applicants required to obtain background checks pursuant to 8.16.2 NMAC and 8.17.2 NMAC will also undergo a screen of abuse and neglect information in each State where the applicant resided during the preceding five years.
[8.8.3.6 NMAC - Rp, 8.8.3.6 NMAC, 10/1/16, A, 10/01/19]

8.8.3.7 DEFINITIONS:

- A.** AOC means administrative office of the courts.
- B.** "Administrative review" means an informal process of reviewing a decision that may include an informal conference or hearing or a review of written records.
- C.** "Administrator" means the adult in charge of the day-to-day operation of a facility. The administrator may be the licensee or an authorized representative of the licensee.
- D.** "Adult" means a person who has a chronological age of 18 years or older, except for persons under medicaid certification as set forth in Subsection K below.
- E.** "Appeal" means a review of a determination made by the BCU, which may include an administrative review or a hearing.
- F.** "Applicant" means any person who is required to obtain a background check under these rules and NMSA 1978, Section 32A-15-3.
- G.** "Arrest" means notice from a law enforcement agency about an alleged violation of law.
- H.** BCU means the CYFD background check unit.
- I.** "Background check" means a screen of CYFD's information databases, state and federal criminal records and any other reasonably reliable information about an applicant.
- J.** "Care recipient" means any person under the care of a licensee.
- K.** "Child" means a person who has a chronological age of less than 18 years, and persons under applicable medicaid certification up to the age of 21 years.
- L.** "Conditional employment" means a period of employment status for a new applicant prior to the BCU's final disposition of the applicant's background check.
- M.** "Criminal history" means information possessed by law enforcement agencies of arrests, indictments, or other formal charges, as well as dispositions arising from these charges.
- N.** "Direct, physical supervision" means continuous visual contact or live video observation by a direct provider of care who has been found eligible by a background check of an applicant during periods when the applicant is in immediate physical proximity to care recipients.
- O.** "Direct provider of care" means any individual who, as a result of employment or, contractual service or volunteer service has direct care responsibilities or potential unsupervised physical access to any care recipient in the settings to which these regulations apply.
- P.** "Eligibility" means the determination that an applicant does not pose an unreasonable risk to care recipients after a background check is conducted.
- Q.** "Employment history" means a written summary of the most recent three-year period of employment with names, addresses and telephone numbers of employers, including dates of employment, stated reasons for leaving employment, and dates of all periods of unemployment with stated reasons for periods of unemployment, and verifying references.
- R.** "Licensed" means authorized to operate by the licensing authority by issuance of an operator's license or certification certificate.

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

T. “Licensing authority” means the CYFD division having authority over the licensee.

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

V. “Notice of provisional employment” means a written notice issued to a child care center or home applicant indicating the BCU reviewed the applicant’s fingerprint based federal or New Mexico criminal record and made a determination that the applicant may begin employment under direct physical supervision until receiving background eligibility. A notice may also indicate the applicant must receive a complete background eligibility prior to beginning employment.

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

~~[W.]~~ **X.** “Unreasonable risk” means the quantum of risk that a reasonable person would be unwilling to take with the safety or welfare of care recipients.

[8.8.3.7 NMAC - Rp, 8.8.3.7 NMAC, 10/1/16, A, 10/01/19]

8.8.3.11 COMPLIANCE EXCEPTIONS:

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

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

(2) ~~[until receiving background eligibility the applicant shall at all times be under direct physical supervision; this provision does not apply to registered child care home applicants;]~~ the licensee or applicant shall send the BCU a completed application form and an electronic fingerprint submission receipt prior to employment;

(3) ~~[the licensee or applicant shall send the BCU a completed application form and an electronic fingerprint submission receipt prior to the commencement of supervised services; and]~~ until receiving background eligibility, the applicant shall at all times be under direct physical supervision. See next paragraph for standards regarding applicants required to obtain a background check pursuant to 8.16.2 NMAC or 8.17.2 NMAC;

(4) a licensee or applicant required to obtain a background check pursuant to 8.16.2 NMAC or 8.17.2 NMAC must receive either a notice of provisional employment or background check eligibility prior to beginning employment. Applicants working after receipt of a notice of provisional employment shall at all times be under direct physical supervision until receiving background check eligibility. Upon completion of Paragraph (2) of this subsection, a notice of provisional employment decision will be provided to the child care center or home within five days unless the BCU determines there is good cause shown for an extension; and

~~(4)]~~ (5) no more than 45 days shall have passed since the date of the initial application unless the BCU documents good cause shown for an extension.

B. With the exception of the provision under 8.16.2.19 NMAC and 8.17.2.11 NMAC, if a direct provider of care has a break in employment or transfers employment more than 180 days after the date of an eligibility letter from the BCU, the direct provider of care must re-comply with 8.8.3.10 NMAC. A direct provider of care may transfer employment, as permitted by 8.16.2.19 NMAC and 8.17.2.11 NMAC, or for a period of 180 days after the date of an eligibility letter from the BCU without complying with 8.8.3.10 NMAC only if the direct provider of care submits a preliminary application that meets the following conditions:

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

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

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

[8.8.3.11 NMAC - Rp, 8.8.3.11 NMAC, 10/1/16, A, 10/01/19]

8.8.3.13 ARRESTS, CONVICTIONS AND REFERRALS:

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

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

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

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

(4) a substantiated referral, regardless of the date, for sexual abuse or for a substantiation of abuse or neglect relating to a failure to protect against sexual abuse;

(5) the applicant's child is in CYFD or another state's custody [~~at the time the application is processed by the BCU~~]; or

(6) a registration, or a requirement to be registered, on a state sex offender registry or repository or the national sex offender registry established under the Adam Walsh Child Protection and Safety Act of 2006.

B. A disqualifying conviction may be proven by:

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

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

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

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

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

C. If a background check shows pending charges for a felony offense, any misdemeanor offense involving domestic violence, child abuse, any other misdemeanor offense of moral turpitude, or an arrest but no disposition for any such crime, there shall be a determination of unreasonable risk if a conviction as charged would result in a determination of unreasonable risk.

D. If a background check shows a pending child protective services referral or any other CYFD investigation of abuse or neglect, there shall be a determination of unreasonable risk.

E. If a background check shows that an applicant has an outstanding warrant, there shall be a determination of unreasonable risk.

[8.8.3.13 NMAC - Rp, 8.8.3.13 NMAC, 10/1/16, A, 10/01/19]

8.8.3.16 ELIGIBILITY SUSPENSIONS, REINSTATEMENTS AND REVOCATIONS:

A. An applicant's background check eligibility may be suspended for the following:

- (1) an arrest or criminal charge for any felony offense, any misdemeanor offense involving domestic violence, child abuse or any other misdemeanor offense of moral turpitude if a conviction as charged would result in a determination of unreasonable risk;
- (2) a pending child protective services referral or any other CYFD investigation of abuse or neglect; ~~or~~
- (3) an outstanding warrant; or
- (4) any other reason that creates an unreasonable risk determination pursuant to these regulations.

B. It is the duty of the administrator of a facility or the licensee and the background check eligibility holder, upon learning of any of the above, to notify the licensing authority immediately. Failure to immediately notify the licensing authority may result in the revocation of background check eligibility.

C. A suspension of background check eligibility shall have the same effect as a determination of unreasonable risk until the matter is resolved and eligibility is affirmatively reinstated by the BCU.

D. Background check eligibility may be reinstated or revoked as follows:

- (1) If the applicant can provide information relating to the disqualifying criminal charge that would show that a criminal conviction as charged would not lead to an unreasonable risk;
- (2) If the matter causing the suspension is resolved within six months of the suspension, the applicant may provide documentation to the BCU showing how the matter was resolved and requesting reinstatement of background check eligibility. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If, the applicant's eligibility is revoked, the applicant may appeal the revocation.
- (3) If the matter causing the suspension is resolved after six months of the suspension, the applicant may reapply for clearance for the same licensee by submitting an electronic fingerprint submission receipt and the required forms. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If the applicant's eligibility is revoked, the applicant may appeal the revocation.

[8.8.3.16 NMAC - N, 10/1/16, A, 10/01/19]