

## NOTICE OF RULEMAKING AND PUBLIC RULE HEARING

The New Mexico Children, Youth and Families Department hereby gives notice as required under Section 14 - 4 - 5.2 NMSA 1978 and 1.24.25.11 NMAC that it proposes to adopt amendments to the following rules regarding CHILDREN, YOUTH AND FAMILIES GENERAL PROVISIONS GOVERNING BACKGROUND CHECKS AND EMPLOYMENT HISTORY VERIFICATION as authorized by Section 9 - 2A - 7 NMSA 1978:

8.8.3.6 NMAC - OBJECTIVE

8.8.3.7 NMAC - DEFINITIONS

8.8.3.11 NMAC - COMPLIANCE EXCEPTIONS

8.8.3.13 NMAC - ARRESTS, CONVICTIONS AND REFERRALS

8.8.3.16 NMAC - ELIGIBILITY SUSPENSIONS, REINSTATEMENTS AND REVOCATIONS

No technical scientific information was consulted in drafting these proposed rules.

**Purpose of proposed rules:** The purpose of the rules is to amend the background check requirements to clarify that abuse and neglect screens in each state where the applicant resided within the last five years will only be conducted for applicants applying pursuant to 8.16.2 NMAC and 8.17.2 NMAC. In addition, language is added to incorporate a two - step clearance process for applicants applying pursuant to 8.16.2 NMAC and 8.17.2 NMAC. A notice of provisional employment or background check eligibility will be required prior to commencing employment and will include a timeline for issuance of the notice. These amendments are to comply with federal requirements. Additional minor changes will be made to clarify existing language within 8.8.3 NMAC.

Copies of the proposed rules may be found at CYFD's website at <https://www.newmexicokids.org/> or may be obtained from 1120 Paseo De Peralta, Santa Fe, New Mexico, 30 days prior to the Public Hearing.

**Notice of public rule hearing:** The public rule hearing will be held on Thursday, August 29, 2019 at 10:00 a.m. in Apodaca Hall, 1120 Paseo de Peralta, Santa Fe, New Mexico 87502. The public hearing will be conducted in a fair and equitable manner by a CYFD agency representative or hearing officer and shall be recorded. Any interested member of the public may attend the hearing and will be provided a reasonable opportunity to offer public comment, either orally or in writing, including presentation of data, views, or arguments, on the proposed rules during the hearing. Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Debra Gonzales at [debra.gonzales@state.nm.us](mailto:debra.gonzales@state.nm.us). CYFD will make every effort to accommodate all reasonable requests, but cannot guarantee accommodation of a request that is not received at least ten calendar days before the scheduled hearing.

**Notice of acceptance of written public comment:** Written public comment, including presentation of data, views, or arguments about the proposed rules, from any interested member of the public, may also be submitted via email to CYFD - ECS- [PublicComment@state.nm.us](mailto:PublicComment@state.nm.us) with the subject line "8.8.3 NMAC Public Comment," or via first class mail to, or by hand delivery to Kimberly Brown, Child Care Services Bureau, Children, Youth and Families Department, P.O. Drawer 5160, Santa Fe, New Mexico 87502 - 5160. The comment period ends at the conclusion of the public hearing on August 29, 2019.

## AVISO DE PROMULGACION DE LEYES ADMINISTRATIVAS Y AUDIENCIA PÚBLICA

El Departamento de Niños, Jóvenes y Familias de Nuevo México por este medio da aviso como se requiere bajo la Sección 14-4-5.2 NMSA 1978 y 1.24.25.11 NMAC propone adoptar enmiendas a las siguientes reglas con respecto a PROVISIONES GENERALES DEL DEPARTAMENTO DE NIÑOS, JÓVENES Y FAMILIAS, GOVERNANDO LA COMPROBACIÓN DE ANTECEDENTES Y HUELLAS Y VERIFICACION DE HISTORIAL DE EMPLEO según lo autorizado por la sección 9-2A-7 NMSA 1978:

8.8.3.6 NMAC – OBJETIVO

8.8.3.7 NMAC – DEFINICIONES

8.8.3.11 NMAC – EXCEPCIONES DE CONFORMIDAD

8.8.3.13 NMAC – ARRESTOS, CONVICCIONES Y REFERENCIAS SUBSTANCIADAS

#### 8.8.3.16 NMAC – SUSPENSION DE ELIGIBILIDAD, REINSTALACIONES Y REVOCACIONES

No se consultó información científica o técnica cuando se redactaron las propuestas leyes administrativas.

**Propósito de las propuestas leyes administrativas s:** El propósito de las leyes administrativas es enmendar los requisitos para clarificar que la detección de negligencia y abuso en cada estado donde el solicitante ha vivido durante los últimos cinco años, solo será realizada para solicitantes que aplican conforme a 8.16.2 NMAC y 8.17.2 NMAC. Adicionalmente, lenguaje será añadido para incorporar un proceso de dos pasos de autorización para solicitantes que aplican conforme a 8.16.2 NMAC y 8.17.2 NMAC. Un aviso de empleo provisional (o comprobación de antecedentes y huellas elegibles aprobada) será requerido antes de empezar empleo e incluirá un cronograma cuando el aviso será emitido. Estas enmiendas tienen que estar conformes con requerimientos federales. Se harán menores cambios adicionales para clarificar el lenguaje actual en el 8.8.3 NMAC.

Copias de las propuestas leyes administrativas pueden ser localizadas en el sitio de la red de CYFD

@<https://www.newmexicokids.org/> o se pueden obtener en: 1120 Paseo De Peralta, Santa Fe, New México, 30 días antes de la Audiencia Pública.

**Aviso de Audiencia Pública de leyes administrativas:** La audiencia pública de leyes administrativas será el jueves, 29 de agosto, 2019 a las 10:00 a.m. en , 1120 Paseo de Peralta, Santa Fe, Nuevo México 87502, en la sala Apodaca Hall, La audiencia pública se llevará a cabo de manera justa y equitativa por un representante de la agencia de CYFD o el funcionario de audiencias y será grabada. Cualquier miembro del público interesado en asistir la audiencia tendrá una oportunidad razonable para ofrecer comentarios al público, oralmente o por escrito, incluso una presentación de datos, puntos de vista o argumentos, sobre las propuestas. Personas con discapacidades que necesiten cualquier forma de asistencia auxiliar para asistir o participar en la audiencia pública deben comunicarse con Debra Gonzales, [debra.gonzales@state.nm.us](mailto:debra.gonzales@state.nm.us). CYFD hará todos los esfuerzos posibles para acomodar todas solicitudes razonables, pero no puede garantizar acomodar solicitudes que no sean recibas por lo menos diez días antes de la fecha programada para la audiencia.

**Aviso de aceptación de comentario público por escrito:** Comentarios públicos por escritos, incluso presentaciones de datos, puntos de vista o argumentos de cualquier miembro del público interesado, sobre las propuestas leyes administrativas, pueden ser enviados a través de correo electrónico a: CYFD-ECS-PublicComment@state.nm.us, especificando en la línea de Asunto: “8.8.3 NMAC Public Comment,” o por correo de primera clase a Child Care Services Bureau, Children, Youth and Families Department, P.O. Drawer 5160, Santa Fe, New Mexico 87502-5160, o se pueden entregar en mano a Kimberly Brown. El período de comentarios termina a la conclusión de la audiencia pública del 29 de agosto de 2019.

### **Proposed Rules/Reglas Propuestas**

#### **8.8.3.6 OBJECTIVE:**

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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.

#### **8.8.3.7 DEFINITIONS:**

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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.

[V-] 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.

#### **8.8.3.11 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 paragraph (4) of Subsection A of Section 8.8.3.11 NMAC 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 Subsection A of Section 8.8.3.11 NMAC, a notice of provisional employment decision will be provided to the child care center or home within 10 days; 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.

#### **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.

**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.