

Working Group to Study Background Checks for Child Care Facilities and Providers

Friday, October 14, 2016 @ 1pm
State House Room 438 (Judiciary Committee Room)
Augusta, Maine

THIRD MEETING AGENDA

- 1:00pm-1:10pm: Welcome from chairs and introductions
- 1:10pm-1:20pm: Brief review of governing federal law and areas of state discretion
- 1:20pm-2:30pm: Discussion via video conference with Administration for Children and Families (ACF), U.S. Department of Health and Human Services

Participants:

Office of Child Care, Central Office Staff

Mary Sprague, Child Care Program Specialist

Andrew Williams, Director, Policy Division

Moniquin Huggins, Director, Program Operations Division(tentative)

**National Center on Child Care Subsidy Innovation and
Accountability**

Leigh Ann Bryan, Senior Technical Assistance Specialist

Robert Frein, Technical Assistance Lead

Don Beltrame, Senior Technical Assistance Specialist

See separate handout with questions submitted by Working Group to ACF.

- 2:30pm-2:40pm: Update on Department requests
- 2:40pm-3:10pm: Answers to Information Requests
- 3:10pm-3:45pm: Discussion
- Recommendations for final report
- 3:45pm-4:00pm: Finalize recommendations
- Adjourn

IMPLEMENTATION OF CCDBG ACT OF 2014 BACKGROUND CHECK REQUIREMENT:
DISCRETIONARY ISSUES FOR STATES IDENTIFIED BY FEDERAL RULE COMMENTARY

1. *Whether to expand definition of “staff member” – i.e., who should be checked?*
 - For example, States may require checks of: minors residing in family provider homes; volunteers who have only supervised access to children; etc.
2. *Whether to expand list of disqualifying offenses?*
 - For example, can add other crimes, substantiated DHHS child abuse finding, etc.
3. *Whether to restrict employment at child care facilities that do not receive CCDF funds?*
 - Federal rules require all licensed facilities/providers to conduct background checks on their staff members, but only disqualifies individuals with criminal histories from being employed by facilities/providers that receive CCDF funds.
 - State may choose to extend disqualifications to facilities/providers that do not receive CCDF funds (*this is the approach Maine currently takes in P.L. 2015, ch. 497*)
4. *Whether to use a “rap back” program?*
 - Federal rules strongly encourage enrolling child care staff members in a “rap back program” to provide DHHS with notification of subsequent criminal activity.
 - *Note: Maine Background Check Center Act has a rap back program. 22 M.R.S. § 9056.*
5. *Whether to impose stricter guidelines for provisional employment?*
 - Federal rules allow provisional employment after FBI or State fingerprint-based check has been complete, provided employee is supervised at all times.
 - States may impose stricter requirements.
 - Federal rules require results of all background checks to be complete in 45 days.
 - States may allow provisional employees to keep working if checks are delayed.
6. *Should background check results be shared with child care employers?*
 - Federal CCDBG Act and rules require that employer is only told whether employee is eligible for work; only the employee receives detailed criminal history results.
 - Federal Rule commentary explains this limitation might not apply if the State uses a different federal law as authority to conduct the FBI fingerprint-based background check. States could use the National Child Protection Act/Volunteers for Children Act (42 U.S.C. § 5119a) as the authority to conduct checks and share results with employers, if State has a “VECHS program” in place.
7. *Whether to permit waiver of felony drug offenses committed in past 5 years?*
8. *Whether to add details to appeals process?*
 - States must create process for individuals to challenge accuracy of criminal record
 - States have discretion to create: specific timeframes between filing appeal and hearing and between hearing and decision; right to work pending appeal decision
9. *Who Pays for the Background Check?*
 - States have flexibility to charge provider or employee or to use CCDF grant funds.

OVERVIEW OF BACKGROUND CHECK REQUIREMENT IN CCDBG ACT OF 2014
42 U.S.C. § 9858f and Implementing Regulations

AFFECTED PROVIDERS	“Child care provider”: includes center-based and family child care providers who are licensed, regulated, or registered under State law and other providers of child care for compensation who receive CCDF subsidies
WHO MUST BE CHECKED	“Child care staff member”: Includes individuals (A) employed by the child care provider for compensation, including contract employees or self-employed individuals; (B) whose activities involve the care or supervision of children . . . or unsupervised access to children; and (C) any adult in family child care home
WHEN CHECK MUST OCCUR	<ul style="list-style-type: none"> • Prior to the date of employment (unless already checked in past 5 years and individual has not been separated from child care employment for more than 180 days) and every 5 years thereafter
SCOPE OF BACKGROUND CHECK	<ul style="list-style-type: none"> • FBI fingerprint check using Next Generation Identification • Search of NCIC’s National Sex Offender Registry • Following searches in State of residence and states where resided in past 5 years: <ul style="list-style-type: none"> ○ State criminal history (with fingerprints in state of residence, fingerprints optional other states) ○ State sex offender registry ○ State child abuse and neglect registry
RESULTS DUE	State must provide results “expeditiously” in a time “not to exceed 45 days” after request submitted
PRIVACY	<u>Provider</u> : Must be notified whether the individual is eligible or ineligible for employment “without revealing any disqualifying crime or other related information regarding the individual.” <u>Ineligible staff member</u> : Must be given information related to each disqualifying crime & opportunity to appeal
DISQUALIFYING OFFENSES (STATES MAY ADD TO LIST)	<ul style="list-style-type: none"> • Registered or required to be registered on state or national sex offender registry • Felony consisting of murder, child abuse or neglect, crime against children (including child pornography), spousal abuse, rape or sexual assault, kidnapping, arson, or physical assault or battery • Drug-related felony during preceding 5 years (States may create individualized waiver process) • Violent misdemeanor committed as an adult against a child
APPEALS	Ineligible staff members must be able to appeal accuracy or completeness of information in the background report
PROVISIONAL EMPLOYMENT	Individual may work provisionally <u>after</u> FBI or State fingerprint check is completed, <u>only if</u> individual is supervised at all times by someone who has a completed background check
DEADLINE	September 30, 2017 (States may apply for a 1-year extension) – 5% grant reduction if State does not comply

QUESTIONS FROM WORKING GROUP TO
FEDERAL ADMINISTRATION FOR CHILDREN AND FAMILIES

1. What portion of the CCDF Funds allocated to Maine in each of the past three years has not been spent? What happens to the unspent funds? Does having unspent money affect future allocations?
2. Does the definition of “child care staff member” in § 98.43(a)(2)(ii) of the final rules include contractors who are employed by a family child care provider for home maintenance and similar purposes?
 - a. For example, is a background check required for: (a) a plumber hired by a family child care provider to fix a sink in the residence portion of the home, (b) a plumber hired to fix a drain in the childcare portion of the home, (c) a person hired to plow the driveway, or (d) a person hired to mow the lawn where the childcare playground equipment is located?
 - b. Does it make a difference whether the family childcare is open or closed when these professionals are working on site?
3. Does the definition of “child care staff member” in § 98.43(a)(2)(ii) include a speech therapist or other special education professional hired by an education agency (*i.e.*, not employed by the childcare facility or family child care provider) who provides service to the child in the childcare setting? Does the answer depend on whether the special educator is supervised or unsupervised while working with the child?
4. The final rule extends the background check requirement to childcare staff members under age 18, but not to individuals residing in a family child care home who are less than 18 years of age. Why has ACF chosen to make this distinction?
5. In Maine, juvenile offenses are not “crimes”, “misdemeanors” or “felonies” in the traditional sense of those words. May an individual’s Maine juvenile record therefore be ignored in determining whether a staff member is eligible for employment under 42 U.S.C. § 98585f(c)(1)(D) or (E) and the implementing regulation?
6. The commentary to the proposed federal rules and the final federal rules suggests that CCDF funds can be used to pay the cost of background checks for childcare workers. Can you confirm this is the case? Are there any limitations on the use of CCDF funds for this purpose? Can a State use CCDF Funds to buy electronic fingerprinting equipment for use in implementing the background check requirement of the CCDBG Act of 2014?
7. How long does it take to process an FBI fingerprint check? (The commentary to the final rules indicate electronic fingerprint results can be obtained within 24 hours, yet the FBI website advertises a several-month timeframe for an individual to obtain his or her own fingerprint-based background check results.)
8. Does ACF know or have an estimate for the cost of an NCIC-National Sex Offender Registry search and the timeframe for processing that type of search?

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 98

RIN 0970-AC67

Child Care and Development Fund (CCDF) Program

AGENCY: Office of Child Care (OCC), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule makes regulatory changes to the Child Care and Development Fund (CCDF) based on the Child Care and Development Block Grant Act of 2014. These changes strengthen requirements to protect the health and safety of children in child care; help parents make informed consumer choices and access information to support child development; provide equal access to stable, high-quality child care for low-income children; and enhance the quality of child care and the early childhood workforce.

DATES: *Effective:* November 29, 2016.

Compliance date: States and Territories are expected to be in full compliance by the end of the Fiscal Year (FY) 2016–2018 CCDF Plan period. ACF will determine compliance with provisions in this final rule through review and approval of the FY 2019–2021 CCDF Plans that become effective October 1, 2018 and through the use of federal monitoring of progress in accordance with section 98.90 prior to that date.

For Tribal Lead Agencies, ACF will determine compliance through review and approval of the FY 2020–2022 Tribal CCDF Plans that become effective October 1, 2019. See further discussion of effective and compliance dates in the background section of this rule.

FOR FURTHER INFORMATION CONTACT: Andrew Williams, Office of Child Care at 202-401-4795 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Contents

- I. Executive Summary
- II. Background
 - a. Child Care and Development Fund
 - b. Statutory Authority
 - c. Effective Dates
- III. Development of the Regulation

- IV. General Comments and Cross-Cutting Issues
- V. Section by Section Discussion of Comments and Regulatory Provisions
 - Subpart A—Goals, Purposes and Definitions
 - Subpart B—General Application Procedures
 - Subpart C—Eligibility for Services
 - Subpart D—Program Operations (Child Care Services) Parental Rights and Responsibilities
 - Subpart E—Program Operations (Child Care Services) Lead Agency and Provider Requirements
 - Subpart F—Use of Child Care and Development Funds
 - Subpart G—Financial Management
 - Subpart H—Program Reporting Requirements
 - Subpart I—Indian Tribes
 - Subpart J—Monitoring, Non-Compliance, and Complaints
 - Subpart K—Error Rate Reporting
- VI. Regulatory Process Matters
 - a. Regulatory Flexibility Act
 - b. Executive Orders 12866 and 13563
 - c. Regulatory Impact Analysis
 - d. Unfunded Mandates Reform Act of 1995
 - e. Executive Order 13045 on Protection of Children
 - f. Executive Order 13175 on Consultation with Indian Tribes
 - g. Paperwork Reduction Act of 1995
 - h. Congressional Review
 - i. Executive Order 13132
 - j. Treasury and General Government Appropriations Act of 1999

I. Executive Summary

Overview. On November 19, 2014, President Barack Obama signed the Child Care and Development Block Grant (CCDBG) Act of 2014 (Pub. L. 113-186) into law following its passage in the 113th Congress. The CCDBG Act, as amended (42 U.S.C. 9858 *et seq.*, and hereinafter referred to as the “Act”), along with Section 418 of the Social Security Act (42 U.S.C. 618) authorizes the Child Care and Development Fund (CCDF), which is the primary Federal funding source devoted to providing low-income families who are working or participating in education or training activities with help paying for child care and improving the quality of child care for all children.

The bipartisan CCDBG Act of 2014 made sweeping statutory changes that require significant reforms to State and Territory CCDF programs to raise the health, safety, and quality of child care and provide more stable child care assistance to families. It expanded the purposes of CCDF for the first time since 1996, ushering in a new era for child care in this country. Since 1996, a significant body of research has demonstrated the importance of early childhood development and how stable, high-quality early experiences can positively influence that development

and contribute to children’s futures. In particular, low-income children stand to benefit the most from a high-quality early childhood experience. Research has also shown the important role of child care financial assistance in helping parents afford reliable child care in order to obtain and maintain stable employment or pursue education. The reauthorized Act recognizes CCDF as an integral program to promote both the healthy development of children and parents’ pathways to economic stability.

In Fiscal Year (FY) 2014, CCDF provided child care assistance to 1.4 million children from nearly 1 million low-income working families in an average month. The Congressional reauthorization of CCDBG made clear that the prior law was inadequate to protect the health and safety of children in care and that more needs to be done to increase the quality of CCDF-funded child care. It also recognized the central importance of access to subsidy continuity in supporting parents’ ability to achieve financial stability and children’s ability to develop nurturing relationships with their caregivers, which creates the foundation for a high-quality early learning experience.

Purpose of this regulatory action. The majority of CCDF regulations at 45 CFR parts 98 and 99 were last revised in 1998 (with the exception of some more recent updates related to State match and error reporting). This regulatory action is needed to update the regulations to accord with the reauthorized Act and to reflect what has been learned since 1998 about child care quality and child development.

Legal authority. This final rule is being issued under the authority granted to the Secretary of Health and Human Services by the CCDBG Act of 1990, as amended, (42 U.S.C. 9858 *et seq.*) and Section 418 of the Social Security Act (42 U.S.C. 618).

Major provisions of the final rule. The final rule addresses the CCDBG Act of 2014, which includes provisions to: (1) Protect the health and safety of children in child care; (2) help parents make informed consumer choices and access information to support child development; (3) provide equal access to stable, high-quality child care for low-income children; and (4) enhance the quality of child care and the early childhood workforce.

Protect Health and Safety of Children in Child Care

This rule provides details on the health and safety standards established in the CCDBG Act of 2014, including health and safety training,

inspectors to conduct valid and reliable inspections. While the Act does not require a specific ratio, Lead Agencies can refer to the National Association of Regulatory Agencies (NARA) recommendation of a maximum workload for inspectors of 50–60 facilities. (*NARA and Amie Lapp-Payne, (May 2011). Strong Licensing: The Foundation for a Quality Early Care and Education System: Preliminary Principles and Suggestions to Strengthen Requirements and Enforcement for Licensed Child Care.*)

Reporting of serious injuries and deaths. At § 98.42(b)(4), this final rule requires that Lead Agencies require child care providers to report to a designated State, Territorial, or Tribal entity any serious injuries or deaths of children occurring in child care. This complements § 98.53(f)(4), which requires States and Territories to submit a report describing any changes to regulations, enforcement mechanisms, or other policies addressing health and safety based on an annual review and assessment of serious child injuries and any deaths occurring in child care programs serving CCDF children and, to the extent possible, other regulated and unregulated child care settings. States, Territories, and Tribes are required to apply this reporting requirement to all child care providers, regardless of subsidy receipt, to report incidents of serious child injuries or death to a designated agency. This is also consistent with the statutory requirement at Section 658E(c)(2)(D), which requires Lead Agencies to collect and disseminate aggregate number of deaths, serious injuries, and instances of substantiated child abuse that occurred in child care settings each year, for eligible providers.

The Lead Agency must identify the “designated entity” in its Plan as required at § 98.16(ff). If there are existing structures in place that look at child morbidity, the Lead Agency may work within that structure to establish a designated entity. The reporting mechanism can be tailored to fit with existing policies and procedures. Our purpose is the reporting of incidents so that the Lead Agency and other responsible entities can make the appropriate response, publicly report prevalence data, and make any appropriate changes to health and safety policies.

Comment: There was support for the requirement of reporting serious injuries and deaths of children occurring in child care settings. However, concern was raised that the NPRM failed to provide specific direction as to how Lead Agencies should respond to

reports of serious injuries and deaths, who should bear responsibility of investigating and responding to allegations, and what rights parents and defendants have to information during and following the investigation.

Response: As mentioned above, § 98.32(d)(1) requires Lead Agencies to report in their State Plans how they respond to and substantiate complaints, including whether the process includes monitoring of child care providers. We have chosen not to establish further parameters around this requirement to give Lead Agencies flexibility to design a system that best works for their program.

Exemption for relative providers. Previous regulations at § 98.41(e) allowed Lead Agencies to exempt relative caregivers, including grandparents, great-grandparents, siblings (if such providers live in a separate residence), and aunts or uncles from health and safety and monitoring requirements described in this section. In the final rule, this relative exemption remains at § 98.42(c), which includes language that requires Lead Agencies, if they choose to exclude such providers from any of these requirements, to provide a description and justification in the CCDF Plan, pursuant to § 98.16(1), of requirements, if any, that apply to these providers. Asking Lead Agencies to describe and justify relative exemptions from health and safety requirements and monitoring provides accountability that any exemptions are issued in a thoughtful manner that does not endanger children.

Comment: We received a request for clarification on whether or not relative providers are exempt from requirements for ratios, group size, and caregiver qualifications. We also received one comment that reflected concern for the lack of health and safety requirements on guidance and training for relative providers. We also received one comment requesting that the types of relatives who may be exempt from requirements be expanded to include additional types of relatives.

Response: A Lead Agency may choose to exclude relative providers from any health and safety and monitoring requirements if a description and justification is provided in the CCDF Plan. This may include requirements for ratios, group size, and caregiver qualifications.

We should clarify that while the federal statute gave the option to exempt relatives from health and safety requirements, it is not required. Also, Lead Agencies have the option to exempt relatives from certain, but not all health and safety requirements. They

have the ability to determine the scope of an exemption and if there are certain health and safety requirements that the Lead Agency believes are important to apply to a relative provider, they have the ability to do so. Technical assistance will be available to support the promotion of health, safety, and child development in all early care and education settings.

The Act defines relatives and, therefore, we are unable to expand the scope of who may be considered for exemption due to statutory language. However, as there is an option in the final rule to develop alternative monitoring requirements for in-home providers at § 98.42(b)(2)(v), Lead Agencies may choose to explore this flexibility when care is provided in the child’s home by individuals who are not included in the list for exemption but the Lead Agency believes merit special considerations.

§ 98.43 Criminal Background Checks

The reauthorization added Section 658H on requirements for comprehensive criminal background checks, which are a basic safeguard essential to protect the safety of children in child care and reduce children’s risk of harm. Parents have the right to be confident that their children’s caregivers, and others who come into contact with their children, do not have a record of violent offenses, sex offenses, child abuse or neglect, or other behaviors that would disqualify them from caring for children. A GAO report found several cases in which individuals convicted of serious sex offenses had access to children in child care facilities as employees, because they were not subject to a criminal history check prior to employment (*Overview of Relevant Employment Laws and Cases of Sex Offenders at Child Care Facilities, GAO-11-757, GAO, 2011*).

Comprehensive background checks have been a long-standing ACF policy priority. According to an analysis of the FY 2016–2018 CCDF Plans, all States and Territories require that child care center staff undergo at least one type of criminal background check, and approximately 45 require an FBI fingerprint check for centers. Fifty-five States and Territories require family child care providers to have a criminal background check, and approximately 45 require an FBI fingerprint check. For some States and Territories, these requirements are currently limited to licensed providers, rather than all providers that serve children receiving CCDF subsidies.

START of
Commentary

Background check effective dates. The Act requires that States and Territories shall meet the requirements for the provision of criminal background checks for child care staff members not later than the last day of the second full fiscal year after the date of enactment of the Child Care and Development Block Grant Act of 2014. This delayed effective date requires States and Territories to come into compliance with the background check requirements by September 30, 2017.

Comment: Several States requested clarifying language be added to the preamble around the statutory effective dates for the background check requirements.

Response: A State must have policies and procedures in place that meet the background check requirements not later than September 30, 2017. In addition, in accordance with Section 658H(d)(2), staff members who were employed prior to the enactment of the CCDBG Act of 2014 must have submitted requests for background checks that meet all the requirements by September 30, 2017. Section 658H(d)(4), the Act provides that a provider need not submit a new request for a child care staff member if the staff member received a background check meeting all the required components under the Act within the past five years while employed by, or seeking employment by, a child care provider within the State. If a staff member employed prior to the CCDBG Act of 2014 satisfies all of those requirements, then it is not necessary for a provider to submit a new request until five years following the background check completion. It will be important to evaluate the current background check requirements to ensure that all new requirements are satisfied, including the disqualification factors. If the current background check requirements do not satisfy the new requirements or results of the current background checks are not maintained, then new background checks would need to be conducted.

We strongly encourage States to establish policies and procedures well in advance of the September 30, 2017, effective date, in order to allow sufficient time to clear the backlog of existing providers and staff members that must be checked prior to the deadline. It is also important to note that the HHS Secretary may grant the State an extension of up to one year to complete the background check requirements, as long as the State demonstrates a good faith effort to comply. This extension is separate from the transitional waiver described earlier in the preamble. States applying for an

extension must be able to describe their current implementation efforts and present a timeline for compliance within one year, by September 30, 2018. ACF will release specific guidance to States interested in an extension. In addition, the reauthorized Act establishes a penalty for noncompliance. For any year that a State fails to substantially comply, ACF shall withhold up to 5 percent of the State's CCDF funds for each year until coming into compliance.

Background check implementation. Section 658H(a) of the Act requires that States shall have in effect requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of child care providers. Having procedures in place to conduct background checks on child care staff members will require coordination across public agencies. The CCDF Lead Agency must work with other agencies, such as the Child Welfare office and the State Identification Bureau, to ensure the checks are conducted in accordance with the Act. In recognition of this effort, § 98.43(a)(1) clarifies that these requirements involve multiple State, Territorial, or Tribal agencies. We discuss the comments we received on this provision further below.

Tribes and background checks. In the final rule, Tribal Lead Agencies are also subject to the background check requirements described in this section, with some flexibility as discussed later in Subpart I.

Applicability of background checks requirements. The statutory language identifying which providers must conduct background checks on child care staff members is unclear. It is our interpretation of the Act that all licensed, regulated, and registered child care providers and all child care providers eligible to deliver CCDF services (with the exception of those individuals who are related to all children for whom child care services are provided) are subject to the Act's background check requirements. Section 98.43(a)(1)(i) of the final rules applies this requirement to all licensed, regulated, or registered providers, regardless of whether they receive CCDF funds and all license-exempt CCDF providers (with the exception of individuals who are related, as defined in the definition of *eligible child care provider*, to all children for whom child care services are provided).

Comment: Overall, the comments, from national organizations and multiple States, supported broadly applying the background check

requirements to all licensed, regulated, or registered child care providers and all child care providers eligible to deliver CCDF services. One State and one Territory submitted comments disagreeing with our interpretation.

Response: ACF was pleased by the support for broad applicability of the background check requirements. We acknowledge that the statutory language is not clear about the universe of staff and providers subject to the background check requirement; however, our interpretation aligns with the general intent of the statute to improve the overall safety of child care services and programs. Furthermore, there is justification for applying this requirement in the broadest terms for two important reasons. First, all parents using child care deserve this basic protection of having confidence that those who are trusted with the care of their children do not have criminal backgrounds that may endanger the well-being of their children. Second, limiting those child care providers who are subject to background checks has the potential to severely restrict parental choice and equal access for CCDF children, two fundamental tenets of CCDF. If not all child care providers are subject to comprehensive background checks, providers could opt to not serve CCDF children, thereby restricting access. Creating a bifurcated system in which CCDF children have access to only a portion of child care providers who meet applicable standards would be incongruous with the purposes of the Act and would not serve to advance the important goal of serving more low-income children in high-quality care.

Comment: One comment suggested adding regulatory language to capture all State definitions of provider groups. The comment stated, "Some States may use words, such as 'certified' or 'listed care' that should not be exempt from a comprehensive check merely because the words 'licensed, regulated, or registered' are not used. For example, legislation is currently pending in at least one State that would eliminate the category of care called 'voluntarily registered' and replace it with a voluntary 'list.'"

Response: It is not necessary to insert additional regulatory language to address other State definitions of provider groups. As described earlier, the background check requirements apply to licensed, regulated, or registered providers, regardless of whether they receive CCDF funds as well as all providers eligible to deliver CCDF services. Our interpretation of the law applies these requirements broadly

and includes providers who are "certified" or "listed."

Definition of child care staff member. Section 658H(i) of the Act defines a child care staff member as someone (other than an individual who is related to all children for whom child care services are provided) who is employed by the child care provider for compensation or whose activities involve unsupervised access to children who are cared for by the child care provider. Section 98.43(a)(2)(ii) of the final rule includes contract and self-employed individuals in the definition of child care staff members, as they may have direct contact with children. In addition, we require individuals, age 18 or older, residing in a family child care home to be defined as child care staff members and, therefore, subject to background checks, as well as the disqualifying crimes and appeals processes.

Comment: In the NPRM, at § 98.43(a)(2)(ii), we defined child care staff member to mean "an individual age 18 and older . . ." We received a letter from Senator Alexander and Congressman Kline asking us to revise this regulatory language to reflect current State practice. The letter stated, "The NPRM defines those staff required to receive a background check as individuals 18 and older, yet a number of State laws allow individuals younger than 18 to be employed by providers. To ensure the maximum amount of safety while still respecting individual States' employment laws, we request the Department provide information or assistance to States on conducting background checks for both staff aged 18 and older, and those younger than 18 to ensure all States are able to comply with the background checks required in the Act."

Response: ACF agreed with the concerns described in the letter. The reference to "age 18 or older" is removed from the final rule. This change better aligns with the original statutory language and removes the unintentional limitation placed on the definition of child care staff member. The original statutory language requires any individual, regardless of age, who is employed by a child care provider for compensation to complete comprehensive background checks.

Comment: Several comments continued to ask for clarification on who is included in the definition of child care staff member. A letter from Senator Alexander and Congressman Kline advised, "The scope of the NPRM's definition of 'child care staff member' for the purposes of a required background check is unclear. We ask for

clarity for providers so they may know definitively if an individual who receives 'compensation, including contract employees or self-employed individuals' is required to automatically receive a background check, or if such individuals should additionally have duties listed under subparagraph (B). As written, the definition is unclear if these requirements are mutually exclusive and would trigger a background check on their own regard or if a 'child care staff member' would need to fit both such requirements. We ask you also to review the administrative burden this definition could place on providers. While retaining the highest safety measures for children, we urge the Department to review this requirement and listen to comments from centers and providers to ensure their obligation captures individuals who may have unsupervised access to children but is not duplicative of State requirements or overly burdensome."

Response: The Act states that a child care staff member means an individual (other than an individual who is related to all children for whom child care services are provided) who is employed by a child care provider for compensation; or whose activities involve the care or supervision of children for a child care provider or unsupervised access to children who are cared for or supervised by a child care provider. This definition, like the definition of child care provider, is broad. It encompasses not only caregivers, teachers, or directors, but also janitors, cooks, and other employees of a child care provider who may not regularly engage with children, but whose placement at the facility gives them the opportunity for unsupervised access. Given that these individuals are employed by a child care provider, they are included in the statute's definition. Therefore, it is important that they also complete a comprehensive background check in order to ensure and protect children's safety.

The final rule adds the terms "contract employees" and "self-employed individuals" to the definition of "child care staff member." These terms are meant to clarify the definition, particularly for family child care providers. Many family child care providers are self-employed individuals who own their own businesses. The final rule specifically requires any individual residing in a family child care home age 18 or older to complete a background check. We discuss this requirement in greater detail below. These individuals may also have unsupervised access to children, so

completing a background check is a necessary safeguard to protect the children in care. The definition of child care staff member generally covers any individual who is employed by the child care provider and any individual who may have unsupervised access to children in care.

Comment: The comments were mixed on whether other adults in a family child care home should be subject to the background checks requirements. Several national organizations and States wrote in support, while child care worker organizations, a few national organizations, and one State did not support the provision. One State wrote, "We currently require background reviews on all household members 18 years or older and have found multiple individuals whose presence could place children at risk."

Response: As illustrated by the State's comment, requiring other adults in family child care homes to complete background checks is vital to ensuring children's health and safety. A majority of States already require other adults in family child care homes to receive background checks. Forty-three States require some type of background check of family members 18 years of age or older that reside in the family child care home (*Leaving Child Care to Chance: NACCRRA's Ranking of State Standards and Oversight for Small Family Child Care Homes*, National Association of Child Care Resource and Referral Agencies, 2012).

Although these individuals may not be directly responsible for caring for children, they have ample opportunity for unsupervised access to children. For this reason, as proposed in the NPRM, we are specifically requiring other adults in family child care homes to complete the background check requirements. Because these individuals are included in the definition of child care staff member, they are subject to the same disqualifications and appeals processes described in the Act and the regulations. We strongly discourage States from identifying any additional disqualifying crimes for residents of family child care homes, and encourage them to consider that casting too wide a net could have adverse effects on the supply of family child care providers and other consequences for individuals returning from incarceration. As described later in the preamble, we also strongly encourage States to implement a waiver review process that meets the recommendations of the U.S. Equal Employment Opportunity Commission for any additional disqualifying crimes (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on*

the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

Comment: In the NPRM, ACF asked for comment on whether additional individuals in the family child care homes should be subject to the background check requirements. There was only lukewarm support for requiring background checks for minors in family child care homes. Several States recommended checking individuals over ages 12, 13, or 16 to mirror current State policy and practice.

Response: ACF is declining to require background checks for individuals under age 18 in family child care homes. However, States that check individuals younger than age 18 may continue checking all background check components permitted by State law. The Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901) requires States to include in their sex offender registries juveniles convicted as adults and juveniles who are convicted of an offense similar or more serious than aggravated sexual abuse. We allow States the flexibility to follow current State laws and registry policies to check those individuals younger than 18 in family child care homes; however, we strongly encourage States to implement a waiver process that meets the recommendations of the U.S. Equal Employment Opportunity Commission for any additional disqualifying crimes (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*).

Comment: A few comments asked for clarification around volunteers. One State wrote, "In many circumstances, a parent volunteer (for activities such as field trips) would fit into the definition of child care staff member ('activities involve the care or supervision of children' and they may be unsupervised for periods of time) and therefore [would] require them to meet all background check requirements. This requirement could prevent some parents from involvement in enrichment activities, particularly because of the cost associated with the background checks."

Response: Volunteers who provide infrequent and irregular service that is supervised or parent volunteers who are supervised do not meet the definition of child care staff member. Volunteers who

come into a child care facility to help with a classroom party, read to students, or assist with recess are not caring for or supervising children for a child care provider. Rather, volunteers in the situations described above are providing additional assistance under supervision of the primary caregiver.

Volunteers are not specifically included in the Act, nor have we specifically included them in the regulation. We are allowing States the discretion to create their own policies and screening processes for volunteers. However, it is ACF's view that volunteers who have not had background checks may not be left with children unsupervised. Volunteers who have unsupervised access to children must have background checks that comply with the statute. These volunteers will be subject to the same disqualifications and appeals process as described in the Act and regulations. As with other adults in the household, we strongly discourage States from adding additional disqualifications outside the Act. We also encourage Lead Agencies to require that volunteers who have not had background checks be easily identified by children and parents, for example through visible name tags or clothing.

Components of a criminal background check. The Act outlines five components of a criminal background check: (1) A search of the State criminal and sex offender registry in the State where the staff member resides and each State where the staff member has resided for the past five years; (2) A search of the State child abuse and neglect registry in the State where the staff member resides and each State where the staff member has resided for the past five years; (3) A search of the National Crime Information Center; (4) A Federal Bureau of Investigation (FBI) fingerprint check using the Integrated Automated Fingerprint Identification System; and (5) A search of the National Sex Offender Registry.

After extensive consultation with the FBI and other subject-matter experts, we made technical changes to address duplication among these components. In the final rule, we are consolidating the list of required components in the regulations at § 98.43(b) to:

- (1) A Federal Bureau of Investigation fingerprint check using Next Generation Identification;
- (2) A search of the National Crime Information Center's National Sex Offender Registry; and
- (3) A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where

such staff member resided during the preceding 5 years:

- i. State criminal registry or repository, with the use of fingerprints being required in the State where the staff member resides, and optional in other States;
- ii. State sex offender registry or repository; and
- iii. State-based child abuse and neglect registry and database.

It is our understanding that there is some duplication among the National Crime Information Center's (NCIC) National Sex Offender Registry (NSOR), the FBI fingerprint searches, and the searches of State criminal, sex offender, and child abuse and neglect registries. An FBI fingerprint check provides access to national criminal history record information across State lines on people arrested for felonies and some misdemeanors under State, Federal, or Tribal law. However, there are instances where information is contained in State databases, but not in the FBI database. A search of the State criminal records and a FBI fingerprint check returns the most complete record and better addresses instances where individuals are not forthcoming regarding their past residences or committed crimes in a State in which they did not reside.

In addition to gaps in the FBI fingerprint and the State criminal records, there are a number of instances in which an individual may be listed in the State sex offender registry and not in NSOR, and vice versa. For example, some States have statutes that disallow the removal of offenders, regardless of offender status, while in the NSOR, the agency owning the record is required to remove the offender from active status once his/her sentencing is completed. In addition, federal, juvenile, and international sex offender records may be included in the NSOR; whereas, State laws may prohibit the use of this information in the State sex offender registry. Because of these discrepancies, it is important to check the State sex offender registries in addition to an FBI fingerprint check and a check of the NCIC's NSOR. It is our belief that the Act requires such thorough background check to ensure that offenders do not slip through the cracks to be given access to children.

Comment: Commenters, including several national organizations, child care worker organizations, and a couple of States, argued that an FBI fingerprint check should be considered a sufficient check of the National Crime Information Center (NCIC) and the National Sex Offender Registry (NSOR) because it checks the fingerprint records of several NCIC files, including the NSOR.

MINORS IN HOME

VOLUNTEERS

Response: Based on consultation with the FBI, we understand that the comments are partially correct. The FBI fingerprint check using Next Generation Identification (NGI) (formerly the Integrated Automated Fingerprint Identification System—IAFIS) will provide a person's criminal history record information which will incorporate data from three NCIC person files, including the NSOR, provided certain identifying information has been entered into the NSOR record. The change in the language from IAFIS to NGI is a technical change and should not impact Lead Agency background check processes. The NGI is the biometric identification system that has now replaced the older IAFIS.

There is significant overlap between the FBI fingerprint check and the NSOR check (via the NCIC), yet there are a number of individuals in the NSOR who are not identified by solely conducting an FBI fingerprint search. The FBI links fingerprint records to the NSOR records via a Universal Control Number, but a small percentage of cases are missing the fingerprints. In some cases, individuals were not fingerprinted at the time of arrest, or the prints were rejected by the FBI for poor quality. This small percentage of records can be accessed through a name-based search of the NCIC. A number of those individuals may also be identified by a search of the State sex offender registries, but it is impossible to know whether there is complete overlap. In the absence of verification of complete duplication of records, it is important to require separate searches of an FBI fingerprint check and a name-based search of the NCIC's NSOR. Because Congress included each of these searches in the Act, it is our belief that the intent is for the background check to be as comprehensive and thorough as possible.

Comment: In the NPRM, we requested comments on the feasibility of a search of the NCIC and the level of burden required by the Lead Agency. We received comments from 12 States and two State police departments that all emphasized that without further guidance from the FBI, name-based searches of the NCIC and NSOR will be extremely difficult because these databases are limited to law enforcement purposes only.

Response: The comments are correct. The NCIC is a law enforcement tool consisting of 21 files, including the NSOR. The 21 files contain seven property files that help track missing property and 14 person files with information relevant to law enforcement (e.g., missing persons or wanted

persons). State criminal records are not stored in the NCIC. The only file with information that would aid in determining whether an individual could be hired as a child care employee is the NSOR. The other files do not contain information on the disqualifying crimes listed in the Act. Further, the FBI has advised that a general search of the NCIC database will return records that cannot be made privy to individuals outside of law enforcement (i.e., the Known or Appropriately Suspected Terrorist File). Therefore, we are clarifying that a check of the NCIC will only need to search the NSOR file.

The comments call out a number of potential challenges, also identified by ACF, in requiring an NCIC check. It is our understanding that an NCIC check has not been included in any other non-criminal background check law applicable to States to date, and so, resolving these challenges is in many ways uncharted territory.

First, access to the NCIC, including, in some cases, physical access to computers capable of searching the NCIC, is limited, and it is primarily available to law enforcement agencies. Therefore, to conduct this check, Lead Agencies will have to partner with a State, Tribal, or local law enforcement agency. Because the NCIC has not been used this way, we do not know of examples of other State agencies partnering in this way or what such partnerships would entail. We also do not know the implications for Lead Agencies that use third-party vendors to conduct background checks. Third-party vendors do not have authorized access to conduct name-based checks of the NCIC for noncriminal justice purposes.

Secondly, the NCIC is a name-based check, rather than fingerprint based. Hit verification of name-based checks may be labor intensive, especially when searching for individuals with common names. While we are concerned about the burden on Lead Agencies to conduct this check, we recognize that the NCIC was included in the statute, and we are concerned about the potential for missing sex offenders by not conducting a comprehensive search.

Because of the challenges identified by both the commenters and ACF, we will not begin to determine compliance with the requirement to search the NCIC's NSOR until after guidance is issued by ACF and the FBI. ACF has been working closely with the FBI to find solutions for State access. We plan to release guidance that will be shared with both State Lead Agencies and State Identification Bureaus. We expect that Lead Agencies will be required to partner with local law enforcement to

perform NCIC checks of the NSOR. This guidance will give States further instruction in how to search the NCIC's NSOR and how to utilize the results. We understand that States may not be able to begin implementing the check of the NCIC's NSOR until the specific guidance is released. ACF will address implementation timeframes for this particular search in the future guidance. Lead Agencies should begin to form partnerships with local law enforcement and State Identification Bureaus in order to meet the requirement to check the NCIC's NSOR database.

Comment: Several commenters, including States and a State police department, suggested requiring a search of the National Sex Offender Public Web site (NSOPW) instead of a search of the NSOR.

Response: A search of the NSOPW does not satisfy the statutory requirement for a search of the NSOR, and therefore, we declined to make any changes in the final rule. ACF does encourage an additional search of the NSOPW at www.nsopw.gov, although it is not required. The NSOPW acts as a pointer for each State, Territory, and Tribally-run sex offender registry. The registries are updated and kept in real time and may be searched by name, but other identifying information may be limited in these records.

Comment: In the NPRM, we proposed to require that the search of the State criminal records would include a fingerprint check in the State where the individual resides and the States the individual has resided for the past five years. However, State commenters, including State police departments, recommended removing the requirement to search other States' criminal repositories using fingerprints. The comments emphasized that the technology does not exist to allow States to send fingerprints electronically to check other States' repositories. A law enforcement representative wrote, "For State Identification Bureaus that are the ones sending the prints on to the FBI, it could be easy; however, requests coming from other States would be a very manual process—hard copy cards, scanned in, and mailed responses back. We have no way of disseminating results back to every other State via an automated means."

Response: ACF is removing the proposal to check other States' criminal repositories using fingerprints. It was not our intent to create an additional burden for States. Instead, in the final rule, we are requiring States to do a fingerprint-based check of the criminal repository only in the State where the individual resides. Use of fingerprints is

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Sex
offender
registry

optional in other States where the individual resided within the past five years. Fingerprint searches reduce instances of false positives and also help capture records filed under aliases. We do not believe that a fingerprint search of the State repository is an additional burden. States can use the same set of fingerprints to check both the State criminal history check and the FBI fingerprint check. When conducting searches of other States' criminal repositories, the State may utilize a name-based search, instead of a fingerprint.

Comment: The Act requires States to check the State criminal registry or repository; sex offender registry or repository; and child abuse and neglect registry and database for every State where a child care staff member has lived in for the past five years. Based on our preliminary conversations with States, the requirement to conduct cross-State background checks of the three different repositories is another unexplored area for Lead Agencies. In the NPRM, we asked for comments on whether States have any best practices or strategies to share and how ACF can support Lead Agencies in meeting the cross-State background check requirements.

Comments we received from national organizations and States reinforced that these cross-State checks are indeed new territory for Lead Agencies. These comments offered a variety of suggestions of how ACF can support States in meeting the cross-State background check requirements, including introducing an electronic information exchange system, drafting a standard Memorandum of Understanding, maintaining a national contacts list, and studying the viability of cross-State background checks at the regional level.

Response: ACF is continuing to work closely alongside our technical assistance partners to learn how we can support and help facilitate these cross-State checks. In the months since the CCDBG Act of 2014 was enacted and the NPRM was published, we have been engaged in Regional level calls with States to understand supports needed to overcome barriers to the required cross-State checks. We have also been reaching out to other Federal partners to explore existing systems and opportunities to collaborate. We have not found an existing system that would support States in conducting all of the cross-State checks.

We appreciate the suggestions from the commenters and have already begun work toward bringing some of them to fruition. We know States want tools and

guidance to complete these checks. ACF has recently announced a pilot project to develop a National Interstate Background Check Clearinghouse to support Lead agencies in meeting the cross-State background check requirements. The goal of this system is to enable Lead Agencies to exchange background check information securely with other State, Territory, and Tribal Lead Agencies. ACF is also working on developing a national CCDF information sharing agreement as part of this project. We ask that States continue to make a good faith effort toward complying with these checks and that States work to build partnerships across State lines.

While ACF is still working to understand how we can support cross-State background checks, this rule also requires a couple of provisions to help create transparency around the process. At § 98.43(a)(1)(iii), Lead Agencies are required to have requirements, policies, and procedures in place to respond as expeditiously as possible to other States', Territories', and Tribes' requests for background check results in order to accommodate the 45 day timeframe. The final rule also requires Lead Agencies to include the process by which another Lead Agency may submit a background check request on the Lead Agency's consumer education Web site, along with all of the other background check policies and procedures. In addition, this final rule requires, at § 98.16(o), that Lead Agencies describe in their Plans the procedures in place to respond to other State, Territory, or Tribal requests for background check results within the 45 day timeframe. ACF will use this question in the Plan to help ensure compliance with the background check requirements in the Act. These provisions are intended to minimize confusion about the correct contact information for background check requests and to ensure that there are processes in place for timely responses. Having policies and procedures in place to respond to outside background check requests is a first step toward an effective cross-State background check system.

Comment: We heard from a number of States that are closed-record States, which means they cannot release an individual's background check records or information to other States. One State explained that it is, "a closed record State and does not release criminal history information to any out-of-state entity for civil purposes, one of which is determining employment eligibility. This is a fundamental tenant of being a closed record State. However, there is a process by which an individual residing in another State may obtain his/her

fingerprint-based personal criminal background history from [the State's] Bureau of Criminal Identification and Information (Bureau) within the Office of State Police and provide it to a Lead Agency in another State."

Response: States need to have a methodology in place to respond to other States' requests for background check results. ACF does not expect to penalize States that have made a good faith effort to request information from other States. For States with closed-record laws or policies, we understand that this requirement may be in direct opposition with State law. States will need to either change their laws to allow for the exchange of background check information for child care staff members or create other solutions. Although the Act requires States to be in compliance by September 30, 2017, States (including closed-record States) may request an extension of up to one year in order to make the necessary legislative or other changes to share background check information across State lines. ACF is currently working with our technical assistance partners to understand the impact of closed-record laws.

Although ACF discourages this practice, a closed-record State may utilize a process similar to what the State commenter describes above. The closed-record State may give the background check results directly to the individual to relay to the requesting State. States are required to respond to other States' requests for background check requests, and when a State is giving the results directly to an individual, that State must have a process in place to inform the requesting State. This practice increases the potential for fraud relating to the results and also places the burden on the individual. States should carefully consider these factors and the impact they could have on the supply of child care providers. ACF encourages States to find other solutions, whenever possible.

We encourage State partnerships and agreements, whenever possible, in order to meet the requirements of the Act. One potential solution may be for the closed-record States to determine whether the individual is eligible or ineligible for employment given the State background check results. The closed-record State could disclose this determination with the requesting State, without revealing the background check information. We do recognize that this is an imperfect solution, since States use different definitions and criteria for disqualification, particularly in the case of child abuse and neglect findings.

However, States may use this solution to comply with the statutory requirements, as long as States also comply with the requirements related to the appeals process.

If the individual is deemed ineligible by a closed-record State, then the closed-record State is also responsible for notifying the individual and following the requirements at § 98.43(e)(2)(ii). The closed-record State must provide information related to each disqualifying crime in a report to the individual. The closed-record State must also send information on the opportunity to appeal and adhere to the appeals process described at § 98.43(e)(3).

Comment: Comments from States and national organizations asked ACF to provide clarity around what to do if a State does not respond to another State's request for results from the State's criminal repository, sex offender registry, and child abuse and neglect registry.

Response: As discussed later in the preamble, we are allowing States the flexibility to make employment decisions in the event that not all background check components are completed within 45 days. ACF does not expect to penalize States that have made a good faith effort to request information from other States.

Comment: Before publishing our NPRM, we heard particular concern about the statutory requirement for cross-State checks of the child abuse and neglect registries. We understand that States have developed their own requirements for submitting requests, and there is not a uniform method of responding. Therefore, in the NPRM, we solicited comments on how States will meet this requirement and respond to other State requests.

Comments from national organizations and child care worker organizations suggested new regulatory language that would only require a search of the State-based child abuse and neglect registries "if one exists and such a search is allowable for such purposes under State law and practice." Other comments emphasized the importance of cross-State child abuse and neglect registries. A letter co-signed by several child care resource and referral agencies, asserted, "We do not support language that would circumvent the concept of checking against a State child abuse registry or listing or whatever such a registry may be called in a State. States have the systems, although they may be called different names. It is time to have effective cross-checks in place to promote the safety of children."

Response: ACF is declining to add the suggested regulatory language. The Act includes, as the final component of a comprehensive background check, the search of the State child abuse and neglect registries in the State where the individual lives and the States where the individual has resided for the past five years. States, including those that do not have formal child abuse and neglect registries, are expected to comply with this requirement. We recognize that implementation of this critically important component of protecting children will vary across States. Every State has procedures for maintaining records of child abuse and neglect, but only 41 States, the District of Columbia, American Samoa, Guam, and Puerto Rico require central registries by statute. The type of information contained in central registries and department records differ from State to State. Some States maintain all investigated reports of abuse and neglect in the central registry, while others maintain only substantiated or indicated reports. The length of time the information is held and the conditions for expunction also vary. Access to information maintained in registries also varies by State, and some States may need to make internal changes to meet the requirement for a search of the State's own child abuse and neglect registry. Approximately 31 States and the District of Columbia allow or require a check of the central registry or department records for individuals applying to be child or youth care providers. (*Establishment and Maintenance of Central Child Abuse Registries*, Children's Bureau, July 2014).

Comment: We received a number of requests for guidance on what information from child abuse and neglect registries States need to make employment decisions and how to interpret that information. Simply being part of a State-based child abuse and neglect registry is not a disqualification under the Act, so just knowing that an individual is on the registry is not enough information to make a determination. States need to know what types of information they need and how to interpret that information in order to make employment eligibility determinations for child care staff members.

Response: The commenters are correct that the Act only requires that the child abuse and neglect registries be checked and did not require an individual be disqualified because of child abuse and neglect findings. Because many child abuse and neglect registries use name-based searches, States may need to take

additional steps to verify that the individual is the same person as is listed on a registry. There is so much variation in the information maintained in each registry, so we are allowing Lead Agency flexibility in how to handle findings on the child abuse and neglect registries. ACF does suggest that the Lead Agency not necessarily immediately disqualify an individual, depending on the finding and evaluate any findings carefully, on a case by case basis.

The definitions of child abuse and neglect, what is considered substantiated or indicated child abuse and neglect, and other legal terminology associated with child abuse and neglect registries varies from State to State. In addition, some registries may contain unsubstantiated complaints or incidences. Lead Agencies should be cautious when using unsubstantiated allegations of child abuse and neglect in determining an individual's employment eligibility.

Based on consultation with the Children's Bureau at ACF, we understand that State Child Welfare agencies or State Child Protective Services agencies already have policies and procedures in place to make determinations about the suitability of substitute care providers using child abuse and neglect findings. We are working to ensure that child welfare agencies are also aware of the requirements in the Act for a search of the State child abuse and neglect registry in the State where the individual lives and the States where the individual has resided for the past five years. Lead Agencies should partner closely with the relevant State agencies to seek guidance in making employment decisions.

Comment: We received several comments from States that do not conduct due process when placing an individual on their child abuse and neglect registry. One State wrote, "In the course of abuse/neglect investigations in our State, we do not offer up-front due process for findings made against an individual. If a background check is requested on the individual in the course of employment in child care in [the State] or as part of a foster care/adoption application in [the State], our agency uses that opportunity to offer a hearing in front of an administrative law judge through the State Office of Administrative Hearings. If an individual chooses to contest the finding(s), the process can be lengthy. It requires our agency to schedule and prepare for a hearing, including contacting appropriate witnesses and

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providing opposing council (if one exists) with redacted case files.”

Response: We understand the issue the commenters are raising relates to procedures that some State child welfare agencies have on due process for individuals in state child abuse and neglect registries that may delay the Lead Agency in providing information about an individual who is seeking employment with a child care provider. The Act requires States to carry out background checks requests, including searches of State-based child abuse and neglect registries, as quickly as possible, in not less than 45 days. States that have a due process approach as described by the commenters may not be able to meet the 45 day timeframe for providing the registry information for child care employment purposes. As such, we encourage the Lead Agencies to work with their child welfare agencies to assist them in understanding the statutory requirements to meet the 45 day timeframe. ACF is working on joint guidance to be released by the Children’s Bureau and the Office of Child Care to ensure that both the State Lead Agencies and State child welfare agencies are aware of their roles in the background check process.

Comment: In the NPRM, ACF requested comment from States about whether cross-State background check systems for foster or adoptive parents could be used to support cross-State background checks for prospective child care staff members as well. Comments varied. Two States believe that their foster and adoptive parent systems would be able to support cross-State background checks for child care staff members. However, the national association of State child care administrators expressed concern about this suggestion: “Administrators understand that these data are housed in the child welfare agency and use of and compliance with this proposal would vary.”

Response: The cross-State background check requirement has similarities to language at Section 152(a)(1)(C) of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 671(a)(1)(C)) for foster or adoptive parents. That law requires a State to check any child abuse and neglect registry maintained by the State for information on any prospective foster or adoptive parent and on any other adult living in the home of such a prospective parent, and request any other State in which any such prospective parent or other adult has resided in the preceding five years, to enable the State to check any child abuse and neglect registry maintained by such State for such

information, before the prospective foster or adoptive parent may be finally approved for placement of a child. We encourage Lead Agencies to reach out to the State Child Welfare or Protective Services to explore whether the process in place for foster or adoptive parents could also be used to support a process for child care staff members.

Disqualifications. The Act specifies a list of disqualifications for child care providers and staff members who are serving children receiving CCDF assistance. Unlike the other requirements in the background check section, the Act only applies the restriction against employing ineligible child care staff members to child care providers receiving CCDF assistance. These employment disqualifications specifically do not apply to child care staff members of licensed providers who do not serve children receiving CCDF subsidies. This gives Lead Agencies the flexibility to impose similar restrictions upon child care providers who are licensed, regulated, or registered and do not receive CCDF funds.

The list of disqualifications from the Act includes a list of felonies and misdemeanors that disqualify an individual from being employed as a child care staff member. We understand that States define crimes differently, but our expectation is that States will match the equivalent crimes to those on this list. These disqualification requirements appear at § 98.43(a)(1)(ii) and § 98.43(c). We are not adding any additional disqualifications to the final rule.

Even though the Act includes a specific list of disqualifications, it also allows Lead Agencies to prohibit individuals’ employment as child care staff members based on their convictions for other crimes that may impact their ability to care for children. If a Lead Agency does disqualify an individual’s employment, they must, at a minimum, give the child care staff members or prospective staff members the same rights and remedies described in § 98.43(e). This language from Section 658H(h) of the Act is restated in the final rule at § 98.43(h). In the final rule, we also added language to link this paragraph to the list of disqualifications at § 98.43(c)(1).

We strongly encourage Lead Agencies that chose to consider other crimes as disqualifying crimes for employment to ensure that a robust waiver and appeals process is in place. As discussed later, a waiver and appeals process should conform to the recommendations of the U.S. Equal Employment Opportunity Commission, including the ability to waive findings based on factors as inaccurate information, certificate of

rehabilitation, age when offense was committed, time since offense, and whether the nature of offense is a threat to children. (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). Moreover, we strongly discourage Lead Agencies from considering additional disqualifying crimes. Casting too wide a net could have adverse effects on the supply of family child care providers and other consequences for individuals returning from incarceration. The disqualifications described in the Act are appropriate to determine whether an individual should be able to care for children.

Comment: A couple of States requested clarification on the length of time an individual would be ineligible if convicted of one of the disqualifying crimes listed in the Act. One State said, “[the State’s] Supreme Court rendered a decision that precludes the State from imposing lifetime employment bans. Enforcing the regulation as proposed will require the program office to challenge that decision. Additionally the proposed regulation appears to go beyond what the statute provides and encroaches on the State’s police powers to decide who can be licensed in the State.”

Response: ACF is not requiring any additional disqualifications or parameters around disqualifications that are not already required by the Act. The Act includes a list of disqualifications at Section 658H(c), with a list of disqualifying crimes at Sections 658H(c)(1)(D) and (E). With the exception of a felony conviction of a drug-related offense committed during the preceding five years, all of the felony and violent misdemeanor convictions listed by the Act are lifetime bans against employment by a child care provider delivering CCDF services. The Act does not allow any flexibility to grandfather in current child care staff members who have been convicted of one of the crimes described in the Act. States do have the option to individually review drug-related felony convictions that were committed during the preceding five years. As discussed later in the preamble, we encourage States to conduct these reviews in accordance with guidance from the U.S. Equal Employment Opportunity Commission.

Comment: Several comments from national organizations and child care worker organizations urged ACF to

OTHER CRIMES

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redact self-disclosure language that originally appeared in the preamble of the NPRM. A letter co-signed by 80 national organizations, wrote, "Given the complexity of the background checks as prescribed and the specific disqualifying crimes established in Act, we recommend that ACF not encourage self-disclosure as it could prevent employment of a qualified child care staff member or prospective staff member. Individuals with a criminal history completely unrelated to their ability to care for and have responsibility for the safety and well-being of children, as well as those with no record whatsoever who might be intimidated, could inaccurately assume that they would not be eligible for employment. It could also violate a child care staff member's right to privacy with his or her employer."

Response: We agreed with the commenters and have removed the self-disclosure language from the preamble.

Frequency of Background Checks. Section 658H(d) of the Act requires child care providers to submit requests for background checks for each staff member. The requests must be submitted prior to when the individual becomes a staff member and must be completed at least once every five years. These requirements are included in the regulations at § 98.43(d)(1) and (2). For staff members employed prior to the enactment of the CCDBG Act of 2014, the provider must request a background check prior to September 30, 2017 (the last day of the second full fiscal year after the date of enactment) and at least once every five years.

Although not a requirement, we encourage Lead Agencies to enroll child care staff members in rap back programs. A rap back program works as a subscription notification service. An individual is enrolled in the program, and the State Identification Bureau receives a notification if that individual is arrested or convicted of a crime. States can specify which events trigger a notification. Rap back programs provide authorizing agencies with notification of subsequent criminal and, in limited cases, civil activity of enrolled child care staff members so that background check information is not out of date. However, unless the rap back program includes all the components of a comprehensive background check under the Act, the Lead Agency is responsible for ensuring that child care staff members complete all other components at least once every five years.

Section 658H(d)(4) of the Act specifies instances in which a child care provider is *not* required to submit a

background check for a staff member. Staff members do not need background check requests if they satisfy three requirements: (1) The staff member received a background check that included all of the required parts within the past five years while employed by, or seeking employment by, another child care provider in the State; (2) the State gave a qualifying result to the first provider for the staff member; and (3) the staff member is employed by a child care provider within the State or has been separated from employment from a child care provider for less than 180 days. These requirements are included in the final rule at § 98.43(d)(3). Lead Agencies should consider how to facilitate tracking this type of information and maintaining records of individual providers so that unnecessary checks are not repeated.

Comment: We received several comments from States asking whether staff members' background checks could be re-assessed when they seek employment by another child care provider in the State. One State wrote, "We allow a child care staff to carry forward his or her fingerprint-based background check from one child care operation to another, as long as the person maintains a name-based recheck every 24 months. However, our agency also has a process where we re-assess an individual with certain criminal or abuse/neglect history for each child care operation in which he/she would like to work. [The State] looks at a variety of factors, including details about the role the individual will be working in and the compliance history of the specific child care operation, and makes a determination of overall risk given the results of the background check."

Response: If a staff member meets the three requirements described in the Act, then the child care provider does not need to submit a background check request. However, States do have the option of creating more stringent requirements, such as requiring background to be performed with greater frequency or when a staff member changes the place of employment. Where possible, ACF encourages States to keep processes in place, like the one described by the State, that allow them to make nuanced decisions about individuals' employment eligibility and that carefully consider extenuating circumstances relating to the individual's background check records.

Provisional Employment. The Act requires child care providers to submit a request for background check results prior to a staff member's employment but does not describe instances of

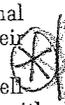
provisional employment while waiting for the results of the background check. We received many comments on this issue in the 2013 NPRM, with commenters expressing concern that the background check requirements could prevent parents from accessing the provider of their choice, if the provider's staff has not already received a background check. Parents often need to access child care immediately, for example, as they start new jobs, and commenters were worried that this could lead to delays in accessing care.

In recognition of the possible logistical constraints and barriers to parents accessing the care they need, § 98.43(d)(4) of the final rule allows prospective staff members to provide services to children while under supervision and on a provisional basis, after completing either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides.

Comment: In the NPRM, we proposed that a prospective staff member could begin work for a child care provider after the background check request was submitted, as long as that staff member was continually supervised by someone who had already completed the background check requirements. Although several commenters supported the idea of provisional employment, others were concerned that the provision as proposed did not protect children's health and safety.

Response: We agreed with the commenters. The final rule allows a prospective staff member to begin work while under supervision after completing the FBI fingerprint check or the search of the State criminal repository using fingerprints in the State where the staff member resides. Until all the background check components have been completed, the prospective staff member must be supervised at all times by someone who has already received a qualifying result on a background check within the past five years. States may pose additional requirements beyond this minimum. We note that the new regulatory language aligns with the requirements in the Head Start Performance Standards and hope the language allows for better partnerships between the two programs.

In addition, we encourage Lead Agencies to require child care providers to inform parents about background check policies and any provisional hires they may have. Allowing provisional hiring does offer more flexibility, but it is also important that Lead Agencies ensure that any provisional status is



RAP BACK PROGRAM

PROVISIONAL EMPLOYEES

limited in scope and implemented with transparency.

Comment: Several commenters asked ACF to clarify what should happen to provisional employees if all of the required background check components are not completed by the end of the statutory 45 day timeframe.

Response: A State must process, at the very least, either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides, before a child care staff member may begin work. As described in further detail later in the preamble, we expect all of the checks to be completed in the timeframe established by the Act. However, the final rule gives Lead Agencies the discretion to make decisions in the limited cases in which not all of the required components are completed.

Completion of Background Checks. Once a child care provider submits a background check request, Section 658H(e)(1) of the Act requires the Lead Agency to carry out the request as quickly as possible. The process must not take more than 45 days after the request was submitted. These requirements are included in the final rule at § 98.43(e)(1).

Comment: Many comments from State continue to be concerned with being able to meet the statutory 45-day timeframe, especially for cross-State checks. Several comments asked ACF for an exception to the 45-day timeframe in those cases.

Response: The Act does not give ACF the authority to grant States exceptions to the 45-day timeframe. While we expect checks to be completed in the timeframe established by the Act, we will allow Lead Agencies to create their own procedures in the event that all of the components of a background check are not complete within the required 45 days. As described earlier in the preamble, prospective child care staff members are required to complete either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides, before they begin work.

Lead Agencies must work together with the relevant State/Territory entities to minimize delays. After the FBI receives electronic copies of fingerprints, they typically process background check results within 24 hours. There can be delays when the submitted fingerprint image quality is poor. Some States use hard copy fingerprints that must be made electronic for submission to the FBI, which can lead to delays. We encourage Lead Agencies to adopt electronic

fingerprinting, which allows for background check results to be processed more quickly.

We encourage Lead Agencies to leverage existing resources to build and automate their background check systems. One potential resource for States is the National Background Check Program (NBCP), as established by Section 6201 of the Patient Protection and Affordable Care Act, which aims to create a nationwide system for conducting comprehensive background checks on applicants for employment in the long-term care (LTC) industry. The NBCP is an open-ended funding opportunity that can award up to \$3 million dollars (with a \$1 million dollar State match) to each State to support building State background check infrastructure. The Centers for Medicare & Medicaid Services (CMS) administers the NBCP and since 2010, has awarded over \$63 million in grant funds to participating States to design, implement, and operate background check programs that meet CMS's criteria.

Privacy of results. Section 658H(e)(2) of the Act requires the Lead Agency to make determinations regarding a child care staff member's eligibility for employment. The Lead Agency must provide the results of the background check to the child care provider in a statement that indicates only whether the staff member is eligible or ineligible, without revealing specific disqualifying information. If the staff member is ineligible, the Lead Agency must provide information about each specific disqualifying crime to the staff member, as well as information on how to appeal the results of the background check to challenge the accuracy and completeness. In the final rule, we clarify the language at § 98.43(e)(2)(ii) to specifically require that when an individual is sent the information on the disqualifying crimes, the State must, at the same time, provide information on the opportunity to appeal. This change is discussed in greater detail below.

In order for a Lead Agency to conduct FBI fingerprint checks, it must have statutory authority to authorize the checks. The Act may be used an authority to conduct FBI background checks, but Lead Agencies may continue to use other statutes as authorities to conduct FBI background checks on child care staff as well. Most Lead Agencies currently use Public Law 92-544 or the National Child Protection Act/Volunteers for Children Act (NCPA/VCA) (42 U.S.C. 5119a) as the authority to conduct FBI background checks. Public Law 92-544, enacted in 1972, gave the FBI authority to conduct

background checks for employment and licensing purposes. The majority of States are using Public Law 92-544 as authority to conduct background checks, but a few States use the NCPA/VCA.

Public Law 92-544 is similar to the Act and only allows the State to notify the provider whether an individual is eligible or ineligible for employment. Similarly, the NCPA/VCA requires dissemination of the results to a governmental agency, unless the State has implemented a Volunteer and Employee Criminal History System (VECHS) program. Thus, a major difference between the Act and the NCPA/VCA with a VECHS program is in the protection of privacy of results. Through the NCPA/VCA VECHS program, Lead Agencies may share an individual's specific background check results with the child care provider, provided the individual has given consent. Lead Agencies have the flexibility to continue to use these statutes as authority to complete the FBI fingerprint check, as long as the employment determination process required by the Act is followed. That is, Lead Agencies must make employment eligibility determinations in accordance with the requirements in the Act, but they also may exercise the flexibility allowed through the NCPA/VCA VECHS program to share results of background checks with child care providers. Comments from States that utilize differing statutes were supportive of this flexibility.

Appeals and review process. Section 658H(e)(3) of the Act requires Lead Agencies to have a process for child care staff members (including prospective staff members) to appeal the results of a background check by challenging the accuracy or completeness of the information contained in their criminal background report. An appeals process is an important aspect of ensuring due process for staff members and allows them to challenge the accuracy of the background check results. According to the Act, each child care staff member should be given notice of the opportunity to appeal and receive instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of their background report. The Lead Agency must complete the appeals process in a timely manner. The Lead Agency must work with other agencies that are in charge of background check information and results, such as the Child Welfare office and the State Identification Bureau, to ensure the appeals process is conducted in accordance with the Act.

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System

45-day deadline

SHARING RESULTS
WITH PROVIDERS

The appeals requirements appear at § 98.43(e)(3) of the final rule.

Section 658H(e)(4) of the Act allows for a review process specifically for staff members convicted of drug-related felonies committed during the previous five years. States may use this review process, also known as a waiver process, to determine those staff members convicted of drug-related felonies committed during the previous five years to be eligible for employment by a CCDF provider. The review process is different from the appeals process because it allows the Lead Agency to consider extenuating circumstances on a case-by-case basis. The Act's review process requirements appear at § 98.43(e)(4) of the final rule.

Comment: A comment, co-signed by several national organizations, wrote advocating for more protections governing the appeals process for individuals who challenge inaccurate background checks. The letter advised, "[T]he regulations fail to include adequate standards governing appeals that seek to demonstrate that the background check information relied upon was inaccurate or incomplete. Given the CCDF program's reliance on the FBI background check system, which routinely generate(s) faulty information, ACF should adopt more robust appeals rights to protect those workers—mostly workers of color—who, through no fault of their own, often have inaccurate records in the federal and State criminal history information systems. Thus, the following key features of a fair and effective appeal process should be incorporated into the ACF regulations:

1. In response to an appeal filed by a worker challenging the accuracy of the background check report, the State should immediately make the background check report available in order for the worker to validate the State's information and properly prepare an appeal.

2. The burden should be on the State to make a genuine effort to track down missing disposition information related to disqualifying offenses, not on the worker. Often, the worker is not in a position to locate information on an arrest that may have occurred in another State or may no longer be readily accessible in court or law enforcement systems due to the age of the offense.

3. The worker should be provided at least 60 days to prepare the appeal, and a longer period of time (up to 120 days) if the State requires the individual to produce official documentation of a record. The State should also allow for a 'good cause' extension of time to file the appeal or supporting material.

4. Once the State has received the appeal information from the worker, it should issue a written decision within a specific period of time (not to exceed 30 days).

5. In the case of a negative determination, the decision should indicate the State's efforts to verify the accuracy of the information challenged by the worker. The decision should also indicate any additional appeal rights available to the worker, as well as information on how the individual can correct the federal or State records at issue in the case.

6. The State should collect and periodically report data on the number of appeals filed, the outcome of the appeals, and the State's decision processing times."

Response: ACF strongly agrees with the worker protections described in this comment. While background checks are a necessary safeguard to protect children in child care, we are also mindful of the disproportionate impact that they can have on low-income individuals of color. A robust and effective appeals process, that incorporates the elements described above, is critical to protect prospective child care staff members who have inaccurate or incomplete background check records. As such, we made changes to the regulatory language at § 98.43(e)(2)(ii) and § 98.43(e)(3) to incorporate many of these protections, while still preserving some State flexibility.

At § 98.43(e)(2)(ii), the final rule requires that when a staff member receives a disqualifying result from the State, that information should be accompanied by information on the opportunity to appeal. The State must provide information about each specific disqualifying crime to the staff member, and that information should allow the staff member to decide whether to challenge the accuracy and completeness of the background checks results. Each child care staff member will be given clear instructions about how to complete the appeals process. The instructions should include the process for appeals, with clear steps individuals may take to appeal and the timeline for each of these steps. Although we are not requiring a specific timeframe, we do recommend that States allow staff members a reasonable amount of time of at least 60 days to prepare the appeal.

If the staff member chooses to file an appeal, then, at § 98.43(e)(3)(iii), the final rule requires the State to attempt to verify the accuracy of the information challenged by the child care staff member, including making an effort to

locate any missing disposition information related to the disqualifying crime. As the comment notes, child care staff members may not be able to access court or law enforcement records, so the burden should be on the State to recover them.

The Act requires that the appeals process must be completed in a timely manner. Although the final rule does not require a specific timeframe, we recommend that States issue a decision within 30 days of the appeal. The final rule, at § 98.43(e)(3)(v), requires that every staff member who submits an appeal will receive a written decision from the State. In the case of a negative determination, the decision should indicate the State's efforts to verify the accuracy of information challenged by the child care staff member, as well as any additional appeals rights available to the child care staff member. The final rule does not require that States collect and report data on the number of appeals filed, the outcome of the appeals, or the State's decision processing times. However, States should consider tracking and publishing this information. This information can be used to gage the speed and effectiveness of the appeals process, and States may be able to use it to make improvements to their appeals process over time.

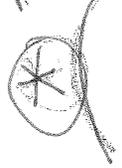
Comment: A letter from Senator Alexander and Congressman Kline asked ACF to provide guidance on the obligations of a child care provider during the appeals process: "The NPRM strongly encourages Lead Agencies that choose to consider crimes other than those listed in the Act as disqualifying crimes for employment to ensure a robust waiver and appeals process is in place; however, it is unclear what the obligations of a provider are during the appeals process timeframe. We support the highest level of safety assurances for parents and children, as well as legal assurances for providers, and again we ask the Department to carefully consider the comments from providers and centers to ensure these provisions are easy to follow without causing great disruption to the delivery of care for children."

Response: The Act does not address the obligations of child care providers while staff members or prospective staff members are engaged in the appeals process. In addition, ACF did not receive any comments from child care providers addressing this issue. Therefore, ACF opts not to include additional regulatory language in order to allow States to make decisions that will continue to protect children's health and safety without causing great

WAIVERS OF DRUG
OFFENSES

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APPEALS (also next page)

APPEALS


disruption to the delivery of care for children. States are responsible for determining the most appropriate obligations for providers during the appeals process, and must inform providers about those obligations during an appeals process. States have the option of allowing child care providers to employ staff members or prospective staff members while they are involved in the appeals process. We encourage States to consult the U.S. Equal Employment Opportunity Commission's guidance (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). In addition, we note Section 658H(e)(5) of the Act, which is reiterated at § 98.43(e)(5), requires that nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section. If a child care provider acts in accordance with the requirements of the Act, private parties may not bring a lawsuit.

Comment: Comments from national organizations and child care worker organizations urged ACF to include new regulatory language requiring the individualized review for drug-related felonies described at § 98.43(e)(4) to follow the U.S. Equal Employment Opportunity Commission's (EEOC) guidelines. A letter co-signed by several national organizations stated, "Communities of color, and women of color in particular, have suffered immeasurably as a result of the collateral consequences of an arrest or conviction for a drug offense. Indeed, women now represent the fastest growing segment of the criminal justice system, due largely to drug offenses, not violent crime. In fact, 24 percent of all incarcerated women were convicted of drug offenses, compared to just 16 percent of men. As the ACLU concluded in their analysis of the issue, '[w]omen of all races use drugs at approximately the same rate, but women of color are arrested and imprisoned at much higher rates.' [W]e urge ACF to emphasize in the preamble that the States should adopt robust waivers procedure as applied to disqualifying drug offenses. In addition, ACF should specifically incorporate the EEOC guidelines in the regulations (Section 98.43(e)(4)), which would provide specific direction to the States beyond simply referencing Title VII."

Response: Section 658H(e)(4) of the Act, which is reiterated at § 98.43(e)(4) of the final rule, allows Lead Agencies

to conduct a review process through which the Lead Agency may determine that a child care staff member (including a prospective child care staff member) convicted of a disqualifying felony drug-related offense, committed during the preceding five years, may be eligible for employment by a provider receiving CCDF funds. The law also requires that the review process must be consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), which prohibits employment discrimination based on race, color, religion, sex and national origin. ACF interprets the statutory reference to Title VII of the Civil Rights Act to mean that Lead Agencies must conduct the review processes in accordance with the EEOC's current guidance on the use of criminal background checks in employment decisions, which requires individualized consideration of the nature of the conviction, age at the time of the conviction, length of time since the conviction, and relationship of the conviction to the ability to care for children, or other extenuating circumstances.

Lead Agencies should consult the EEOC's current guidance on the consideration of criminal records in employment decisions to ensure compliance with Title VII's prohibition against employment discrimination (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). As described in the comment, members of low-income communities of color are disproportionately charged and convicted of drug-related offenses. Establishing a robust process for an individualized review that follows EEOC guidance is important to protect these individuals. This process allows Lead Agencies to consider extenuating circumstances and to make nuanced decisions to deem an individual to be eligible for employment.

Comment: A letter co-signed by several national organizations also asked ACF to require an individualized review that complies with the EEOC guidance for any other disqualifying crimes added by the Lead Agency. The letter wrote, "This 'individualized assessment' of mitigating factors is a critical component of a fair background check process, as detailed in the EEOC guidance. It simply provides an opportunity for a prospective hire to explain why she is qualified for the position and does not pose a risk to

child safety and well-being, even if she may have an otherwise disqualifying offense on her record. Individualized assessments are also particularly important for victims of domestic violence, who are often charged and convicted of a broad range of offenses, many of which are directly related to the abuse they experience. Accordingly, we urge ACF to incorporate the language of the EEOC guidance into Section 98.43(h)(1) of the CCDF regulations, thus mandating that the States take into account the individual's work history, evidence of rehabilitation, and other compelling factors that mitigate against disqualifying the individual from child care employment based on a conviction record."

Response: As described above, ACF interprets consistency with Title VII of the Civil Rights Act to mean that Lead Agencies must follow the EEOC guidelines. As such, we strongly encourage Lead Agencies to follow recommendations to implement an individualized assessment and waiver process in particular for any other disqualifying crimes not listed in the Act. In addition to challenging the record for accuracy and completeness, an individualized review allows the Lead Agency to consider other relevant information, and to provide waivers where appropriate. The EEOC recommends reviewing the following evidence: "the facts or circumstances surrounding the offense or conduct; the number of offenses for which the individual was convicted; older age at the time of conviction, or release from prison; evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts (e.g., education/training); employment or character references and any other information regarding fitness for the particular position; and whether the individual is bonded under a federal, State, or local bonding program" (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

Background check fees. Lead Agencies have the flexibility to determine who pays for background checks (e.g., the provider, the applicant, or the Lead Agency) but Section 658H(f) of the Act requires that the fees charged for completing a background check may

DRUG OFFENSE
 WAIVERS

not exceed the actual cost of processing and administration. The cost of conducting background checks varies across States and Territories. The current FBI fee is \$14.75 to conduct a national fingerprint check (subject to change). According to FY 2014–2015 CCDF State Plan data, most Lead Agencies report low costs to check State registries.

ACF recognizes the important role that fees play in sustaining a background check system. While States and Territories cannot profit from background check fees, we do not want to prevent fees that support the necessary infrastructure. Fees cannot exceed costs and result in return to State general funds, but they can be used to build and maintain background check infrastructure. Further, we expect that Lead Agencies using third party contractors to conduct background checks will ensure that these contractors are not charging excessive fees that would result in huge profits. ACF does not want background check fees to be a barrier or burden for entry into the child care workforce.

Comment: Comments from national organizations and child care worker organizations asked ACF to clarify whether CCDF funds could be used to cover the costs of background checks. One child care worker organization wrote, “We urge ACF to additionally clarify that States are permitted to use CCDBG funding to cover the cost of the background checks for legally exempt and family child care providers, and their household members, so that the cost of the background checks is not a barrier for these providers.”

Response: We agree with the comments. The intent of the Act is not to create additional burdens for certain provider groups. At Lead Agency discretion, CCDF funds may be used to pay the costs of background checks, including legally exempt and family child care providers, and their household members.

Consumer education Web site. The Act requires States and Territories to ensure that their background check policies and procedures are published on their Web sites. We require that States and Territories also include information on the process by which a child care provider or other State or Territory may submit a background check request in order to increase transparency about the process. Comments on this provision, located at § 98.43(g) of the final rule, were largely supportive. These background check policies and procedures should be included on the consumer education

Web site discussed in detail in Subpart D at § 98.33(a).

§ 98.44 Training and Professional Development

Section 658E(c)(2)(G) of the Act requires Lead Agencies to describe in their CCDF Plan their training and professional development requirements designed to enable child care providers to promote the social, emotional, physical and cognitive development of children and to improve the knowledge and skills of caregivers, teachers, and directors in working with children and their families, which are applicable to child care providers receiving CCDF assistance. At § 98.44 we create a cohesive approach to the Act’s provisions for training and professional development at Section 658E(c)(2)(G), provider training on health and safety at Section 658E(c)(2)(I)(i)(XI), and provider qualifications at Section 658E(c)(2)(H)(i)(III). This rule builds on the pioneering work of States on professional development and reflects current State policies.

We received comments from States concerned about the resources needed to meet these requirements and the capacity of professional development providers to fulfill the demand. We recognize that the Act and the rule require more attention to training and professional development; however, the knowledge and skill of caregivers, teachers, and directors is at the heart of quality experiences for children.

Caregiver, teacher and director. As discussed earlier, we have added definitions for “teacher” and “director” to § 98.2. Adding these terms promotes professional recognition for early childhood and school-age care teachers and directors and aligns with terms used in the field. The Act uses the terms “caregiver” and “provider” and we maintain the use of those terms throughout this section as appropriate. We also use the terms “teacher” and “director” to recognize the different professional roles and their differentiated needs for training and professional development. For example, teachers provide direct services to children and need knowledge of curricula and health, safety, and developmentally appropriate practices. In addition, directors need skills to manage and support staff and perform other administrative duties. For simplicity sake, we have included teacher assistants or aides in the same term as teacher. Training and professional development should be tailored to the role or job responsibilities but all caregivers, teachers, and directors need the

foundational knowledge of health, safety, and child development.

Collaboration. The Act requires the Lead Agency to consult with the State Early Care and Education Advisory Committee on this section of the Plan. We encourage Lead Agencies to collaborate as well with entities that set State teacher standards and certificates, entities that award early childhood education credentials, institutions of higher education, child care providers and early childhood education professional associations.

Framework and progression of professional development. At § 98.44(a), we require that Lead Agencies describe in their CCDF Plan the State or Territory framework for training, professional development and postsecondary education based on statutory language at Section 658E(c)(2)(G)(i). The Act requires the framework to be developed in consultation with the State Advisory Council on Early Childhood Education and Care (SAC). We received many comments supporting our outline of the six framework components.

The final rule at § 98.44(a)(3) describes the components of a professional development framework. We deleted language in the NPRM that proposed these components be addressed in the framework “to the extent practicable” since each State’s framework should address these components to some extent—but we recognize that each State may be in a different stage of development of implementation. We received many comments supporting our identification of six components of a framework, described below. These are based on recommendations by the National Child Care Information Center and the National Center on Child Care Professional Development Systems and Workforce Initiatives (former technical assistance projects of the Office of Child Care), and national early childhood professional associations, including the National Association for the Education of Young Children. The recent report of the National Academies of Sciences’ expert panel on the early childhood workforce speaks to the intentional and multifaceted system of supports that will be needed to ensure that every caregiver, teacher, and director can provide high-quality development and learning to the diversity of children in child care and early childhood programs. (Institute of Medicine and National Research Council, 2015. Transforming the workforce for children birth through age 8: A unifying foundation. Washington, DC: The National Academies Press) The six components are: Professional standards

from the term "child care providers." If the Lead Agency chooses to exclude these providers, the Lead Agency shall provide a description and justification in the CCDF Plan, pursuant to § 98.16(l), of requirements, if any, that apply to these providers.

§§ 98.43 through 98.47 [Redesignated as §§ 98.45 through 98.49]

■ 22. Redesignate §§ 98.43 through 98.47 of subpart E as §§ 98.45 through 98.49.

■ 23. Add new § 98.43 to subpart E to read as follows:

§ 98.43 Criminal background checks.

(a)(1) States, Territories, and Tribes, through coordination of the Lead agency with other State, territorial, and tribal agencies, shall have in effect:

(i) Requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of all licensed, regulated, or registered child care providers and all child care providers eligible to deliver services for which assistance is provided under this part as described in paragraph (a)(2) of this section;

(ii) Licensing, regulation, and registration requirements, as applicable, that prohibit the employment of child care staff members as described in paragraph (c) of this section; and

(iii) Requirements, policies, and procedures in place to respond as expeditiously as possible to other States', Territories', and Tribes' requests for background check results in order to accommodate the 45 day timeframe required in paragraph (e)(1) of this section.

(2) In this section:

(i) Child care provider means a center based child care provider, a family child care provider, or another provider of child care services for compensation and on a regular basis that:

(A) Is not an individual who is related to all children for whom child care services are provided; and

(B) Is licensed, regulated, or registered under State law or eligible to receive assistance provided under this subchapter; and

(ii) Child care staff member means an individual (other than an individual who is related to all children for whom child care services are provided):

(A) Who is employed by a child care provider for compensation, including contract employees or self-employed individuals;

(B) Whose activities involve the care or supervision of children for a child care provider or unsupervised access to

children who are cared for or supervised by a child care provider; or

(C) Any individual residing in a family child care home who is age 18 and older.

(b) A criminal background check for a child care staff member under paragraph (a) of this section shall include:

(1) A Federal Bureau of Investigation fingerprint check using Next Generation Identification;

(2) A search of the National Crime Information Center's National Sex Offender Registry; and

(3) A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where such staff member resided during the preceding five years:

(i) State criminal registry or repository, with the use of fingerprints being:

(A) Required in the State where the staff member resides;

(B) Optional in other States;

(ii) State sex offender registry or repository; and

(iii) State-based child abuse and neglect registry and database.

(c)(1) A child care staff member shall be ineligible for employment by child care providers of services for which assistance is made available in accordance with this part, if such individual:

(i) Refuses to consent to the criminal background check described in paragraph (b) of this section;

(ii) Knowingly makes a materially false statement in connection with such criminal background check;

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

(iv) Has been convicted of a felony consisting of:

(A) Murder, as described in section 1111 of title 18, United States Code;

(B) Child abuse or neglect;

(C) A crime against children, including child pornography;

(D) Spousal abuse;

(E) A crime involving rape or sexual assault;

(F) Kidnapping;

(G) Arson;

(H) Physical assault or battery; or

(I) Subject to paragraph (e)(4) of this section, a drug-related offense committed during the preceding 5 years; or

(v) 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 of a

misdemeanor involving child pornography.

(2) A child care provider described in paragraph (a)(2)(i) of this section shall be ineligible for assistance provided in accordance with this subchapter if the provider employs a staff member who is ineligible for employment under paragraph (c)(1) of this section.

(d)(1) A child care provider covered by paragraph (a)(2)(i) of this section shall submit a request, to the appropriate State, Territorial, or Tribal agency, defined clearly on the State or Territory Web site described in paragraph (g) of this section, for a criminal background check described in paragraph (b) of this section, for each child care staff member (including prospective child care staff members) of the provider.

(2) Subject to paragraph (d)(3) of this section, the provider shall submit such a request:

(i) Prior to the date an individual becomes a child care staff member of the provider; and

(ii) Not less than once during each 5-year period for any existing staff member.

(3) A child care provider shall not be required to submit a request under paragraph (d)(2) of this section for a child care staff member if:

(i) The staff member received a background check described in paragraph (b) of this section:

(A) Within 5 years before the latest date on which such a submission may be made; and

(B) While employed by or seeking employment by another child care provider within the State;

(ii) The State provided to the first provider a qualifying background check result, consistent with this subchapter, for the staff member; and

(iii) The staff member is employed by a child care provider within the State, or has been separated from employment from a child care provider within the State for a period of not more than 180 consecutive days.

(4) A prospective staff member may begin work for a child care provider described in paragraph (a)(2)(i) of this section after completing either the check described at paragraph (b)(1) or (b)(3)(i) of this section in the State where the prospective staff member resides. Pending completion of all background check components in paragraph (b) of this section, the staff member must be supervised at all times by an individual who received a qualifying result on a background check described in paragraph (b) of this section within the past five years.

RULE
TEXT

(e) *Background check results.* (1) The State, Territory, or Tribe shall carry out the request of a child care provider for a criminal background check as expeditiously as possible, but not to exceed 45 days after the date on which the provider submitted the request, and shall provide the results of the criminal background check to such provider and to the current or prospective staff member.

(2) States, Territories, and Tribes shall ensure the privacy of background check results by:

(i) Providing the results of the criminal background check to the provider in a statement that indicates whether a child care staff member (including a prospective child care staff member) is eligible or ineligible for employment described in paragraph (c)(1) of this section, without revealing any disqualifying crime or other related information regarding the individual.

(ii) If the child care staff member is ineligible for such employment due to the background check, the State, Territory, or Tribe will, when providing the results of the background check, include information related to each disqualifying crime, in a report to the staff member or prospective staff member, along with information on the opportunity to appeal, described in paragraph (e)(3) of this section.

(iii) No State, Territory, or Tribe shall publicly release or share the results of individual background checks, except States and Tribes may release aggregated data by crime as listed under paragraph (c)(1)(iv) of this section from background check results, as long as such data is not personally identifiable information.

(3) States, Territories, and Tribes shall provide for a process by which a child care staff member (including a prospective child care staff member) may appeal the results of a criminal background check conducted under this section to challenge the accuracy or completeness of the information contained in such member's criminal background report. The State, Territory, and Tribe shall ensure that:

(i) Each child care staff member is given notice of the opportunity to appeal;

(ii) A child care staff member will receive clear instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of the information contained in such member's criminal background report;

(iii) If the staff member files an appeal, the State, Territory, or Tribe will attempt to verify the accuracy of the information challenged by the child care

staff member, including making an effort to locate any missing disposition information related to the disqualifying crime;

(iv) The appeals process is completed in a timely manner for each child care staff member; and

(v) Each child care staff member shall receive written notice of the decision. In the case of a negative determination, the decision should indicate the State's efforts to verify the accuracy of information challenged by the child care staff member, as well as any additional appeals rights available to the child care staff member.

(4) States, Territories, and Tribes may allow for a review process through which the State, Territory, or Tribe may determine that a child care staff member (including a prospective child care staff member) disqualified for a crime specified in paragraph (c)(1)(iv)(I) of this section is eligible for employment described in paragraph (c)(1) of this section, notwithstanding paragraph (c)(2) of this section. The review process shall be consistent with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*);

(5) Nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section.

(f) *Fees for background checks.* Fees that a State, Territory, or Tribe may charge for the costs of processing applications and administering a criminal background check as required by this section shall not exceed the actual costs for the processing and administration.

(g) *Transparency.* The State or Territory must ensure that its policies and procedures under this section, including the process by which a child care provider or other State or Territory may submit a background check request, are published in the Web site of the State or Territory as described in § 98.33(a) and the Web site of local lead agencies.

(h) *Disqualification for other crimes.*

(1) Nothing in this section shall be construed to prevent a State, Territory, or Tribe from disqualifying individuals as child care staff members based on their conviction for crimes not specifically listed in paragraph (c)(1) of this section that bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children.

(2) Nothing in this section shall be construed to alter or otherwise affect the rights and remedies provided for child care staff members or prospective staff members residing in a State that disqualifies individuals as child care

staff members for crimes not specifically provided for under this section.

■ 24. Add new § 98.44 to subpart E to read as follows:

§ 98.44 Training and professional development.

(a) The Lead Agency must describe in the Plan the State or Territory framework for training, professional development, and postsecondary education for caregivers, teachers, and directors, including those working in school-age care, that:

(1) Is developed in consultation with the State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(1)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i))) or similar coordinating body;

(2) May engage training and professional development providers, including higher education in aligning training and education opportunities with the State's framework;

(3) Addresses professional standards and competencies, career pathways, advisory structure, articulation, and workforce information and financing;

(4) Establishes qualifications in accordance with § 98.41(d)(3) designed to enable child care and school-age care providers that provide services for which assistance is provided in accordance with this part to promote the social, emotional, physical, and cognitive development of children and improve the knowledge and skills of caregivers, teachers and directors in working with children and their families;

(5) Includes professional development conducted on an ongoing basis, providing a progression of professional development (which may include encouraging the pursuit of postsecondary education);

(6) Reflects current research and best practices relating to the skills necessary for caregivers, teachers, and directors to meet the developmental needs of participating children and engage families, including culturally and linguistically appropriate practices; and

(7) Improves the quality, diversity, stability, and retention (including financial incentives and compensation improvements) of caregivers, teachers, and directors.

(b) The Lead Agency must describe in the Plan its established requirements for pre-service or orientation (to be completed within three months) and ongoing professional development for caregivers, teachers, and directors of child care providers of services for which assistance is provided under the

↑ END
RULE

SEN. ROGER J. KATZ, CHAIR
SEN. CHRISTOPHER K. JOHNSON



REP. AARON M. FREY, CHAIR
REP. JOYCE A. MAKER
REP. JOYCE McCREIGHT

STATE OF MAINE

ONE HUNDRED AND TWENTY-SEVENTH LEGISLATURE
SECOND REGULAR SESSION

WORKING GROUP TO STUDY BACKGROUND CHECKS FOR CHILD CARE FACILITIES AND PROVIDERS

October 4, 2016

Hon. Paul R. LePage, Governor
Office of the Governor
1 State House Station
Augusta, ME 04333-0001

Re: Request for Sarah Taylor, Director of the Division of Licensing and Regulatory Services, Department of Health and Human Services and Matthew Ruel, Director of the State Bureau of Identification (SBI), Department of Public Safety to attend the October 14, 2016 meeting of the Working Group to Study Child Care Background Checks for Child Care Facilities and Providers established by HP 1167.

Dear Governor LePage:

As chairs of the Working Group to Study Child Care Background Checks for Child Care Facilities and Providers, on behalf of the working group, we are writing to request your administration's participation in the final scheduled meeting of the Working Group on October 14 at 1pm. Specifically, we would like to again invite Sarah Taylor, Director of the Division of Licensing and Regulatory Services and Matthew Ruel, Director of the State Bureau of Identification to the meeting, both of whom we previously requested attend our September 14 meeting in our August 10 letter to you.

While we appreciated having written responses immediately before our second meeting on September 28 from the Department of Health and Human Services (in response to our September 6 email request to Sarah Taylor prior to the first meeting), we have a number of additional questions and find it would be most helpful to have someone from the Department participate in our next meeting. Additional questions arise during discussions that we can't foresee and it is crucial we're able to ask these questions in real time. The more assistance the Department provides, the more likely our recommendations to the Judiciary Committee will align with the current process for background checks for other professions as much as possible, as well as with federal requirements. This will result in an easier and smoother process for your Departmental staff.

We also have not heard back from the State Bureau of Identification, Department of Public Safety regarding questions we submitted to Matt Ruel on September 6. We would like to invite Matt Ruel from the State Bureau of Identification to attend our October 14 meeting. If he or someone with similar expertise is not available, we would still like responses to our submitted questions prior to the October 14 meeting.

We know the legislature can benefit from the institutional knowledge of the departments. We are all supposed to be on the same team to ensure the health and safety of Maine children. The departments' participation will assist us in our duty to protect Maine children in the most effective and efficient way without unnecessarily burdening Executive Branch staff.

Should you require additional information on any of the above, please contact working group staff, Alyson Mayo or Janet Stocco at 287-1670. Thank you for your attention to this important matter.

Sincerely,


Senator Roger Katz
Senate Chair


Representative Aaron Frey
House Chair

cc: Mary Mayhew, Commissioner, Department of Health and Human Services
John E. Morris, Commissioner, Department of Public Safety
Sarah Taylor, Director of the Division of Licensing and Regulatory Services, Department of Health and Human Services
Matthew Ruel, Director of the State Bureau of Identification, Department of Public Safety
Stephanie Ham, Executive Assistant to the Governor
Janet Stocco, Legislative Analyst, Office of Policy and Legal Analysis
Alyson Mayo, Legislative Analyst, Office of Policy and Legal Analysis



STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

October 7, 2016

Senator Roger Katz, Chair
Representative Aaron Frey, Chair
Working Group to Study Background Checks for Child Care Facilities and Providers
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333

Dear Senator Katz and Representative Frey:

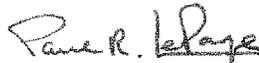
Thank you for your letter requesting the attendance of two Executive Branch employees at the next meeting of your Legislative Working Group. I appreciate your directing this request to me.

As you know, the Maine Constitution creates three separate branches of government. Moreover, our Constitution provides the Governor with the authority to direct Executive Branch employees via Article V, Part First, Section 1 and grants the Governor (not inferior State officers) the authority to recommend to the Legislature such measures as the Governor may judge expedient pursuant to Article V, Part First, Section 9.

Executive Branch employees will not actively participate in this Legislative Working Group. In an attempt to assist the Working Group as best we can, however, please send your questions in writing to me and I will assure that they are answered.

Thank you for your attention to this letter.

Sincerely,


Paul R. LePage
Governor

cc: Commissioner Mayhew
Commissioner Morris



PRINTED ON RECYCLED PAPER

SEN. ROGER J. KATZ, CHAIR
SEN. CHRISTOPHER K. JOHNSON

REP. AARON M. FREY, CHAIR
REP. JOYCE A. MAKER
REP. JOYCE McCREIGHT



STATE OF MAINE

ONE HUNDRED AND TWENTY-SEVENTH LEGISLATURE
SECOND REGULAR SESSION

WORKING GROUP TO STUDY BACKGROUND CHECKS FOR CHILD CARE FACILITIES AND PROVIDERS

October 11, 2016

Hon. Paul R. LePage, Governor
Office of the Governor
1 State House Station
Augusta, ME 04333-0001

Re: Questions for the State Bureau of Identification from the Working Group to Study Background Checks for Child Care Facilities and Providers established by HP 1167

Dear Governor LePage:

We acknowledge receipt of your letter of October 7, 2016. Although we are disappointed that the Working Group to Study Background Checks for Child Care Facilities and Providers will not benefit from the in-person assistance of members of the Executive Branch, we are glad for your personal assurance the questions we submit to you will be answered by the knowledgeable individuals within the Executive Branch within a timely fashion.

As you may recall, in your letter dated August 16 you invited the Working Group to submit written questions to the officials we had named in our first request for Executive Branch assistance. We availed ourselves of this opportunity, submitting written questions both to Sarah Taylor, Director of the Division of Licensing and Regulatory Services within the Department of Health and Human Services and to Matthew Ruel, Director of the State Bureau of Identification (SBI) within the Department of Public Safety. In response, Department of Public Safety Commissioner Morris, to whom we had submitted a courtesy copy of our written questions to Mr. Ruel, requested that we submit the questions directly to your office for approval. We immediately complied, sending an electronic copy of the written questions to your office.

Unfortunately, we did not receive a response to any of our questions prior to the Working Group's first meeting on September 14. The next day, we submitted follow-up letters, once again urging the named Executive Branch officials to lend their expertise to the Working Group's task of implementing the criminal background check component of the federal Child Care and Development Block Grant Act of 2014. As you know, if Maine does not implement these requirements by September of 2017, the State will lose more than \$800,000 in federal Child Care and Development funds each year, which could impact the ability of low-income, working Mainers to afford high-quality child care for their children.

We were glad to receive responses to our questions from DHHS on the day of our second Working Group meeting. Those responses, as well as the Working Group's own research, generated additional questions, which we submitted directly to Nicholas Adolphsen, DHHS's Director of Government Relations and Policy on October 3. A copy of those questions is attached to this letter for your review.

Despite our repeated requests, we have not yet received any answers from the SBI. Their expertise in the field of criminal background checks cannot be overstated; the Working Group would truly benefit from SBI's assistance in implementing the new federal background check requirements.

In the meantime, on September 23, the federal government issued its final regulations implementing the background check requirements of the Child Care and Development Block Grant Act of 2014. In light of these final regulations, as well as the information the Working Group has gathered at its first two meetings, we have made slight changes to the questions we originally submitted to Mr. Ruel on September 6. We therefore request your assistance in securing answers to the following questions:

1. What is the cost of each of the following types of background check, which are required by the federal regulations implementing the Child Care and Development Block Grant Act of 2014:
 - a. A Federal Bureau of Investigation fingerprint check using Next Generation Identification;
 - b. A search of the National Crime Information Center's National Sex Offender Registry; and;
 - c. A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where such staff member resided during the preceding 5 years:
 - i. State criminal registry or repository, with the use of fingerprints being required in the State where the staff member resides, and optional in other States;
 - ii. State sex offender registry or repository; and
 - iii. State-based child abuse and neglect registry and database.
2. How long does it generally take to receive the results of each type of check listed in question 1?
3. Does Maine currently conduct each of the types of background check listed in question 1 for any other profession in Maine?
 - a. If any of these checks are performed for other professions, would it be possible to use the same process to perform checks on child care workers?
 - b. If any of these checks are not currently performed in Maine, do you anticipate any obstacles to implementing that type of check for child care workers?
4. Should there be any additional language in state statute, beyond the language of P.L. 2015, ch. 497, to ensure that the process for background checks of child care providers complies with other federal and state laws governing access to criminal history information?
5. What is the status of the Maine Background Check Center, established by P.L. 2015, ch. 299?
 - a. What progress has been made toward establishing the Maine Background Check Center?
 - b. If the Center is operational, what is the user fee amount? (If the Center is not operational, does SBI have a recommendation for the user fee amount?)
6. For how many people and in which professions or kinds of employment are background checks currently conducted?

- a. Does SBI have any specific recommendations regarding the process or record-keeping for fingerprint background checks for childcare providers that would optimize the ability to be interchangeable with checks currently conducted for school employees or required for other professions or occupations?
7. Can you briefly explain the background check process for individuals employed in public elementary and secondary schools in Maine?
- a. What types of criminal history are checked (Maine criminal history, other-state criminal history, federal criminal history, fingerprint-based, etc.)?
 - b. Are electronic or paper fingerprints used? Where must the individuals go to get their prints taken?
 - c. How much does the entire process cost?
 - d. How long does it take for the results to be obtained?
 - e. Would it be possible to implement a similar process for Maine's child care workers?

We look forward to timely responses from either Mr. Ruel or another SBI or DPS expert before our final Working Group meeting this Friday, October 14. We are happy to receive responses either via email or in writing, whichever is more convenient, to Working Group Staff Janet Stocco and Alyson Mayo of the Office of Policy and Legal Analysis.

Should you require additional information on any of the above, please do not hesitate to contact Janet Stocco or Alyson Mayo at 287-1670. Thank you for your attention to this important matter.

Sincerely,


Senator Roger Katz
Senate Chair


Representative Aaron Frey
House Chair

cc (*via email*): Matt Ruel, Director, State Bureau of Identification
John E. Morris, Commissioner, Department of Public Safety
Mary Mayhew, Commissioner, Department of Health and Human Services
Janet Stocco, Legislative Analyst, Office of Policy and Legal Analysis
Alyson Mayo, Legislative Analyst, Office of Policy and Legal Analysis

Mayo, Alyson

From: Mayo, Alyson
Sent: Monday, October 03, 2016 2:07 PM
To: Adolphsen, Nick
Cc: Stocco, Janet
Subject: Working Group Background Checks for Child Care Facilities and Providers --Questions

Hi Nick,

I'm contacting you on behalf of the Working Group to Study Background Checks for Child Care Facilities and Providers.

Thank you for the written response to our questions on September 28.

The Working Group has some additional questions and requests a response by Wednesday, October 12 in order to review them prior to their third meeting on Friday, October 14.

- Could you provide a copy of the August 8, 2016 revised plan for the State of Maine CCDF State Plan referenced in your September 28 document to the Working Group chairs?
- How much money does DHHS currently budget and also actually spend on (non-fingerprint) background checks for childcare workers? Where do these funds come from?
- Is there currently a waiting list for background checks?
- What was the source of the 85% state median income figure in the "income guidelines" link under "Who is eligible to receive Child Care Subsidy?" referenced in your September 28 document to the Working Group chairs? We noted that these figures are from page 60 of the State Plan under 85% of State Median Income. We would like to know where these numbers came from.
- Does DHHS have an estimate of staff turnover rates for childcare facilities, perhaps from the number of background checks done?

Thank you very much,
Alyson and Janet

Alyson Mayo
Legislative Analyst
Office of Policy and Legal Analysis
Maine Legislature
(207) 287-1670



STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

Paul R. LePage
GOVERNOR

October 12th, 2016

By Electronic Mail

Dear Ms. Stocco,

I am writing in response to the most recent letter that was sent to me from Sen. Katz and Rep. Frey on behalf of the Working Group to Study Background Checks for Child Care Facilities and Providers. That letter was dated yesterday, October 11th, 2016. My office received it yesterday and I just read it this morning, October 12th. By the terms of the letter, I am asked to provide answers to lengthy, complex questions by 1:00 P.M. this coming Friday, October 14th, 2016.

Frankly, the requested timeline is a bit short. The Executive Branch will begin gathering answers to these questions to the extent that such answers can be gathered on such a short timeframe. Answers that can be obtained will be sent to the Working Group.

Sincerely,


Paul R. LePage
Governor





Department of Health
and Human Services

Maine People Living
Safe, Healthy and Productive Lives

Paul R. LePage, Governor

Mary C. Mayhew, Commissioner

Department of Health and Human Services
Commissioner's Office
221 State Street
11 State House Station
Augusta, Maine 04333-0011
Tel.: (207) 287-3707; Fax (207) 287-3005
TTY Users: Dial 711 (Maine Relay)

October 14, 2016

TO: Senator Roger J. Katz, Senate Chair
Representative Aaron Frey, House Chair

FROM: Nick Adolphsen, Director of Government Relations and Policy, DHHS

Re: Response to Questions for the Department of Health and Human Services from the September 28, 2016 Working Group to Study Background Checks for Child Care Facilities and Providers established by HP 1167

1. Could you provide a copy of the August 8, 2016 revised plan for the State of Maine CCDF State Plan referenced in your September 28 document to the Working Group chairs?

Response: The current plan can be found at <http://www.maine.gov/dhhs/ocfs/ec/occhs/child-care.html>. The revised plan is not yet approved and currently under consideration by our Federal program officer.

2. How much money does DHHS currently budget and also actually spend on (non-fingerprint) background checks for childcare workers? Where do these funds come from?

Response: In SFY 16, approximately \$48,000 in CCDF was expended to support child care provider background checks.

3. Is there currently a waiting list for background checks?

Response: At this time, there is not a waiting list for child protective background checks to be completed.

4. What was the source of the 85% state median income figure in the "income guidelines" link under "Who is eligible to receive Child Care Subsidy?" referenced in your September 28 document to the Working Group chairs? We noted that these figures are from page 60 of the State Plan under 85% of State Median Income. We would like to know where these numbers came from.

Response: Please see the attached. A family of four can earn up to \$64,000, more than 250% of the Federal Poverty, to be eligible to receive a subsidy.

5. Does DHHS have an estimate of staff turnover rates for childcare facilities, perhaps from the number of background checks done?

Response: We do not have this data.

CLIENT INCOME ELIGIBILITY CRITERIA

Individuals eligible for child care subsidy from the Department of Health and Human Services must comply with income eligibility criteria below.

Funds	Child Care Development Funds (CCDF) Fund for a Healthy Maine (FHM) Temporary Assistance to Needy Families (TANF) State Funds (SPSS)
Income Eligibility	All families must meet income guidelines of gross family income at or below 85% of the State Median Income based on the current adjusted State Median Income estimates and calculations used in the Low Income Home Energy Assistance Program (LIHEAP) ¹
Fee Assessment	Fees are assessed to all families.

MAXIMUM INCOME GUIDELINES – CHILD CARE SERVICES

Effective July 1, 2015 until further notice

FAMILY SIZE	ANNUAL INCOME	MONTHLY INCOME (ANNUAL/12)	WEEKLY INCOME (ANNUAL/52)
1	\$33,793.11	\$2,816.09	\$649.87
2	\$44,190.99	\$3,682.58	\$849.83
3	\$54,588.87	\$4,549.07	\$1,049.79
4	\$64,986.75	\$5,415.56	\$1,249.75
5	\$75,384.63	\$6,282.05	\$1,449.70
6	\$85,782.51	\$7,148.54	\$1,649.66
7	\$87,732.11	\$7,311.01	\$1,687.16
8	\$89,681.72	\$7,473.48	\$1,724.65
9	\$91,631.32	\$7,635.94	\$1,762.14
10	\$93,580.92	\$7,798.41	\$1,799.63

For families with more than one child in care, the youngest child is always considered the first child enrolled. The total amount of assessed fees to a family shall not exceed 10% of the family's gross income for all of their children.

Weekly fee assessments must be rounded down to the nearest dollar. All assessed parent fees shall be paid directly to the caregiver by the parent.

¹ SMI DATA: <https://www.federalregister.gov/articles/2015/06/10/2015-14187/the-low-income-home-energy-assistance-program-announces-the-state-median-income-estimates-for-ffy2016>

**WORKING GROUP TO STUDY BACKGROUND CHECKS
FOR CHILD CARE FACILITIES AND PROVIDERS**

Information Requests from Second Working Group Meeting

1. Do MaineCare and Maine child care subsidy income guidelines match?

Family Size	Income limit for Cub Care Insurance (annual) ¹	Income limit for Child Care Subsidy (annual) ²
1	\$19,608	\$33,793.11
2	\$26,400	\$44,190.99
3	\$33,204	\$54,588.87
4	\$40,008	\$64,986.75
5	\$46,800	\$75,384.63
6	\$53,604	\$85,782.51

* Income calculations — what income is included/excluded, asset caps, etc. — may vary between programs

2. How long does it take to process an FBI fingerprint-based criminal history check?

Answer: An electronic fingerprint check can be processed in approximately 24 hours; poor quality electronic prints or paper prints slow the process down significantly.

3. What is the cost of a digital/electronic fingerprinting machine?

Answer: Fulcrum Biometrics sells a variety of machines priced from \$4800 to \$11,000. See the website at <http://www.fulcrumbiometrics.com/Live-Scan-Systems-s/107.htm>

4. Where would a child care provider obtain a (paper) fingerprint card?

Answer: if DHHS does not provide child care workers with fingerprint cards, the police departments have cards that can be used. (Source: Michael Field, Bath Chief of Police.)

5. What is the rate of turnover for child care employees in Maine?

Answer: Awaiting response from DHHS.

Maine Child Care Market Rate and Workforce Study (Sept. 2002): “Maine centers reported a turnover rate for the previous year of 16% for directors, 27% for lead teachers, 31% for teachers, and 33% for assistants.”³

2014 Study by Center for the Study of Child Care Employment (see attachment).

6. What is the fingerprinting process for new public school employees in Maine?

¹ The Cub Care income limits can be found at www.maine.gov/dhhs/ofi/services/cubcare/CubCare.htm.

² The Child Care Subsidy income limits can be found by clicking the “income guidelines” hyperlink on the following webpage: <http://www.maine.gov/dhhs/ocfs/ec/occhs/step.htm>.

³ Available at <https://www1.maine.gov/dhhs/ocfs/ec/occhs/workforcereport.pdf>.

Fingerprinting Process for Public School Employees in Maine

Maine statute (20-A M.R.S. § 6103) requires anyone employed by a school system as an employee or contractor to submit to a fingerprint-based state and federal criminal history background check prior to employment. The statute is implemented by Department of Education Rules chapter 115, Part I, § 3.2.

- *Condition of licensure:* Persons certified (teachers, administrators, school psychologists, etc.) or authorized (educational technicians) by the department must submit to the background check prior to receiving the license or authorization.
- *Approval of other employees:* School bus drivers, secretaries, custodians, substitute teachers, etc.— may receive an 8-week temporary approval card while their background checks are processed.

Process:

- *Cost:* By statute, initial background checks cost \$55 and renewal checks cost \$24.
- *Type of Check:* Federal (FBI) and Maine (SBI) criminal history checks using fingerprints.
- *Where:* Fingerprinting is performed by a contractor (IdentoGo) at 9 approved fingerprinting sites:

Augusta	Belfast	Brewer
Farmington	Lisbon	Portland
Presque Isle	Springvale	Winslow

Applicants from out-of-State may have their fingerprints taken in another State through a process approved by the SBI. The fingerprints must be retaken in Maine within 20 days of employment.

- *Scheduling:* Applicants may sign up online through the IdentiGo website and will select a specific fingerprinting location, date, and time. Appointments appear to be available in as little as 1-2 days.
- *Fingerprinting Process:* Applicants must bring a government-issued photo ID to the appointment. They must also provide their social security number, date of birth, and current address.
 - The prints are scanned electronically and sent electronically to the SBI. The SBI performs a state criminal history check and sends the prints to the FBI for an FBI criminal history check.
 - Me. Dept. Ed. Rules prohibit use of the fingerprints as part of any criminal investigation.
 - IdentiGo informs applicants that the fingerprints will not be kept by the FBI and will be maintained by the SBI separately from fingerprints taken for criminal justice purposes.
 - Me. Dept. Ed. Rules prohibit use of these fingerprints by SBI or any law enforcement agency as part of any criminal investigation.
- *Results:* Me. Dept. of Ed. receives the results of the criminal history checks and determines whether to issue the license, certificate, or approval but does not share the results with school districts.
- *New Maine Convictions:* Applicant fingerprints are compared to new Maine convictions on an ongoing basis.
- *Renewals:* The SBI retains the fingerprint cards for license renewal purposes. Fingerprints will be resubmitted to the FBI every five years if the applicant has interrupted service.

Information Sources:

Maine Dept. of Education Website: <http://maine.gov/doe/cert/fingerprinting/index.html>

Maine Dept. of Education Rules Ch. 115, Pt. I, 3.2: <http://www.maine.gov/sos/cec/rules/05/chaps05.htm>

IdentiGo Website: <https://www.identogo.com/locations/maine>



Worthy Work, STILL Unlivable Wages: The Early Childhood Workforce 25 Years after the National Child Care Staffing Study

By Marcy Whitebook, Deborah Phillips, and Carollee Howes



CENTER FOR THE STUDY OF CHILD CARE EMPLOYMENT
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The Center for the Study of Child Care Employment (CSCCE) was founded in 1999 to focus on achieving comprehensive public investments which enable and reward the early childhood workforce to deliver high-quality care and education for all children. To achieve this goal, CSCCE conducts cutting-edge research and proposes policy solutions aimed at improving how our nation prepares, supports, and rewards the early care and education workforce to ensure young children's optimal development.

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The average hourly wage paid to lead teachers and teachers of preschool-age children across all center types was \$7.49 in 1990 (equivalent to \$13.16 in 2012 dollars) and \$15.70 in 2012, representing a 19-percent increase in real wages (constant 2012 dollars) over this 22-year period. This average increase, however, hides the vast range in real wage growth — from 3.6 percent in public school-sponsored centers to over 29 percent in independent, non-profit, or government-run centers — that affected teachers working in different sectors of the center-based child care market. The average hourly wage for teachers was highest for public school-sponsored centers in both 1990 and 2012 (\$14.40 and \$26.20, respectively, a 3.6 percent increase in constant 2012 dollars). The wages of teachers in Head Start centers were the next highest after those in public school-sponsored centers, with hourly wages of \$9.67 in 1990 and \$17.90 in 2012 (a 5.4 percent real increase). Public-school sponsored centers constituted 6.1 percent of all centers in 2012 in our analyses; Head Start centers were 18.2 percent of the 2012 sample of centers (see **Table 3.2**). In both 1990 and 2012, for-profit chains and independent for-profit centers paid the lowest wages. However, for-profit chains and independent, non-profit, or government-run centers showed the most dramatic increases in wages over this time period, both increasing by over 25 percent.

Staff Turnover/Departure

Both the Profile and NSECE surveys relied on center directors to report annual turnover/departure numbers. The pertinent question in both surveys was phrased identically (“how many ___ have left the program in the last 12 months?”), however, the Profile survey asked specifically about lead and other teachers (excluding assistant teachers and aides), while the NSECE asked about all staff working directly with children in such a way that lead teachers and teachers could not be separated from assistant teachers and aides. As a result, the 1990 and 2012 turnover/departure data are not comparable, although the direction of any bias that is introduced is difficult to estimate. Any comparisons across the Profile and NSECE data should be interpreted with caution; comparisons within each survey (e.g., across center types) are not compromised.

Table 3.5 presents the overall center turnover/departure rates, the percentage of centers with any turnover, and the turnover/departure rates for those centers with any turnover by type of center in 1990 and 2012.

In 1990, the average annual teacher turnover/departure rate was 25 percent. In 2012, the average annual classroom staff turnover/departure rate was 13 percent, closer to the turnover rate of 15 percent reported in the 1977 National Day Care Study.⁶⁸ Turnover/departure rates among centers that experienced any turnover were 50 percent in 1990 and 25 percent in 2012. In both survey years, turnover/departure rates among the centers with any turnover were double the rate for centers as a whole. Finally, in both surveys, the share of centers experiencing any turnover/departures during the prior year remained constant at half of all centers. As a point of reference, Bureau of Labor Statistics data indicate that the rates of separation (e.g. quits and layoffs) across all non-farm occupations have slowed in recent years.⁶⁹

TABLE 3.5
Annual Staff/Teacher Departure Rates¹ as Reported in *A Profile of Child Care Settings (1990)*
and NSECE (2012), by Center Auspice

	Profile: Mean Departure Rate (1990)	NSECE: Mean Departure Rate (2012)	Profile: Percentage of Centers with Any Departures (1990)	NSECE: Percentage of Centers with Any Departures (2012)	Profile: Mean Departure Rate in Centers with Any Departures (1990)	NSECE: Mean Departure Rate in Centers with Any Departures (1990)
Head Start (funded)	20%	10%	31%	44%	64%	21%
Public-School Sponsored	14%	14%	23%	51%	60%	28%
Religious-Sponsored, Not-for-Profit	23%	8%	54%	41%	41%	21%
Other Sponsored, Not-for-Profit or Run by Government Agency	25%	13%	53%	51%	47%	23%
Independent, Not-for-Profit or Run by Government Agency	25%	11%	52%	42%	48%	25%
For-Profit, Chain or Franchise	39%	27%	77%	84%	50%	31%
For-Profit, Independent	27%	16%	50%	57%	53%	27%
All Centers	25%	13%	50%	50%	50%	25%

SOURCES: Kisker, E. E., Hofferth, S. L., Phillips, D. A., & Farquhar, E. (1991). *A profile of child care settings: Early education and care in 1990*. Vol. 1. Princeton, NJ: Mathematica Policy Research, Inc.; *National Survey of Early Care and Education Team*. (2014). National Survey of Early Care and Education. Original analyses conducted for this report.

¹Profile survey data based on director reports of turnover ("left program in past 12 months") among lead and other teachers. NSECE data based on director reports of all staff who work directly with children. NSECE reports use the terminology of "departure rates."

There was, however, substantial variation in turnover/departures by center type within both surveys. In both 1990 and 2012, both types of for-profit centers experienced the highest turnover/departure rates. The type of center with the lowest turnover rates varied across years and across the measure used to assess such rates. In both survey years, public school-sponsored centers had overall turnover rates below 15 percent, but relatively high turnover rates among the centers with any turnover. Head Start centers also had relatively low overall turnover rates in both survey years, and a relatively lower number of centers with any turnover.

Discussion

This preliminary view of changes over time in the center-based child care workforce in the U.S., provided by two nationally representative surveys conducted more than two decades apart, reveals:

- no change in the percentage of lead teachers and teachers with associate and bachelor's degrees across all center types,
- close to a 20-percent increase in lead teacher and teacher wages across all types of centers,
- an enduring overall 50-50 split across centers with and without teaching staff turnover in the prior year, and
- a possible decline in overall staff turnover back to mid-1970 levels.

These changes occurred in the context of sizeable growth in the number of center-based programs serving preschool-age children in the U.S.

Importantly, each of these overall trends camouflages large and persistent disparities by center auspice that tend to favor public school-sponsored and Head Start centers, and leave for-profit centers at a relative disadvantage. This pattern is especially strikingly for teacher education and wages. The average wage increase, for example, reflects a vast range from 3.6 percent to over 29 percent in wage growth by center sponsorship. With regard to both education and wages, lead teachers and teachers in the non-profit sector fared better than those in the for-profit sector in both 1990 and 2012. Nevertheless, for-profit chains exhibited the largest increase in both degreed teachers and wages, bringing their teaching staff qualifications closer to those of non-profit centers than was the case in 1990, but still leaving teacher wages substantially lower than in any of the types of non-profit centers tracked in the two national surveys. It is also notable that center types that exhibited improvements in the share of degreed teachers between 1990 and 2012 did not necessarily exhibit improved wages. The turnover numbers are not comparable across surveys, leading us to caution against drawing any firm conclusions about turnover trends. In both 1990 and 2012, however, non-profit centers of all types had lower turnover rates and a smaller share of centers experiencing any turnover than did for-profit centers.

Historically, early care and education in the U.S. has been characterized by fragmentation and wide variation in what children and families experience in different sectors of the market. The trends reported here confirm that these aspects of the field remain in the face of significant growth in centers, and despite significant changes in the early care and education landscape over the past two decades. Public school-sponsored and Head Start centers have been in the vanguard of the growing emphasis on school readiness within the early care and education field. In both 1990 and 2012, public school-sponsored centers employed relatively well-educated teachers and, accordingly, paid the highest wages in the field. Head Start has made deliberate and successful efforts to improve teacher qualifications, but improvements in wages have not kept pace. The remainder of the field, despite some clear efforts to make improvements, as seen, for example, with the for-profit chains, has continued to lag behind, with rare exceptions. These programs that are neither public school-sponsored nor Head Start centers provide the vast majority of early care and education in this country.

Head Start Program Information Report, 1997-2013

(section co-authored by Stephanie Schmit, Senior Policy Analyst, Center for Law and Social Policy)^{70,71}

Since 1979, all Head Start grantees and delegates, including Head Start preschool, Early Head Start, Migrant and Seasonal Head Start, and American Indian and Alaskan Native programs as they were established, have been required to complete a Program Information Report (PIR) on an annual basis. These reports provide extensive information on participating children and their families, program staff, and program features and services. This section focuses almost exclusively on data from Head Start preschool programs. We examine trends in salaries, turnover, and teacher and assistant teacher education. To provide context for these data, we include information on trends in program enrollment, total teaching staff, and federal appropriations for the program. With the 2013 PIR data providing the most current portrait of Head Start preschool, we used 1997 and 2007 as our data points for examining trends in teacher and assistant teacher education and wages.⁷² Turnover data were not collected prior to 2002, and so 2002 and 2007 provide our data points for examining trends in turnover. The education, wage and turnover data from the PIR are not comparable with the Head Start data from the two nationally representative surveys presented previously in this chapter. They not only span different periods of time, but the PIR data reported here include teachers and assistant teachers, while the Profile and NSECE data do not include assistant teachers.

As context for the trends reported in this section, **Table 3.6** provides information on total cumulative enrollment, total teaching staff, and federal funding levels during the years for which we report PIR data.

Statute: fingerprinting school employees

Maine Revised Statutes

Title 20-A: EDUCATION

Chapter 221: SCHOOL RECORDS, AUDITS AND REPORTS

§6103. CRIMINAL HISTORY RECORD INFORMATION CONVICTION DATA

Beginning July 1, 2000, certification, authorization and renewal under chapters 501 and 502 are subject to the provisions of this section. A person who has complied with the requirements of this section is not required to submit to a subsequent national criminal history record check unless that person has not been continuously employed in a position requiring certification or authorization under chapters 501 and 502. A person who has not been continuously employed in such a position is subject to a subsequent national criminal history record check upon renewal. School vacations are not a break in employment. Fingerprinting of immediately affected applicants for certification, authorization or renewal, conducting of the needed state and national criminal history record checks by the State Bureau of Identification and forwarding of the results by the bureau to the department must begin on September 1, 1999. [1999, c. 791, §1 (AMD) .]

Beginning September 1, 1999, approval under chapters 501 and 502 is subject to the provisions of this section. A person who has complied with the requirements of this section is not required to submit to a subsequent national criminal history record check unless that person has not been continuously employed in a position requiring approval under chapters 501 and 502. A person who has not been continuously employed in such a position is subject to a subsequent national criminal history record check upon renewal. School vacations are not a break in employment. Fingerprinting of applicants for approval, conducting of the needed state and national criminal history record checks by the State Bureau of Identification and forwarding of the results by the bureau to the department must begin on September 1, 1999. [1999, c. 791, §2 (AMD) .]

1. Criminal history record information obtained; reliance. The commissioner shall obtain criminal history record information containing a record of public criminal history record information as defined in Title 16, section 703, subsection 8 from the Maine Criminal Justice Information System for any person applying for certification, authorization, approval or renewal. The commissioner may rely on information provided by the Maine Criminal Justice Information System within 24 months prior to the issuance of a certificate, authorization, approval or renewal.

[2013, c. 507, §10 (AMD) .]

2. Issuance restriction. Issuance of a certificate, authorization, approval or renewal to any person whose criminal history record information includes a criminal conviction is subject to the provisions of Title 5, chapter 341 and section 13020.

[1997, c. 452, §3 (AMD) .]

3. Confidentiality. Any information obtained pursuant to this section is confidential. The results of criminal history record checks received by the commissioner are for official use only and may not be disseminated outside the department, except that the commissioner may outsource administrative functions of software document management according to federal outsourcing standards as described in 28 Code of Federal Regulations, Section 906.2 (2011) and allow access to these results for that purpose.

[2011, c. 521, §1 (AMD) .]

3-A. Fees. The Commissioner of Public Safety shall assess a fee of \$55 for each initial criminal history record check and \$24 for each renewal criminal history record check required by this section.

[2015, c. 267, Pt. SSS, §1 (AMD) .]

3-B. Reimbursement of fee.

[2013, c. 506, §13 (RP) .]

4. Expenses.

[2005, c. 457, Pt. CC, §2 (RP) .]

4-A. Phase-in plan. The fingerprinting and approval process established by this section for certain classes of individuals must be phased in as follows:

A. The fingerprinting and approval process must be phased in for all persons regularly employed in a school during the 1999-2000 school year who require department approval to continue in their positions and who have not been fingerprinted pursuant to this section prior to enactment of this subsection. The department shall issue each person a temporary approval card valid through a specified year from 2001 to 2004. Prior to July 1st of the year specified on the temporary approval card, the person must meet the requirements of this section. Once a person has met the requirements of this section, an approval card must be issued; [1999, c. 791, §4 (NEW) .]

B. A person placed under contract by a school and subject to the requirements of this section, who has not been fingerprinted prior to the effective date of this subsection, must meet these requirements by July 1, 2002; [1999, c. 791, §4 (NEW) .]

C. A person employed as a substitute who has not been fingerprinted prior to the effective date of this subsection must meet the requirements by July 1, 2002. Beginning with the 2003-2004 school year, a person employed as a substitute who needs fingerprinting and a criminal history record check pursuant to section 13011, subsection 8 must meet the requirements of this section within 8 weeks of employment by a school administrative unit. A person employed as a substitute who needs fingerprinting and a criminal history record check must be issued a temporary approval card by the department. The temporary approval card is valid for the first 8 weeks of employment, except that, for a person who has been fingerprinted pursuant to this section prior to the 20th day of employment and who has not received the results of the criminal history record check prior to the 9th week of employment, the temporary approval card remains valid until the commissioner determines whether approval is granted or denied based on the criminal history record information obtained from the State Bureau of Identification; and [2003, c. 184, §1 (AMD) .]

D. A regular employee subject to the requirements of this section who begins work in a school after the effective date of this subsection must meet these requirements prior to the 20th day of employment. Beginning with the 2003-2004 school year, a regular employee who needs fingerprinting and a criminal history record check pursuant to section 13011, subsection 8 must meet the requirements of this section within 8 weeks of employment by a school administrative unit. A regular employee who needs fingerprinting and a criminal history record check must be issued a temporary approval card by the department. The temporary approval card is valid for the first 8 weeks of employment, except that, for a person who has been fingerprinted pursuant to this section prior to the 20th day of employment and who has not received the results of the criminal history record check prior to the 9th week of employment, the temporary approval card remains valid until the commissioner determines whether approval is granted or denied based on the criminal history record information obtained from the State Bureau of Identification. [2003, c. 184, §1 (AMD) .]

[2003, c. 184, §1 (AMD) .]

5. Criminal record information obtained from the Federal Bureau of Investigation. The commissioner shall obtain other state and national criminal history record information from the Federal Bureau of Investigation for any person applying for certification, authorization, approval or renewal. The commissioner may rely on information provided by the Federal Bureau of Investigation within 24 months prior to the issuance of a certificate, authorization, approval or renewal.

[1997, c. 452, §3 (NEW) .]

6. Fingerprinting. The applicant shall submit to having fingerprints taken. The Maine State Police, upon payment by the applicant or any other entity required by law of the expenses specified in subsection 3-A, shall take or cause to be taken the applicant's fingerprints and shall forward the fingerprints to the State Bureau of Identification so that the bureau can conduct state and national criminal history record checks. Except for the portion of the payment, if any, that constitutes the processing fee charged by the Federal Bureau of Investigation, all money received by the Maine State Police for purposes of this section must be paid over to the Treasurer of State for deposit in the State Police program, Other Special Revenue Funds account in the Department of Public Safety for the purpose of funding the costs of the Department of Public Safety to administer the criminal history record checks under this section.

[2015, c. 267, Pt. SSS, §2 (AMD) .]

7. Use of criminal history record. State and federal criminal history record information may be used for the purpose of screening educational personnel applicants by the commissioner in order to determine whether certification, authorization, approval or renewal of educational personnel is granted or maintained.

[1997, c. 452, §3 (NEW) .]

8. Applicant's access to criminal history record check. The subject of a Federal Bureau of Investigation criminal history record check may obtain a copy of a criminal history record check by following the procedures outlined in 28 Code of Federal Regulations, Sections 16.32 and 16.33. The subject of a state criminal record check may inspect and review criminal record information pursuant to Title 16, section 709.

[2013, c. 267, Pt. B, §15 (AMD) .]

9. Right of applicant and commissioner to remove fingerprints from fingerprint file. Teachers or educational personnel whose certification, authorization or approval has expired and who have not applied for renewal of certification, authorization or approval may request in writing that the State Bureau of Identification remove their fingerprints from the bureau's fingerprint file. In response to a written request, the bureau shall remove the requester's fingerprints from the fingerprint file and provide written confirmation of that removal to the requester.

The commissioner may, without notice to an applicant, remove fingerprints from the fingerprint file maintained by the State Bureau of Identification when an applicant has had no active credential for 7 years. An applicant may renew a credential after that applicant's fingerprints have been removed from the fingerprint file upon submitting again to fingerprinting.

[2011, c. 521, §2 (AMD) .]

10. Criminal History Record Check Fund. The Criminal History Record Check Fund is created as a dedicated fund within the Department of Education for the transfer of funds from the Department of Public Safety to cover a portion of the cost of a position that issues certificates. The fund may not lapse, but must be carried forward to carry out the purposes of this chapter.

[2015, c. 267, Pt. SSS, §3 (AMD) .]

SECTION HISTORY

MAINE DEPT. OF EDUCATION RULES

SECTION 3. APPLICATION FOR CERTIFICATION, AUTHORIZATION, OR APPROVAL

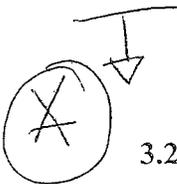
3.1 Application

A. Complete Application

1. Each applicant for a certificate, an authorization, or an approval shall submit a complete, accurate, and signed application on the form provided by the Department, including all supporting documentation required for an evaluation of eligibility for the certificate, authorization or approval sought, and, when required, the recommendation of the support system chairperson. Incomplete materials shall not be processed.
2. Each application must include fees when required, in accordance with 20-A M.R.S.A. §13007(1).
3. The Department will analyze each complete application and provide the applicant with a written statement of any remaining eligibility requirements and the timeframe in which each shall be completed.
4. A teacher, educational specialist, or administrator who is currently certified in Maine and is employed as an Educational Technician I, II, or III need not apply for authorization as an educational technician.
5. A teacher, educational specialist, or administrator who is currently certified in Maine or an education technician who is currently authorized in Maine and is employed in a position that requires only a criminal history record check approval need not apply for the approval.

B. College transcripts

1. Each college transcript filed for certification or authorization purposes shall be an official transcript and shall:
 - (a) Bear the seal of the institution and the signature of the registrar or other official designated by the president or board of the institution;
 - (b) Include descriptive titles, credits and grades for all listed courses; and
 - (c) Indicate the type of degree granted and the date the degree was conferred.
2. Transcripts that are not written in English shall include an English translation.
3. The applicant shall provide, at the applicant's expense, an evaluation of transcripts from institutions outside the United States by an agency satisfactory to the Department.



3.2 Criminal History Records Check

A. Requirement

Before issuance of any certificate, authorization, or approval, the Department shall conduct a Criminal History Records Check on all applicants including all conviction data from the Maine State Bureau of Identification, from other states, and from the Federal Bureau of Investigation. Criminal history record information may also be obtained from other sources including self-disclosure. An applicant with a conviction shall provide court documents if requested by the Department.

B. Fingerprinting

Unless excepted due to a specific medical condition, fingerprinting is required for the initial Criminal History Records Check. Fingerprinting may be repeated if there is interrupted service, as determined by Section 3.2.B.5 of this rule, or lapsed certification, authorization, or approval in accordance with Section 13 of this rule. The Maine Department of Public Safety shall take the required fingerprint impressions if the applicant works or lives in Maine. An applicant for certification or authorization who does not work or live in Maine may have fingerprints taken in another State using a method accepted by the Maine State Bureau of Identification; such applicants shall have fingerprints retaken by Maine Department of Public Safety within twenty days of the first day of employment for those employed under a certificate or authorization and within eight weeks for those employed under an approval in a Maine school.

1. Proof of identification prior to the taking of the fingerprints

The applicant shall provide a government-issued, photo identification prior to the taking of the fingerprints, as well as necessary personal identification information, including social security number, date of birth, and current address.

2. Receipt of fingerprints by the Maine State Bureau of Identification

The law enforcement agency or its designee that has taken the fingerprint impressions shall forward the fingerprint impressions directly to the Maine State Bureau of Identification, which shall compare the fingerprints to all fingerprints in Maine's conviction database. Applicant fingerprints shall be compared to new Maine convictions as they occur. Applicant fingerprints shall not be available to law enforcement agencies as part of any criminal investigation.

3. Receipt of fingerprints by the Federal Bureau of Investigation

The Maine State Bureau of Identification shall forward the applicant's fingerprint impressions to the Federal Bureau of Investigation to conduct a national conviction records check. A national check shall be repeated every five years if there is interrupted service.

4. Receipt of Conviction History by the Department

The Maine State Bureau of Identification shall forward State and national conviction records to the Department for its consideration of applicants and holders of a certificate, authorization or approval. If, based on information received through the fingerprint-based criminal history records check, a certificate, authorization, or approval is suspended, revoked, or denied, this shall be done in accordance with Section 14 of this rule.

5. Interrupted Service

For the purpose of determining whether an applicant for renewal of certification, authorization, or approval has interrupted service, school vacations, paid leave, and a change in employment between school units without loss of work days shall not be considered interrupted service. If an applicant submits affidavits from all employing superintendents or headmasters for the previous five years, a national records check may not be repeated for renewal applications.

C. Confidentiality of Criminal History Record Information

The Department shall observe confidentiality of any criminal history records information in accordance with 20-A M.R.S.A. §6103(3).

Conviction information provided to the Department from the State Bureau of Identification shall not be shared with school personnel, whether or not it results in adverse action against an applicant or holder of a certificate, authorization or approval.

An applicant or holder may access the applicant's own Criminal History Records Check information by submitting a request in accordance with 20-A M.R.S.A. §6103(8).

3.3 Timeframe for Application

A. General

1. An individual may apply at any time for a certificate as a teacher, educational specialist, or administrator, for an authorization as an educational technician, or for an approval. After it has been determined that all requirements have been met as specified in this rule, the certificate, authorization, or approval shall be issued and shall be valid as of the date that the application package was determined by the Department to be complete.
2. If an application for renewal is denied, or if the complete application for renewal is not timely filed, the applicant's certification, authorization, or approval shall be deemed to have lapsed as of its expiration date and renewal shall be in accordance with Section 13 of this rule.

B. Certification Renewal

1. Application Deadline

To maintain continuous certification, a holder seeking renewal of a certificate shall apply for renewal no later than August 31 of the year the current certificate expires. The Commissioner shall accept late applications only upon satisfactory documentation of the unforeseeable or extenuating circumstances that caused the applicant to miss this deadline. Unavailability to the applicant of a transcript for a recently completed course shall be considered an extenuating circumstance.

2. Effective Date

In the case of complete applications for renewal of certification that are timely filed, the existing certificate shall remain in effect until the application is approved or denied, and a renewal certificate subsequently issued shall be deemed effective as of the July 1 expiration date of the previous certificate.

C. Authorization Renewal

1. To maintain continuous authorization, a holder seeking renewal of an authorization shall apply for renewal no later than February 1 of the year the current authorization expires. The Commissioner shall accept late applications only upon satisfactory documentation of the unforeseeable or extenuating circumstances that caused the applicant to miss this deadline. Unavailability to the applicant of a transcript for a recently completed course shall be considered an extenuating circumstance.
2. In the case of complete applications for renewal of an authorization that are timely filed, the existing authorization shall remain in effect until the application is approved or denied, and a renewal authorization subsequently issued shall be deemed effective as of the February 1 expiration date of the previous authorization.

CONSIDERATION OF CRIMINAL HISTORY BY MAINE'S PROFESSIONAL LICENSING ENTITIES

Fingerprint-based FBI and state background check required for professional license/permit:

- **Educators** (teachers, administrators, educational technicians, etc.). *20-A M.R.S. § 6103*
- **Real Estate Appraisers** *32 M.R.S. § 14021(7)*
- **Loan Brokers & Mortgage Loan Originators** *9-A M.R.S. §§ 6-105-A, 13-110*
- **Casino/Slot Machine Operators & Employees** *8 M.R.S. §§ 1011-1021*
- **Commercial beano/bingo hall operator** *17 M.R.S. § 328*

Non-fingerprint background check required for professional license (authority 5 M.R.S. § 5301)

- *Professions within the Office of Professional and Occupational Regulation of DPFR*

Accountants	Physical Therapists
Architects, Landscape Architects, Interior Designers	Plumbers
Auctioneers	Podiatrists
Chiropractors	Psychologists
Complementary Health Care Providers	Radiographer/Radiation Therapist
Counselors	Respiratory Care Practitioners
Dieticians	Social Workers
Electricians	Veterinarians
Foresters	Real Estate Brokers
Funeral Services	Speech Therapists, Audiologists
Geologists/Soil Scientists	Maine Fuel Board licensees
Land Surveyors	Athletic Trainers
Manufactured Housing (sell, install, service)	Massage Therapists
Nursing Home Administrator	Interpreters for the Deaf
Occupational Therapists	Transient Sellers
Pharmacists	Barbers/Cosmetologists
	Charitable Solicitors
- *Boards Affiliated with Department of Professional and Financial Regulation*
 - Board of Dental Examiners (dentists, hygienists, denturists, etc.) – background check required
 - State Board of Optometry (optometrists) – background check required
 - Board of Licensure in Medicine (physicians, physician assistants, etc.) – self-report only, no check
 - Board of Licensure for Professional Engineers – self-report only, no check
 - Board of Osteopathic Licensure – no response received
 - Board of Nursing – no response received
- *Other Professions*
 - Attorney – self-report only, no check

CRIMINAL HISTORY CHECKS REQUIRED FOR EMPLOYMENT

Maine Background Check Center Act (*non-fingerprint background check of state and federal criminal records, DHHS child abuse/neglect registry, sex-offender registry, professional licensing authorities, and Medicare and Medicaid exclusion databases*):

“Direct Access Workers”: those who by virtue of employment have direct access to a Medicare or Medicaid beneficiary or other protected individual (excludes supervised maintenance/delivery folks)

Employers Covered:

Child Care Facilities	Personal care agencies
Child placing agencies	Temporary nurse agencies
Children’s residential care facilities	Adult day care programs
Family child care providers	Assisted housing programs
Nursery schools	Residential care facilities
Hospice providers	Intermediate care facilities
Home health providers	Mental health services/facilities
Nursing facilities	Drug treatment centers

Other Employment-Based Background Check Requirements

Maine public school employees (even if not licensed/certified) (*includes FBI fingerprinting*)

Maine Bureau of Revenue Services Employees/Contractors (*includes FBI fingerprinting*)

POSSIBLE CONFLICTS WITH CURRENT MAINE LAW

(P.L. 2015, ch. 497 is the yellow handout from the first Working Group meeting):

- **Definition of “child care staff member”**
 - P.L. 2015, ch. 497:
 - Each child care staff member whose activities involve the care or supervision of children
 - Each adult who has unsupervised access to children who are cared for or supervised by a child care facility
 - The family child care provider (if applicable)
 - Federal Rule (§ 98.43(a)(2)(ii)):
 - Each individual employed by a child care provider for compensation, including contract employees or self-employed individuals;
 - Each individual whose activities involve the care or supervision of children for a child care provider
 - Each individual with unsupervised access to children who are cared for or supervised by a child care provider
 - Each adult residing in a family child care home

- **Covered Providers:**
 - P.L. 2015, ch. 497 requires DHHS to make rules requiring both licensed child care facilities and certified family child care providers to comply with the federal background check law by amending 22 M.R.S. § 8302-A(1) & (2).
 - No amendment was made to 22 M.R.S. § 8302-B, which governs “a person who provides day care in that person’s home for one or 2 children whose care is paid for by state or federal funds “ but who is not required to be licensed or certified. (see yellow handout from 2nd Working Group meeting)
 - Federal Rule (§ 98.43(a)(1)(i)):
 - Background checks required for “all licensed, regulated, or registered child care providers **and** all child care providers eligible to deliver services for which assistance is provided under this part . . .” (emphasis added).

MAINE BACKGROUND CHECK CENTER ACT (TITLE 22, CHAPTER 109J) AND CCDBG ACT OF 2014

* Italics indicate areas where the state and federal laws have overlapping requirements*

Roman type indicates Maine BCC Act requirements that differ from federal CCDBG Act

PROVIDERS	<i>Includes both licensed child care facilities and licensed family child care providers</i>
WHO MUST BE CHECKED	<p><i>"Direct access worker[s]" who have "direct access to [children]," including employees, independent contractors, volunteers, students or others "with direct access who routinely perform unsupervised functions"</i></p> <ul style="list-style-type: none"> Does not require a check for others employed by the child care provider for compensation Excludes: plumbers, delivery persons and the like "who do[] not have direct access without supervision"
WHEN	<i>Prior to the allowing individual to commence employment & every five years thereafter</i>
CONDITIONAL EMPLOYMENT	<p><i>Provider may employ individual on conditional basis for up to 60 days if:</i></p> <ul style="list-style-type: none"> Individual is not identified in the database as disqualified based on an earlier background check Individual has agreed to submit to a background check Individual signs statement declaring he or she hasn't committed a disqualifying offense Individual "is subject to direct personal supervision during the course of the conditional employment"
SCOPE OF BACKGROUND CHECK	<p><i>Criminal records stored by FBI and state SBI, as well as: abuse and neglect, sex-offender, and employment-related registries; professional licensing authorities; and Medicare and Medicaid exclusion databases</i></p> <ul style="list-style-type: none"> Silent regarding fingerprint-based searches or searches in other States where individual resided in past 5 years
RESULTS DUE	Not stated
PRIVACY	Both provider and individual are given information on each disqualifying offense, as well as pending criminal charges that may result in a disqualifying offense. The provider must keep this information confidential.
DISQUALIFYING OFFENSES	The list of disqualifying offenses is different (focused in part on health care) and is set forth in 22 M.R.S. § 9054(11). <i>DHHS has the authority to add to the statutory list of disqualifying offenses through the rulemaking process.</i>
WAIVERS	<i>Allows for waiver of disqualifying offenses where no other state/ federal law mandates an employment prohibition</i>
APPEALS	<i>DHHS must establish procedures for individuals to challenge and correct errors in background check records</i>
FEES	DHHS must establish a user fee of \$25-150
RAP-BACK PROGRAM	DHHS must establish procedures to provide for continued monitoring of direct access worker's data, searching for new criminal record events appearing subsequent to an initial background check

Working Group to Study Background Checks for Child Care Facilities and Providers
3rd Meeting Draft Recommendations Worksheet
October 14, 2016

Questions to consider:

- To whom are you making recommendations (e.g. HHS, SBI, JUD Committee)?
- Are you providing specific guidance for the Judiciary Committee when the committee reviews rules in January?
- Are you recommending statutory changes?
- Are you recommending to DHHS that they put a specific recommendation of the Working Group in rule (e.g. a letter from the Working Group to Department of Health and Human Services as recommended guidance)?
- Are you recommending DHHS address something in detail in rule (e.g. laying out details of appeals process)?
- Do you have unanswered questions? From whom? Do you want to identify a Department/person and recommend JUD follow up with specific questions when they meet in January?
- Some of these may overlap (you may want to recommend something to DHHS in its rulemaking process, and also recommend to the Judiciary Committee that they look for this when they review rules in January).

Areas of State Discretion	
Issue	Working Group Recommendation?
1. Whether to expand definition of “staff member” – i.e., who should be checked?	
2. Whether to expand list of Disqualifying Offenses?	

	<p>3. Whether to restrict employment at child care facilities that do not receive CCDF funds? (Requires statutory change.)</p>
	<p>4. Whether to use a “rap back” program?</p>
	<p>5. Whether to impose stricter guidelines for provisional employment?</p>
	<p>6. Should background check results be shared with child care employers?</p>
	<p>7. Whether to permit waiver of felony drug offenses committed in past 5 years? (optional)</p>

	8. Details of the Appeals Process
	9. Who Pays for the Background Check?
Possible Problems with Current Maine Law	
Issue	Working Group Recommendation?
10. Definition of “child care staff member.” (P.L. 2015, ch. 497 vs. Federal Rule (Section 98.43(a)(2)(ii))	
11. Covered providers (whether to amend 22 MRSA § 8802-B)?	

Other Recommendations	
Issue	Working Group Recommendation?
12. Do you have any changes you want in statute?	
13. Are there unanswered questions you would like to ask the Departments again or that you would like to recommend the Judiciary Committee follow up on in January?	
14. Do you want to make other recommendations about the background check process Maine will adopt (e.g. whether to use the Department of Education's process, etc.)?	
15. Other?	