

BACKGROUND CHECKS FOR CHILD WELFARE AGENCIES
22VAC40-191
Effective December 1, 2013

Technical Assistance

Updated 12/13

DEPARTMENT OF SOCIAL SERVICES
COMMONWEALTH OF VIRGINIA

TECHNICAL ASSISTANCE
VIRGINIA DEPARTMENT OF SOCIAL SERVICES
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22VAC40-191-10 Definitions: “Barrier crime”

Question: *A woman interested in opening up a family day home was convicted of a felony in 1993 for possession of cocaine and forgery. On May 30, 2008 her rights were restored by Governor Tim Kaine and she has documentation proving this. Will she be eligible to be a licensed provider since her rights were restored?*

Answer: The criminal record still exists when rights are restored. The conviction for felony drug possession would have to be expunged before it would no longer be a barrier crime, but convictions are expunged only in very rare cases. (0029 - 4/09)

22VAC40-191-10 Definitions: “Criminal History Record Report”

Question: *May facilities use a private company to obtain criminal history reports in which, for a fee, the company provides a report from many databases including the Virginia State Police?*

Answer: No, the *Code of Virginia* requires the criminal history record report to be obtained directly from the Central Criminal Records Exchange of the Virginia State Police. (0001 – 12/08)

22VAC40-191-10 Definitions: “Involved in the day-to-day operations”

Question: *What does “in control of” mean as found in the definition of “involved in the day-to-day operations”?*

Answer: “In control of” refers to who has the responsibility for a child. If a volunteer, librarian, physical therapist, or photographer who comes to take center pictures, etc. is in a center “classroom,” the center staff person who is also in the room remains in control of that room and the children in the room. (0002 – 12/08)

Question: *Does the definition of “involved in day-to-day operations” include all 3 of the applicable criteria in the definition or is it any one of those situations that would require the background checks? In one chain, the regional manager has told licensing staff that he likes to go into classrooms and interact with the children.*

Answer: “Involved in the day-to-day operations” is defined in 22VAC40-191 as meaning either 1) in a supervisory or management position making daily decisions regarding the operation of the center, OR 2) counted by the facility for the purposes of staff-to-children ratios, OR 3) having access to child-related and client-related records or to facility personnel records. Individuals have to meet only one of these three criteria to be considered to be involved in the day-to-day operations and therefore needing background checks.

The regional manager in your question would have to a background check if any of the three criteria above apply to him OR if he is or will be alone with, in control of, or supervising one or more of the children (22VAC40-191-40 D 1 a). (0030 - 4/09)

22VAC40-191-10 Definitions: “Volunteer”

Question: *What does “alone with” mean as found in the definition of “volunteer”?*

Answer: “Alone with” means that a person with background checks required according to the background checks regulation is not also present with a child. (0003 – 12/08)

22VAC40-191-40 Identifying who is covered by this regulation.

Question: *Do we need to get updated background checks on the YMCA Executive Director, & CEO every 3 years like we do for staff? The Y is constantly submitting new applications for new sites, but the background checks for these 2 corporate persons are 7 years old.*

Answer: 22VAC40-191-40 D 1 c. states “Any applicant, licensee, agent, employee, and volunteer who is required to have background checks”...must have repeat checks “Before three years since the date of the last sworn statement or affirmation, most recent central registry finding, and most recent criminal history record report.”

If the YMCA Executive Director and CEO are the officers of the corporation which is the licensee or if they are agents who meet the definition of “involved in the day-to-day operations” or are or will be alone with, in control of, or supervising one or more of the children, these individuals must have new background checks every three years or their currently licensed centers are not in compliance with 22VAC40-191-40 D 1 c. (0005 – REVISED 12/13)

Question: *A corporation is purchasing a currently licensed child day center. The corporation does not plan to replace the current employees at the center. Do the current employees have to have new background checks since the licensee will be different?*

Answer: Since the current employees are going to have a new employer, they will have to provide a new sworn statement or affirmation prior to their first day of employment by the new licensee; and they will have to have new criminal history record checks and central registry reports within 30 days of employment if their current reports are dated more than 90 days prior to their first day of employment by the new licensee. (0031 - 4/09)

Question: *Mr. Smith is vice chairman of the board of Mercury Corporation that owns ABC Child Care Center. He forms Venus LLC of which he is the president and applies for a license to operate XYZ Child Care Center. He had a background check a year ago when Mercury Corporation applied for a license for ABC Child Care Center. Does he have to have another background check for XYZ Child Care Center?*

Answer: Yes, Venus LLC is a new applicant. The Code of Virginia at § 63.2-1702 requires background checks of officers and agents of a limited liability company (LLC) applying for licensure. Mr. Smith would have to submit a new sworn statement or affirmation, and a criminal history record check and central registry report dated no more than 90 days prior to the licensure of XYZ Child Care Center. (0032 – 4/09)

Question: *When should friends/family staying in a licensed family day home be required to obtain background checks?*

Answer: The regulation, “Background Checks for Child Welfare Agencies,” defines “living in” as residing in a place for an extended or permanent period of time. Licensing

considers a person to be residing in the home when that home is the person's principal, legal dwelling place. The person's principal, legal dwelling place can be verified by viewing the individual's voter registration card or driver's license, or confirming with neighbors or other collateral contacts.

If it is verified that an adult friend or family member resides in the family day home, this standard requires the person to obtain background checks within 30 days of his beginning to reside in the home. (0035 – 4/09)

Question: *Are individuals who not employed by a center required to have background checks if they handle children's records for registration purposes?*

Answer: Section § 63.2-1720(A) of the *Code of Virginia* requires background checks for "employees who are involved in the day-to-day operation of such agency or who are alone with, in control of, or supervising one or more children." It must be determined if the individuals not employed by the center who have access to the records are involved in the day-to-day operation of the center.

If the center routinely depends upon individuals not employed by the center to register children by viewing a birth certificate or social security number, handling payments, etc., then these individuals are involved in the day-to-day operation of the center and have access to children's records so would have to have background checks. (0013 – 12/08)

Question: *Should we have background checks for chain regional managers and other corporate staff who have access to children's records? They are not in the centers daily but in a management capacity conduct reviews of children's records as well as overall compliance. This would apply to any organizations that have an organizational structure beyond the center level such as KinderCare, LaPetite, Champions, YMCA, etc. whose management staff regularly review compliance in individual centers.*

Answer: These individuals have access to children's records so meet the definition of "involved in the day-to-day operation" and would have to have background checks according to 22VAC40-191-D 1 a. (0033 - 4/09)

Question: *Are background checks required for a bus driver for an elementary school who also drives (on a quarterly basis) a bus for a licensed preschool's field trips? The driver is not counted in the child-to-staff ratio and is never alone with the children.*

Answer: Background checks are not required because the field trips are so infrequent that the driver would not be considered to be involved in the day-to-day operations and is not alone with, in control of or supervising one or more children. If the bus driver volunteers, background checks are not required, regardless of frequency, as long as the driver is not counted in the child-to-staff ratio and is never alone with children. (0006 – 12/08)

Question: *Are background checks required for a private school music teacher who volunteers to provide music time in her music room to children attending a child day center located on the same grounds as the private school? The music teacher is not counted in the child-to-staff ratio and is never alone with children.*

Answer: Background checks are not required because the person volunteers, is not counted in the child-to-staff ratio, and is never alone with, in control of, or supervising the children. However, if the music teacher has a contract with the center to provide music activities, he/she is a contract employee and the provisions in 22VAC40-191-40 D 3 apply. (0007 – 12/08)

Question: *Are background checks required for employees of a Gymnastics Bus that comes to a center and children get onto the bus for gymnastics?*

Answer: If the Gymnastic Bus organization has a contract with the center to provide gymnastics experiences, Gymnastic Bus is a contract agency and background checks must be provided according to 22VAC40-191-40 D 3. If the parents have individual contracts with Gymnastics Bus and the contract specifies that the center has no responsibility for the children while they are participating with Gymnastics Bus, background checks are not required. This would be a situation similar to a center that provides transportation from the center to a public school in the morning and picks up the children at the close of the school day to return them to the center. During the time they are at school, the center has no responsibility for the children. (0008 – 12/08)

Question: *Are background checks required for volunteer coaches who are not counted in the staff-to-child ratio and are not alone with the children?*

Answer: Background checks are not required. (0009 – 12/08)

Question: *Are background checks required for a parent who comes in to read a story to the children two times a week, or provides some other volunteer service on a regular basis while a staff person is present?*

Answer: Background checks are not required. In addition, if the parent is a volunteer at a program operating no more than four hours a day, the parent's child is part of the group, and the parent is supervised by someone who has the background checks, this parent-volunteer may be alone with the children while reading the story or providing other volunteer service. (0010 – 12/08)

Question: *Are background checks required for a parent of a child in a full-day program who is 1) chaperoning a field trip to Kings Dominion or 2) chaperoning a field trip to Richmond Children's Museum and will be left alone with a group of children for parts of the day?*

Answer: Background checks are needed because the parent is a volunteer in a program that operates more than four hours a day (see answer above). (0011 – 12/08)

Question: *Are background checks required for the secretary of an elementary school who gives medication to children in the licensed after-school program run by the local department of parks and recreation, when no center staff person is present?*

Answer: Background checks are needed because the secretary is involved in the day-to-day operations of the center by giving medications on behalf of the center and the secretary has access to child records. (0012 – 12/08)

Question: *Are background checks required for high school students who volunteer at a center for a few hours each week for a month or volunteer as a YMCA-sponsored summer camp and are never alone with the children and not counted in child to staff ratio?*

Answer: Background checks are not required. However, if the teenager is 16 years old, and included in the staff to child ratio, the teenage must have background checks. (0014 – 12/08)

Question: *Are background checks required for lifeguards at pools who are not alone with children and not counted in the child to staff ratio?*

Answer: Background checks are not required. (0015 – 12/08)

Question: *Are background checks required for Head Start personnel, and Part C personnel who are authorized by the Family Services Plan to provide early intervention in the classroom, when the personnel are not alone with the children and not counted in child to staff ratio?*

Answer: Background checks are not required. See above explanation of “in control of”. However, these personnel must have background checks if they will be taking children to another room for evaluations, etc. (0016 – 12/08)

Question: *Are background checks required for individuals who come to a center to take photographs of children, provide dental screenings, or present a juggling program who are not left alone with the children or counted in the staff to child ratio?*

Answer: Background checks are not required. (0017 – 12/08)

Question: *Are background checks required for home health aide who comes to a family day home to care for the mother of the child care provider?*

Answer: Background checks are not required because the home health aide is not an employee of the family day home nor resides in the family day home. (0018 – 12/08)

Question: *Please provide clarification on 22VAC40-191-40 D 1 b (an employee must submit a sworn statement or affirmation “prior to first day of employment at the center”).*

Answer: The first day of employment means the first day the person is on the payroll for the center, not the first day the person actually begins working at the center.

The Code at § 63.2-1720 E. states that a person desiring to work as a compensated employee “shall provide the hiring or approving facility, center, or agency with a sworn statement or affirmation...” The intent of this law is for the individual being considered for employment to disclose criminal charges and conviction as well as founded complaints of child abuse/neglect so that the center (and the children it serves) is protected from hiring an individual who has a barrier offense. (0034 - 4/09)

Question: *Is a person living in a family day home regulated by the Background Checks for Child Welfare Agencies regulation who has had a search of the central registry within three years before turning 18, need to have another search of the central registry within 30 days of becoming 18 years old?*

Answer: Not necessarily. For example:

A licensed family day home provider's daughter had a search of the central registry within 30 days of becoming 14 years old and a repeat search of the central registry three years later. The provider does not need to obtain another search of the central registry upon her daughter's reaching age 18. The provider does need to request a criminal history record check and obtain a sworn statement or affirmation because these were not obtained within the previous three years.

A licensed family day home provider's son had a search of the central registry within 30 days of becoming 14 years old. The provider began to use her son as an assistant in her home when he was 16 years old. "Assistant" means an individual who is 14 years of age or older and who helps the family day home provider in the care, protection, supervision, and guidance of children in the home. The provider obtained all three background checks at that time because her son's duties involved helping the provider in the care, protection, supervision, and guidance of the children. The provider does not need to obtain repeat background checks until three years from the dates of the previous checks. The requirement that an adult living in the home must have background checks has already been met.

As part of renewal application packages, operators of registered family day homes must submit for individuals living in the home new background checks that were completed no more than 90 days prior to the application date for renewal. (0019 – 6/09 REVISED)

Question: *May an employee continue to work if the 3 year "recheck" of the background checks was late or not done?*

Answer: An employee may continue to work if the 3 year re-check is not completed as long as the facility had a satisfactory sworn disclosure prior to the individual's beginning employment at the facility and a criminal history report and Child Protective Services' Central Registry report within 30 days of the individual's beginning employment at the facility, unless the facility has knowledge that the employee has an offense and has no waiver, then the employee must be separated from employment or the facility's license must be revoked (22 VAC 40-191-60 I.

The sections entitled "Explaining consequences of unsatisfactory background check results" (22VAC40-191-60 B & C) state that an employee must be denied continued employment if the facility does not have an original criminal history report and central registry report within 30 days of employment.

If there are no three year re-checks, the facility would be cited at 22VAC40-191-40 D 1 c. unless the individual meets the exception in 22VAC40-191-60 D. Three year re-checks are not required in religiously exempt child day centers. (0020 – 12/08)

Question: *Do we accept background clearances more than 90 days old for family day home applicants who are currently voluntarily registered?*

Answer: 22VAC40-191-40 C 6 provides that "A facility must not accept a required criminal history record report or a central registry finding from an applicant, licensee, registrant, or other person required to obtain background checks that is dated more than

90 days prior to the date of employment, volunteering, residing in the home, or approving a family day home or foster or adoptive home. (0021 – 4/09 REVISED)

Question: *Are background checks required for custodial employees who work under contract for the building management company and are in the center during hours when the children are present?*

Answer: Background checks are not required if the custodians are not involved in the day-to-day operations of the center nor are they alone with, in control of, or supervising one or more children. (0022 – 12/08)

22VAC40-191-50 Explaining requirements for satisfactory background checks.

Question: *If an individual lists a barrier offense on the sworn statement or affirmation center, does that constitute an unsatisfactory background check or must the offense also appear on the criminal history record or CPS registry report?*

Answer: It would not have to also appear on the criminal history record or Child Protective Services' Central Registry report. An admission to an offense on the sworn statement or affirmation would constitute having an offense in the same manner that a criminal history record may reveal a barrier crime or a Central Registry Report may reveal a founded complaint of child abuse or neglect. (0023 – 12/08)

Question: *The sworn disclosure statement of the husband of an individual applying for a family day home license lists multiple convictions in New York State. We do not know if any of the convictions would be barrier offenses in VA. What should we do?*

Answer: Section § 63.2-1719 of the *Code of Virginia* states that a barrier crime conviction includes “an equivalent offense in another state.” Without further information, the Department cannot make a determination as to whether or not the convictions in New York would be equivalent offenses. The applicant must request a national criminal background check from the FBI obtained through the Virginia State Police. (0004 – 4/09 REVISED)

Question: *A facility may not hire a person who has been the subject of a founded complaint of child abuse or neglect. Neither the Code nor the regulations say the individual's name must be currently in the CPS registry. Are facilities prohibited from hiring anyone who has ever been the subject of a founded complaint even if he is no longer in the registry?*

Answer: Yes, facilities are prohibited from hiring anyone who has an “offense” (which includes having been the subject of a founded complaint of child abuse or neglect within or outside Virginia). The Child Protective Services' Central Registry does purge founded complaints and has no information on founded complaints outside Virginia. The Code of Virginia at § 63.2-1722 states that the license or registration of a facility may be revoked or denied renewal if the facility has knowledge that a person required to have a background check has an offense and the facility refuses to separate the person from employment. (0024 – 4/09 REVISED)

Question: *The licensing inspector has been informed by a local department of social services that a staff person in a center has a founded Child Neglect Complaint*

Disposition as a result of the investigation of an injury to a child. May the staff person continue to work during the CPS appeal process?

Answer: If the staff person has appealed the founded complaint in a timely manner, but has not had an administrative hearing yet, he does not have a “disqualifying background” as defined in the regulation (the staff person must provide documentation showing that he filed an appeal in a timely manner). The licensee is not required to terminate an employee when the appeal is at this stage in the process. If the decision issued by the administrative hearing officer sustains the founded complaint, then the person has a disqualifying background. At that point, the center must separate the person from employment or the Department may revoke the center’s license if the center refuses to do this. (0025 – REVISED 12/13)

Question: *A child day center may hire a person convicted of not more than one misdemeanor of assault and battery if 10 years have elapsed following the conviction, unless the person committed the offense while employed in a child day center or the object of the offense was a minor. Does “while employed in a child day center” mean the offense had to have occurred in a child day center?*

Answer: No, the offense could have occurred in a child day center or elsewhere. A center may not hire a person convicted of a misdemeanor of assault and battery, even if 10 years have elapsed following the conviction, if the offense occurred while the individual was employed by a child day center. (0026 – 12/08)

22 VAC 40-191-60 Explaining consequences of unsatisfactory background checks.

Question: *An inspector discovered in the file of a child day center employee, who has been employed longer than 30 days, a criminal history record report that had been stamped by the State Police, but not completed. The State Police have admitted they erred in not completing the report. The center made the initial request for a background check three weeks after the individual was employed and now has requested another check since the first was incomplete. May the individual continue employment in the center until the criminal history report is received?*

Answer: No 22 VAC 40-191-60 C 1 states that an “employee or volunteer must be denied continued employment or staff volunteer service if: “The licensed or registered child welfare agency does not have an original criminal history record report within 30 days of employment or volunteer service.” The center does not meet the exception at 22VAC40-191-60 D because they did not request the report within 7 days of the person’s employment, make a contact with the Department of State Police within 4 days of not receiving a completed report by the 30th day, and send another report within 5 days of the contact. (0027 – 12/08)

Question: *Can we accept a fingerprint check obtained by the state police of another state?*

Answer: No. 22VAC40-191-60 G states that a national criminal background check (fingerprint check) must be conducted in accordance with § 19.2-392.02 of the *Code of Virginia* which requires the fingerprint check to be done through the Virginia State Police. A fingerprint check done in another state does not meet that requirement and the

state may not have the same barrier crimes as listed in § 63.2-1719 of the Code of Virginia).

According to the Virginia State Police, when a fingerprint check is done through them, they check the FBI database and the Central Criminal Record Exchange (CCRE). If the screening result is “qualified,” you know there were no barrier crimes as defined in § 63.2-1719 of the Code in either database.

If you get a “disqualified” result, the standard at 22VAC40-191-60 G states that you must obtain a satisfactory criminal record check report through the CCRE. The reason for this second step is that on a fingerprint check, the State Police screen for barrier crimes as defined in § 63.2-1719 and § 63.2-1726 of the Code. Therefore, someone may have had a conviction for a crime that would be a barrier crime for a person wanting to work in a children’s residential facility, but would not be a barrier crime to work in a child day program. By doing the criminal record check through the CCRE, you know the person is being screened for barrier crimes listed in § 63.2-1719 of the Code (as required by 22VAC40-191). (0028 – 12/08)