

cyfd



Children Youth &
Families Department

Child Care Centers

Background Check and Fingerprint Instructions

IF YOU HAVE QUESTIONS ABOUT YOUR BACKGROUND CHECK, CONTACT:

Background Check Unit

Phone: (505) 827-7326

Fax: (505) 827-7422

Email: cyfd.bcu@state.nm.us

Address: P.O. Drawer 5160

Santa Fe, NM 87502-5160

NONCRIMINAL JUSTICE APPLICANT'S PRIVACY RIGHTS

As an applicant who is the subject of a national fingerprint-based criminal history record check for a noncriminal justice purpose (such as an application for a job or license, an immigration or naturalization matter, security clearance, or adoption), you have certain rights which are discussed below.

- You must be provided written notification¹ that your fingerprints will be used to check the criminal history records of the FBI.
- If you have a criminal history record, the officials making a determination of your suitability for the job, license, or other benefit must provide you the opportunity to complete or challenge the accuracy of the information in the record.
- The officials must advise you that the procedures for obtaining a change, correction, or updating of your criminal history record are set forth at Title 28, Code of Federal Regulations (CFR), Section 16.34.
- If you have a criminal history record, you should be afforded a reasonable amount of time to correct or complete the record (or decline to do so) before the officials deny you the job, license, or other benefit based on information in the criminal history record.²

You have the right to expect that officials receiving the results of the criminal history record check will use it only for authorized purposes and will not retain or disseminate it in violation of federal statute, regulation or executive order, or rule, procedure or standard established by the National Crime Prevention and Privacy Compact Council.³

If agency policy permits, the officials may provide you with a copy of your FBI criminal history record for review and possible challenge. If agency policy does not permit it to provide you a copy of the record, you may obtain a copy of the record by submitting fingerprints and a fee to the FBI. Information regarding this process may be obtained at <http://www.fbi.gov/about-us/cjis/background-checks>.

If you decide to challenge the accuracy or completeness of your FBI criminal history record, you should send your challenge to the agency that contributed the questioned information to the FBI. Alternatively, you may send your challenge directly to the FBI. The FBI will then forward your challenge to the agency that contributed the questioned information and request the agency to verify or correct the challenged entry. Upon receipt of an official communication from that agency, the FBI will make any necessary changes/corrections to your record in accordance with the information supplied by that agency. (See 28 CFR 16.30 through 16.34.)

¹ Written notification includes electronic notification, but excludes oral notification.

² See 28 CFR 50.12(b).

³ See 5 U.S.C. 552a(b); 28 U.S.C. 534(b); 42 U.S.C. 14616, Article IV(c); 28 CFR 20.21(c), 20.33(d) and 906.2(d).

NEW REQUIREMENT

New Background Regulations went into effect on October 1, 2016, requiring abuse and neglect screens in all states where an applicant has lived during the previous five years.

****Please contact the Background Check Unit at (505) 827-7326 if you have lived outside New Mexico in the previous five years for the appropriate state's form and instructions to prevent delay in processing your application.**

BACKGROUND CHECK & FINGERPRINTING PROCEDURE

REGISTRATION:

To begin the application process, every new applicant is required to register either online at www.aps.gemalto.com or by phone at 877-996-6277.

1. At the time of registration you will be asked to provide an ORI and reason for fingerprinting. The proper ORI is NM920120Z and the reason for fingerprinting is Child Care Licensing.
 - If this information is entered incorrectly you may be required to re-register and pay an additional fee.
2. The fee is \$44.00 and may be paid by credit card at the time of registration or by money order made payable to Gemalto Cogent at the time of fingerprinting.

FINGERPRINTING:

To locate a fingerprint site near you, click on the fingerprint location map and scroll down to see a variety of locations. If you are registering by phone, simply ask the customer service representative for a location near you. No appointment is necessary.

FOLLOW UP:

It is very important to remember to submit the proper CYFD background check forms along with your fingerprint registration receipt immediately to the background check unit. We will not know that you've been fingerprinted unless we receive your forms. These forms may be mailed, emailed or faxed to:

CYFD Background Check Unit
PO Drawer 5160
Santa Fe, NM 87502
Fax: (505) 827-7422
Email: cyfd.bcu@state.nm.us

If a background clearance has not been received within 4-6 weeks or if you have any questions regarding the background check process, please call for assistance.

Phone: (505) 827-7326
Toll Free: (888) 317-7326

*The information submitted will be used to conduct an FBI supported background check.

Facility Information

Name

Mailing Address

_____, _____, _____
City State Zip

Physical Address of Applicant's Service

APPLICANT WRITTEN STATEMENT



INSTRUCTIONS: All questions must be answered completely and to the best of your knowledge. Please print legibly. Answers left blank may result in the rejection of the application.

Fingerprint Registration Number: _____

Full Name

First Name

_____, _____
Middle Name No Middle Name

Last Name

Aliases

(birth name, married name(s), nick names)

Date of Birth (month, day, year)

____/____/____

Social Security Number None

Place of Birth (city, state, country)

_____, _____/____

Primary Language

Current Physical Address

Address

Address (optional)

_____, _____, _____
City State Zip

Mailing Address

Same as physical

Address

Address (optional)

_____, _____, _____
City State Zip

Contact Information

Primary Phone Number

Home Mobile Work Other

Secondary Phone Number (optional)

Home Mobile Work Other

Previous Addresses (past five years, most recent first, and include number, street, city, state, zip code.) If you need more space, use a separate sheet of paper.

Address	City	State	Zip

Current Marital Status (circle one): Single Married Separated Divorced Widowed

Current Spouse/Significant Other

_____, _____, _____ _____/____/____ _____-____-____
First Middle Last Date of Birth (month, day, year) Social Security Number

Full Name(s) and Date(s) of Birth of: Birth Children, Adopted Children, Foster Children, and other Children who have lived in your household(s) within the past five years (If you need more space, use a separate sheet of paper)

First Name	Middle Name	Last Name	Date of Birth (month, day, year)
			____/____/____
			____/____/____
			____/____/____
			____/____/____

Full Name(s) and Date(s) of Birth of all Adults who have previously lived with you (within the past five years) (If you need more space, use a separate sheet of paper)

First Name	Middle Name	Last Name	Date of Birth (month, day, year)
			____/____/____
			____/____/____
			____/____/____
			____/____/____
			____/____/____

Full Name(s) and Date(s) of Birth of all Adults who are currently living with you (If you need more space, use a separate sheet of paper)

First Name	Middle Name	Last Name	Date of Birth (month, day, year)
			/ /
			/ /
			/ /
			/ /
			/ /

Names and Places of School(s) attended, along with graduation dates (High School, University, College, and Vocational Training) (If you need more space, use a separate sheet of paper)

Name of School	Location of School	Graduation Date	Type (high school, college, etc.)

Employment History (past ten years, include dates of employment / explain gaps in employment) (If you need more space, use a separate sheet of paper)

Employer	Start Date	End Date	Explain Break in Employment

IF YOU DO NOT UNDERSTAND THESE QUESTIONS, PLEASE SEEK GUIDANCE BEFORE ANSWERING THEM!

Have you ever been involved in a CYFD investigation of abuse or neglect of children or adults as the alleged perpetrator or household member? If so, provide the dates of all such investigations and the outcome of those investigations. **NOTE: Failure to provide this information may lead to denial of your application.**

____ **Yes**, I have been involved in a CYFD (or other protective service agency) investigation of abuse or neglect of children or adults as the alleged perpetrator or household member (Provide details).

____ **No**, I have never been involved in a CYFD (or other protective service agency) investigation of abuse or neglect of children or adults as the alleged perpetrator or household member.

Have you ever been charged with, arrested for, or convicted of a crime? **NOTE: Failure to provide this information may lead to denial of your application.**

____ **Yes**, I have been charged with, arrested for, or convicted of a crime (Provide an explanation and disposition).

____ **No**, I have never been charged with, arrested for, or convicted of a crime.

I understand that information submitted will be used to conduct an FBI supported background check and I, _____, hereby affirm under penalty of perjury that all the answers given on this statement are true and accurate to the best of my knowledge. By signing this affirmation, I am acknowledging that any falsehoods, omissions, or intentionally misleading answers will be grounds for denial of my application. If I do not understand any of the questions, I will seek help and ask for more information.

SIGNATURE: _____

DATE: _____



EMPLOYER STATEMENT

Name of Facility or Program

Mailing Address

City State Zip

Physical Address of Applicant's Employment

I, _____, authorized representative, hereby attest that _____ is an applicant for employment, an employee, contractor or volunteer with our organization. This applicant, employee, contractor or volunteer requires a CYFD background check pursuant to 8.8.3 NMAC and has direct care responsibilities or potential unsupervised access to care recipients. I understand that by signing this statement, our organization waives any claim that this applicant, employee, contractor or volunteer does not have direct care responsibilities or does not have potential unsupervised access to care recipients in the event that he/she is determined to be an unreasonable risk and denied background check eligibility.

I further attest that our organization has or could have primary custody of children for twenty hours or more per week.

Signature of Employer Representative

Title

Phone Number

Fax Number

Email Address

Date

Disposition Request Information Sheet

CYFD is requesting disposition because some types of convictions can result in denial of a background check clearance. Disposition means outcome. CYFD wants to know the final outcome of the arrest.

Where to find disposition

Disposition can often be found at the courts in the county where you were arrested. You can also contact the agency that arrested you, or contact the attorney who represented you, if you had one.

Phone numbers for the Courts, Police Departments, and Attorneys can generally be found in the phone book, in the Government and/or Yellow pages. Out of state information might be found on the internet.

Acceptable forms of disposition

Dispositional information can be found in documents called:

- ✓ Judgment and Sentence
- ✓ Plea and Disposition Agreement
- ✓ Nolle Prosequi
- ✓ Certificate of Conviction

If you are unsure which of the forms contains your disposition, ask the Court clerk for help.

We will not accept

- Clerk's Certificates marked "No Felony Convictions"
- Documentation from the arresting agency marked "No Record Found"
- An explanation of the arrest from your attorney.

Please call our office at (505) 827-7326 if you have any questions.

Disposition must be received no later than 15 days after the date of the request. It is your responsibility to provide this information to CYFD. This sheet is for informational purposes only. Your search for disposition should not be limited to the ideas presented here.

TITLE 8 SOCIAL SERVICES
CHAPTER 8 CHILDREN, YOUTH AND FAMILIES GENERAL PROVISIONS
PART 3 GOVERNING BACKGROUND CHECKS AND EMPLOYMENT HISTORY
VERIFICATION

8.8.3.1 ISSUING AGENCY: Children, Youth and Families Department
[8.8.3.1 NMAC - Rp, 8.8.3.1 NMAC, 10/1/16]

8.8.3.2 SCOPE: This rule has general applicability to operators, volunteers, including student interns, staff and employees, and prospective operators, staff and employees, of child-care facilities, including every facility, CYFD contractor, program receiving CYFD funding or reimbursement, the administrative office of the courts (AOC) supervised visitation and safe exchange program, or other program that has or could have primary custody of children for twenty hours or more per week, juvenile treatment facilities, and direct providers of care for children in including, but not limited to the following settings: Children’s behavioral health services and licensed and registered child care, including shelter care.
[8.8.3.2 NMAC - Rp, 8.8.3.2 NMAC, 10/1/16]

8.8.3.3 STATUTORY AUTHORITY: The statutory authority for these regulations is contained in the Criminal Offender Employment Act, Section 28-2-1 to 28-2-6 NMSA and in the New Mexico Children’s and Juvenile Facility Criminal Records Screening Act, Section 32A-15-1 to 32A-15-4 NMSA 1978 Amended.
[8.8.3.3 NMAC - Rp, 8.8.3.3 NMAC, 10/1/16]

8.8.3.4 DURATION: Permanent
[8.8.3.4 NMAC - Rp, 8.8.3.4 NMAC, 10/1/16]

8.8.3.5 EFFECTIVE DATE: October 1, 2016, unless a later date is cited at the end of a section.
[8.8.3.5 NMAC - Rp, 8.8.3.5 NMAC, 10/1/16]

8.8.3.6 OBJECTIVE:

- A.** The purpose of these regulations is to set out general provisions regarding background checks and employment history verification required in settings to which these regulations apply.
- B.** Background checks are conducted in order to identify information in applicants’ backgrounds bearing on whether they are eligible to provide services in settings to which these regulations apply.
- C.** Abuse and neglect screens are conducted by BCU staff and include a screen of abuse and neglect information in databases in New Mexico and in each State where the applicant resided during the preceding five years in order to identify those persons who pose a continuing threat of abuse or neglect to care recipients in settings to which these regulations apply.

[8.8.3.6 NMAC - Rp, 8.8.3.6 NMAC, 10/1/16]

8.8.3.7 DEFINITIONS:

- A.** AOC means administrative office of the courts.
- B.** ADMINISTRATIVE REVIEW means an informal process of reviewing a decision that may include an informal conference or hearing or a review of written records.
- C.** ADMINISTRATOR means the adult in charge of the day-to-day operation of a facility. The administrator may be the licensee or an authorized representative of the licensee.
- D.** ADULT means a person who has a chronological age of 18 years or older, except for persons under medicaid certification as set forth in Subsection K below.
- E.** APPEAL means a review of a determination made by the BCU, which may include an administrative review or a hearing.
- F.** APPLICANT means any person who is required to obtain a background check under these rules and NMSA 1978, Section 32A-15-3.
- G.** ARREST means notice from a law enforcement agency about an alleged violation of law.
- H.** BCU means the CYFD background check unit.
- I.** BACKGROUND CHECK means a screen of CYFD’s information databases, state and federal criminal records and any other reasonably reliable information about an applicant.
- J.** CARE RECIPIENT means any person under the care of a licensee.

K. CHILD means a person who has a chronological age of less than 18 years, and persons under applicable medicaid certification up to the age of 21 years.

L. CONDITIONAL EMPLOYMENT means a period of employment status for a new applicant prior to the BCU's final disposition of the applicant's background check.

M. CRIMINAL HISTORY means information possessed by law enforcement agencies of arrests, indictments, or other formal charges, as well as dispositions arising from these charges.

N. DIRECT, PHYSICAL SUPERVISION means continuous visual contact or live video observation by a direct provider of care who has been found eligible by a background check of an applicant during periods when the applicant is in immediate physical proximity to care recipients.

O. DIRECT PROVIDER OF CARE means any individual who, as a result of employment or, contractual service or volunteer service has direct care responsibilities or potential unsupervised physical access to any care recipient in the settings to which these regulations apply.

P. ELIGIBILITY means the determination that an applicant does not pose an unreasonable risk to care recipients after a background check is conducted.

Q. EMPLOYMENT HISTORY means a written summary of the most recent three-year period of employment with names, addresses and telephone numbers of employers, including dates of employment, stated reasons for leaving employment, and dates of all periods of unemployment with stated reasons for periods of unemployment, and verifying references.

R. LICENSED means authorized to operate by the licensing authority by issuance of an operator's license or certification certificate.

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

T. LICENSING AUTHORITY means the CYFD division having authority over the licensee.

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

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

W. UNREASONABLE RISK means the quantum of risk that a reasonable person would be unwilling to take with the safety or welfare of care recipients.

[8.8.3.7 NMAC - Rp, 8.8.3.7 NMAC, 10/01/16]

8.8.3.8 APPLICABILITY: These regulations apply to all licensees and direct providers of care in the following settings:

- A.** behavior management skills development;
- B.** case management services;
- C.** group home services;
- D.** day treatment services;

- E.** residential treatment services;
- F.** treatment foster care services agency staff;
- G.** licensed child care homes;
- H.** licensed child care centers;
- I.** registered child care homes;
- J.** licensed shelter care;
- K.** licensed before and after school care;
- L.** non-licensed or exempt after school programs participating in the at risk component of the child and adult care food program;
- M.** comprehensive community support services;
- N.** CYFD contractors and any other programs receiving CYFD funding or reimbursement; and
- O.** AOC supervised visitation and safe exchange program providers.

[8.8.3.8 NMAC - Rp, 8.8.3.8 NMAC, 10/1/16]

8.8.3.9 NON-APPLICABILITY:

A. These regulations do not apply to the following settings, except when otherwise required by applicable certification requirements for child and adolescent mental health Services 7.20.11 NMAC or to the extent that such a program receives funding or reimbursement from CYFD:

- (1) hospitals or infirmaries;
- (2) intermediate care facilities;
- (3) children’s psychiatric centers;
- (4) home health agencies;
- (5) diagnostic and treatment centers;
- (6) unlicensed or unregistered child care homes.

B. These regulations do not apply to the following adults:

- (1) treatment foster care parents;
- (2) relative care providers who are not otherwise required to be licensed or registered;
- (3) foster grandparent volunteers;
- (4) all other volunteers for any program or entity within the scope of these regulations if the

volunteer spends less than six hours per week at the program, is under direct physical supervision, and is not counted in the facility ratio.

[8.8.3.9 NMAC - Rp, 8.8.3.9 NMAC, 10/01/16]

8.8.3.10 COMPLIANCE:

A. Compliance with these regulations is a condition of licensure, registration, certification or renewal, or continuation of same or participation in any other program or contract within the scope of these regulations.

B. The licensee is required to:

(1) submit an electronic fingerprint submission receipt and the required forms for all direct providers of care, household members in licensed and registered child care homes, or any staff member, employee, or volunteer present while care recipients are present, or other adult as required by the applicable regulations prior to the commencement of service, whether employment or, contractual, or volunteer. In the case of a licensed child care home and a registered home, the licensee must submit an electronic fingerprint submission receipt and the required forms for new household members or for any adult who is required to obtain a background check pursuant to 8.16.2 NMAC or 8.17.2 NMAC as applicable. However, in the case of a registered family child care food-only home, all household members are only required to undergo a criminal history and child abuse and neglect screening.

(2) verify the employment history of any prospective direct provider of care by contacting references and prior employers/agencies to elicit information regarding the reason for leaving prior employment or service; the verification shall be documented and available for review by the licensing authority; EXCEPTION: verification of employment history is not required for registered home providers or child care homes licensed for six or fewer children.

(3) submit an adult household member written statement form for each adult household member in a registered family child care food-only home setting in order to conduct criminal history and child abuse and neglect screens on such household members; an adult household member is an adult living in the household or an adult that spends a significant amount of time in the home; the licensee must submit the required forms for new adult household members pursuant to 8.17.2 NMAC.

(4) provide such other information BCU staff determines to be necessary; and

(5) maintain documentation of all applications, correspondence and eligibility relating to the background checks required; in the event that the licensee does not have a copy of an applicant's eligibility documentation and upon receipt of a written request for a copy, the BCU may issue duplicate eligibility documentation to the original licensee provided that the request for duplicate eligibility documentation is made within one year of the applicant's eligibility date.

C. If there is a need for any further information from an applicant at any stage of the process, the BCU shall request the information in writing from the applicant. If the BCU does not receive the requested information within fifteen calendar days of the date of the request, the BCU shall deny the application and send a notice of background check denial.

D. Any person who knowingly makes a materially false statement in connection with these requirements will be denied eligibility.

[8.8.3.10 NMAC - Rp, 8.8.3.10 NMAC, 10/01/016]

8.8.3.11 COMPLIANCE EXCEPTIONS:

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

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

(2) until receiving background eligibility the applicant shall at all times be under direct physical supervision; this provision does not apply to registered child care home applicants;

(3) the licensee or applicant shall send the BCU a completed application form and an electronic fingerprint submission receipt prior to the commencement of supervised services; and

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

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

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

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

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

[8.8.3.11 NMAC - Rp, 8.8.3.11 NMAC, 10/01/16]

8.8.3.12 PROHIBITIONS:

A. Any CYFD licensee who violates these regulations is subject to revocation, suspension, sanctions, denial of licensure, certification, or registration or termination of participation in any other program within the scope of these regulations. AOC supervised visitation and safe exchange program providers will be monitored and sanctioned by the AOC.

B. Licensure, certification, registration or participation in any other program within the scope of these regulations is subject to receipt by the licensing authority of a satisfactory background check for the licensee or the licensee's administrator.

C. Except as provided in 8.8.3.13 NMAC below, licensure, certification, registration or participation in any other program within the scope of these regulations may not be granted by the licensing authority if a background check of the licensee or the licensee's administrator reveals an unreasonable risk.

D. A licensee may not retain employment, volunteer service or contract with any direct provider of care for whom a background check reveals an unreasonable risk. The BCU shall deliver one copy of the notice of unreasonable risk to the facility or program by U.S. mail and to the licensing authority or the AOC by facsimile transmission, e-mail or hand delivery.

E. A licensee shall be in violation of these regulations if it retains a direct provider of care for more than ten working days following the mailing of a notice of background check denial for failure to respond by the BCU.

F. A licensee shall be in violation of these regulations if it retains any direct provider of care inconsistent with Subsection A of 8.8.3.11 NMAC.

G. A licensee shall be in violation of these regulations if it hires, contracts with, uses in volunteer service, or retains any direct provider of care for whom information received from any source including the direct provider of care, indicates the provider of care poses an unreasonable risk to care recipients.

H. Any firm, person, corporation, individual or other entity that violates this section shall be subject to appropriate sanctions up to and including immediate emergency revocation of license or registration pursuant to the regulations applicable to that entity or termination of participation in any other program within the scope of these regulations.

[8.8.3.12 NMAC - Rp, 8.8.3.12 NMAC, 10/01/16]

8.8.3.13 ARRESTS, CONVICTIONS AND REFERRALS:

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

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

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

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

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

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

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

B. A disqualifying conviction may be proven by:

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

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

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

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

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

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

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

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

[8.8.3.13 NMAC - Rp, 8.8.3.13 NMAC, 10/01/16]

8.8.3.14 UNREASONABLE RISK:

A. The BCU may, in its discretion, use all reasonably reliable information about an applicant and weigh the evidence about an applicant to determine whether the applicant poses an unreasonable risk to care recipients. The BCU may also consult with legal staff, treatment, assessment or other professionals in the process of determining whether the cumulative weight of credible evidence establishes unreasonable risk.

B. In determining whether an applicant poses an unreasonable risk, the BCU need not limit its reliance on formal convictions or substantiated referrals, but nonetheless must only rely on evidence with indicia of reliability such as:

- (1) reliable disclosures by the applicant or a victim of abuse or neglect;
- (2) domestic violence orders that allowed an applicant notice and opportunity to be heard and that prohibits or prohibited them from injuring, harassing or contacting another;
- (3) circumstances indicating the applicant is or has been a victim of domestic violence;
- (4) child or adult protection investigative evidence that indicates a likelihood that an applicant engaged in inappropriate conduct but there were reasons other than the credibility of the evidence to not substantiate; or
- (5) any other evidence with similar indicia of reliability.

[8.8.3.14 NMAC - Rp, 8.8.3.14 NMAC 10/01/16]

8.8.3.15 REHABILITATION PETITION: Any applicant whom the BCU concludes is an unreasonable risk on any basis other than those described at Paragraphs (1), (3), (4), (5), or (6) of Subsection A of 8.8.3.13 NMAC, may submit to the BCU a rehabilitation petition describing with specificity all information that tends to demonstrate that the applicant is not an unreasonable risk. The petition may include, but need not be limited to, a description of what actions the applicant has taken subsequent to any events revealed by the background check to reduce the risk that the same or a similar circumstance will recur.

[8.8.3.15 NMAC - Rp, 8.8.3.15 NMAC 10/1/16]

8.8.3.16 ELIGIBILITY SUSPENSIONS, REINSTATEMENTS AND REVOCATIONS:

- A.** An applicant's background check eligibility may be suspended for the following:
- (1) an arrest or criminal charge for any felony offense, any misdemeanor offense involving domestic violence, child abuse or any other misdemeanor offense of moral turpitude if a conviction as charged would result in a determination of unreasonable risk;
 - (2) a pending child protective services referral or any other CYFD investigation of abuse or neglect; or
 - (3) an outstanding warrant.

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

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

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

[8.8.3.16 NMAC - N, 10/1/16]

8.8.3.17 APPEAL RIGHTS:

A. Denials: Any applicant who is found ineligible after completion of background check may request an administrative review from CYFD. The request for an administrative review shall be in writing and the applicant shall cause the BCU to receive it within 15 days of the date of the BCU's written notice of a determination of unreasonable risk. If the request is mailed, three days are added after the period would otherwise expire. The

administrative review shall be completed by a review of the record by a hearing officer designated by the cabinet secretary. The hearing officer's review is limited to:

(1) whether the BCU's conclusion of unreasonable risk is supported by any section of these regulations; and

(2) whether the applicant has been erroneously identified as a person with a relevant conviction or substantiated referral. The review will be completed on the record presented to the hearing officer and includes the applicant's written request for an administrative review and other relevant evidence provided by the applicant. The hearing officer conducts the administrative review and submits a recommendation to the cabinet secretary no later than 60 days after the date the request for administrative review is received unless CYFD and the applicant agree otherwise.

B. Suspensions and revocations: A previously cleared applicant whose eligibility has been suspended or revoked may appeal that decision to CYFD and shall be entitled to a hearing pursuant to CYFD's administrative hearing regulations at 8.8.4 NMAC. The request for appeal shall be in writing and the applicant shall cause the BCU to receive it within 15 days of the date of the BCU's written notice of suspension. If the request is mailed, three days are added after the period would otherwise expire.

[8.8.3.17 NMAC - Rp 8.8.3.16, 10/1/16]

HISTORY OF 8.8.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:

HED 85-6 (HSD), Regulations Governing Criminal Records Check and Employment History of Licensees and Staff of Child Care Facilities, 8/30/85.

History of Repealed Material:

HED 85-6 (HSD), Regulations Governing Criminal Records Check and Employment History of Licensees and Staff of Child Care Facilities, filed - Repealed 7/30/2001.

8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification, filed 7/30/2001 - Repealed effective 3/29/2002.

8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification, filed 3/15/2002 - Repealed effective 10/30/03.

8.8.3 NMAC, Governing Background Checks and Employment History Verification, filed 10/16/2003 - Repealed effective 3/31/2006.

8.8.3 NMAC, Governing Background Checks and Employment History Verification, filed 3/31/2006 - Repealed effective 10/1/2016.