

TITLE 8 SOCIAL SERVICES
CHAPTER 9 EARLY CHILDHOOD EDUCATION AND CARE
PART 6 GOVERNING BACKGROUND CHECKS AND EMPLOYMENT HISTORY
VERIFICATION

8.9.6.1 ISSUING AGENCY: Early Childhood Education and Care Department (“ECECD”)
[8.9.6.1 NMAC - N, 11/01/2022]

8.9.6.2 SCOPE: This rule has general applicability to operators, volunteers, including student interns, employees, and prospective operators, staff and employees, of child-care facilities, including every facility, ECECD contractor, program receiving ECECD funding or reimbursement, or other program that has or could have primary custody of children for twenty hours or more per week, and direct providers of care for children including, but not limited to the following settings: licensed and registered child care, home visiting programs, and Family Infant Toddler (FIT) programs.
[8.9.6.2 NMAC - N, 11/01/2022]

8.9.6.3 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. ECECD’s rule making authority for this rule arises from Subsection E of Section 9-29-6 NMSA 1978; Subsection H of Section 9-29-8 NMSA 1978; and Section 9-29-8.1 NMSA 1978.
[8.9.6.3 NMAC - N, 11/01/2022]

8.9.6.4 DURATION: Permanent
[8.9.6.4 NMAC - N, 11/01/2022]

8.9.6.5 EFFECTIVE DATE: November 1, 2022, unless a later date is cited at the end of a section.
[8.9.6.5 NMAC - N, 11/01/2022]

8.9.6.6 OBJECTIVE:

- A.** The purpose of these regulations is to set out general provisions regarding background checks and employment history verification required in settings to which these regulations apply.
- B.** Background checks are conducted in order to identify information in applicants’ backgrounds bearing on whether they are eligible to provide services in settings to which these regulations apply.
- C.** Abuse and neglect screens of databases in New Mexico are conducted by BCU staff in order to identify those persons who pose a continuing threat of abuse or neglect to care recipients in settings to which these regulations apply. Applicants required to obtain background checks pursuant to 8.9.4 NMAC and 8.9.5 NMAC will also undergo a screen of abuse and neglect information and an inter-state criminal history check in each State where the applicant resided during the preceding five years.

[8.9.6.6 NMAC - N, 11/01/2022]

8.9.6.7 DEFINITIONS:

- A.** “**Administrative review**” means an informal process of reviewing a decision that may include an informal conference or hearing or a review of written records.
- B.** “**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.
- C.** “**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.
- D.** “**Appeal**” means a review of a determination made by the BCU, which may include an administrative review or a hearing.
- E.** “**Applicant**” means any person who is required to obtain a background check under these rules and NMSA 1978, Section 32A-15-3.
- F.** “**Arrest**” means notice from a law enforcement agency about an alleged violation of law.
- G.** “**BCU**” means the ECECD background check unit.
- H.** “**Background check**” means a screen of ECECD’s information databases, state and federal criminal records and any other reasonably reliable information about an applicant.

- I. **“Care recipient”** means any person under the care of a licensee.
- J. **“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.
- K. **“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.
- L. **“Criminal history”** means information possessed by law enforcement agencies of arrests, indictments, or other formal charges, as well as dispositions arising from these charges.
- M. **“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.
- N. **“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.
- O. **“Eligibility”** means the determination that an applicant does not pose an unreasonable risk to care recipients after a background check is conducted.
- P. **“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.
- Q. **“Licensed”** means authorized to operate by the licensing authority by issuance of an operator’s license or certification certificate.
- R. **“Licensee”** means the holder of, or applicant for, a license, certification, or registration pursuant to, 8.9.4 NMAC, 8.9.5 NMAC or other program or entity within the scope of these regulations. ECECD LICENSEE means program or entity within the scope of these regulations.
- S. **“Licensing authority”** means the ECECD division having authority over the licensee.
- T. **“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.
- U. **“Notice of provisional employment”** means a written notice issued to a child care center or home applicant indicating the BCU reviewed the applicant’s fingerprint based federal or New Mexico criminal record and made a determination that the applicant may begin employment under direct physical supervision until receiving background eligibility. A notice may also indicate the applicant must receive a complete background eligibility prior to beginning employment.
- V. **“Relevant conviction”** means a plea, judgment or verdict of guilty, no contest, nolo contendere, conditional plea of guilty, or any other plea that would result in a conviction for a crime in a court of law in New Mexico or any other state. The term RELEVANT CONVICTION also includes decrees adjudicating juveniles as serious youthful offenders or youthful offenders, or convictions of children who are tried as adults for their offenses. Successful or pending completion of a conditional discharge under Section 31-20-13 (1994) NMSA 1978, or Section 30-31-28 (1972) NMSA 1978, or a comparable provision of another state’s law, is not a relevant conviction for purposes of these regulations, unless or until such time as the conditional discharge is revoked or rescinded by the issuing court. The term RELEVANT CONVICTION does not include any of the foregoing if a court of competent jurisdiction has overturned the conviction or adjudicated decree and no further proceedings are pending in the case or if the applicant has received a legally effective executive pardon for the conviction. The burden is on the applicant to show that the applicant has a pending or successful completion of any conditional discharge or consent decree, or that the relevant conviction has been overturned on appeal, or has received a legally effective pardon.
- W. **“Unreasonable risk”** means the quantum of risk that a reasonable person would be unwilling to take with the safety or welfare of care recipients.
[8.9.6.7 NMAC - N, 11/01/2022]

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

- A. licensed child care homes;

- B. licensed child care centers;
 - C. registered child care homes;
 - D. home visiting programs;
 - E. licensed before and after school care;
 - F. non-licensed or exempt after school programs participating in the at risk component of the child and adult care food program;
 - G. Family Infant Toddler (FIT) programs;
 - H. ECECD contractors, and any other programs receiving ECECD funding or reimbursement, that:
 - (1) has or could have primary custody of children for twenty hours or more per week; or
 - (2) will have direct contact with children in the provision of ECECD sponsored services.
- [8.9.6.8 NMAC - N, 11/01/2022]

8.9.6.9 NON-APPLICABILITY:

- A. These regulations do not apply to the following settings, except to the extent that such a program receives funding or reimbursement from ECECD:
 - (1) hospitals or infirmaries;
 - (2) intermediate care facilities;
 - (3) children’s psychiatric centers;
 - (4) home health agencies;
 - (5) diagnostic and treatment centers; and
 - (6) unlicensed or unregistered child care homes.
 - (7) behavior management skills development;
 - (8) case management services;
 - (9) day treatment services;
 - (10) residential treatment services;
 - (11) treatment foster care services agency staff;
 - (12) licensed shelter care;
 - (13) comprehensive community support services;
 - (14) AOC (administrative office of the courts) supervised visitation and safe exchange program providers.

- 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; and
 - (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.
- [8.9.6.9 NMAC - N, 11/01/2022]

8.9.6.10 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 8.9.4 NMAC or 8.9.5 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) Applicants required to obtain background checks pursuant to 8.9.4 NMAC and 8.9.5 NMAC must indicate states where they resided during the preceding five years and obtain the following:
 - (a) a screen of abuse and neglect information in each state where the applicant resided during the preceding five years; and

(b) an inter-state criminal history check in each state where a new applicant resided during the preceding five years. An inter-state criminal history check is not required if a new applicant has resided in a state that participates in the federal bureau of investigation's national fingerprint file. All existing staff hired after October 1, 2016, must undergo an inter-state criminal history check in each state where the applicant resided during the preceding five years at the time of application. An inter-state criminal history check is not required if an applicant has resided in a state that participates in the federal bureau of investigation's national fingerprint file.

(3) 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.

(4) 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 8.9.5 NMAC.

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

(6) 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.

[8.9.6.10 NMAC - N, 11/01/2022]

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

(2) the licensee or applicant shall send the BCU a completed application form and an electronic fingerprint submission receipt prior to employment;

(3) until receiving background eligibility, the applicant shall at all times be under direct physical supervision. See next paragraph for standards regarding applicants required to obtain a background check pursuant to 8.9.4 NMAC or 8.9.5 NMAC;

(4) a licensee or applicant required to obtain a background check pursuant to 8.9.4 NMAC or 8.9.5 NMAC must receive either a notice of provisional employment or background check eligibility prior to beginning employment. Applicants working after receipt of a notice of provisional employment shall at all times be under direct physical supervision until receiving background check eligibility. Upon completion of Paragraph 2 of this subsection, a notice of provisional employment decision will be provided to the child care center or home within five days unless the BCU determines there is good cause shown for an extension; and

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

B. With the exception of the provision under 8.9.4.19 NMAC and 8.9.5.11 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 8.9.6.10 NMAC. A direct provider of care may transfer employment, as permitted by 8.9.4.19 NMAC and 8.9.5.11 NMAC, or for a period of 180 days after the date of an eligibility letter from the BCU without complying with 8.9.6.10 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.
[8.9.6.11 NMAC - N, 11/01/2022]

8.9.6.12 PROHIBITIONS:

A. Any ECECD 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.

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 8.9.6.13 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, facsimile transmission, secure (or encrypted) e-mail or hand delivery, and to the licensing authority by facsimile transmission, secure (or encrypted) 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 issuing 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 8.9.6.11 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.

[8.9.6.12 NMAC - N, 11/01/2022]

8.9.6.13 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 New Mexico's Children, Youth, and Families Department (CYFD) or another state's custody; 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 CYFD child protective services referral or any other investigation of abuse or neglect by ECECD, CYFD, or any other state or federal agency with authority to investigate, 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.

[8.9.6.13 NMAC - N, 11/01/2022]

8.9.6.14 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.

[8.9.6.14 NMAC - N, 11/01/2022]

8.9.6.15 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 8.9.6.13 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.

[8.9.6.15 NMAC - N, 11/01/2022]

8.9.6.16 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 CYFD child protective services referral or any other investigation of abuse or neglect by ECECD, CYFD, or any other state or federal agency with authority to investigate allegations of abuse or neglect;

(3) an outstanding warrant; or

(4) any other reason that creates an unreasonable risk determination pursuant to these regulations.

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

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

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

(1) If the applicant can provide information relating to the disqualifying criminal charge that would show that a criminal conviction as charged would not lead to an unreasonable risk;

(2) If the matter causing the suspension is resolved within six months of the suspension, the applicant may provide documentation to the BCU showing how the matter was resolved and requesting reinstatement of background check eligibility. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If, the applicant's eligibility is revoked, the applicant may appeal the revocation.

(3) If the matter causing the suspension is resolved after six months of the suspension, the applicant may reapply for clearance for the same licensee by submitting an electronic fingerprint submission receipt and the required forms. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If the applicant's eligibility is revoked, the applicant may appeal the revocation.

[8.9.6.16 NMAC - N, 11/01/2022]

8.9.6.17 APPEAL RIGHTS:

A. Denials: Any applicant who is found ineligible after completion of background check may request an administrative review from ECECD. 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 ECECD 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 ECECD and shall be entitled to a hearing pursuant to ECECD's identified administrative hearing regulations. 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.

[8.9.6.17 NMAC - N, 11/01/2022]

HISTORY OF 8.9.6 NMAC: [RESERVED]