

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

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

FIRST MEETING AGENDA

- | | |
|----------------|--|
| 1:00pm-1:15pm: | Welcome from chairs and introductions |
| 1:15pm-1:30pm: | Review Joint Study Order and general study procedures |
| 1:30pm-2:00pm: | Review of relevant statutes |
| 2:00pm-2:45pm: | Review responses from departments to chairs' questions |
| 2:45pm-3:30pm: | Discussion and additional information requests |
| 3:30pm-3:45pm: | Next steps |
| 3:45pm: | Adjourn |

STATE OF MAINE

In House _____

ORDERED, the Senate concurring, that the Working Group to Study Background Checks for Child Care Facilities and Providers is established as follows.

1. Working Group to Study Background Checks for Child Care Facilities and Providers established. The Working Group to Study Background Checks for Child Care Facilities and Providers, referred to in this order as "the working group," is established.

2. Membership. The working group consists of 5 members appointed as follows:

A. Two members of the Senate appointed by the President of the Senate, including members from each of the 2 parties holding the largest number of seats in the Legislature; and

B. Three members of the House of Representatives appointed by the Speaker of the House, including members from each of the 2 parties holding the largest number of seats in the Legislature.

The members appointed must serve on the Joint Standing Committee on Judiciary, the Joint Standing Committee on Health and Human Services, the Joint Standing Committee on Education and Cultural Affairs or the Joint Standing Committee on Appropriations and Financial Affairs.

3. Working group chairs. The first-named Senator is the Senate chair of the working group and the first-named member of the House is the House chair of the working group.

4. Appointments; convening of working group. All appointments must be made no later than 30 days following passage of this order. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been made. When the appointment of all members has been completed, the chairs of the working group shall call and convene the first meeting of the working group. If 30 days or more after the passage of this order a majority of but not all appointments have been made, the chairs may request authority and the Legislative Council may grant authority for the working group to meet and conduct its business.

5. Duties. The working group shall review the requirements for national criminal history background checks based on fingerprints as required by the federal Child Care and Development Block Grant Act of 2014. The working group shall invite the participation of and comments from stakeholders, including but not limited to child care facilities, family child care providers and parents. The working group shall invite the participation of the Department of Health and Human Services and the Department of Public Safety, State Bureau of Identification. The working group shall recommend how the required background checks should be incorporated into law in this State, including but not limited to who should be subject to the background checks, whether the law should provide for contingent or provisional hiring while background checks are pending, who is responsible for the payment of costs associated with the background checks and how the Background Check Center within the Department of Health and Human Services can help coordinate and streamline the background check process for child care facilities and providers. The working group shall explore options, including the application of federal grant funds, to defray all or some of the initial and ongoing additional costs.

6. **Staff assistance.** The Legislative Council shall provide necessary staffing services to the working group.

7. **Report.** No later than November 2, 2016, the working group shall submit a report that includes its findings and recommendations, including suggested legislation, to the Second Regular Session of the 127th Legislature.

SPONSORED BY: _____

(Representative **HOBBS**)

TOWN: Saco

COSPONSORED BY: _____

(Senator **BURNS**)

COUNTY: Washington

COSPONSORED BY: _____

(Senator **JOHNSON**)

COUNTY: Lincoln

COSPONSORED BY: _____

(Senator **VOLK**)

COUNTY: Cumberland

COSPONSORED BY: _____

(Representative **EVANGELOS**)

TOWN: Friendship

COSPONSORED BY: _____

(Representative **GINZLER**)

TOWN: Bridgton

COSPONSORED BY: _____

(Representative **GUERIN**)

TOWN: Glenburn

COSPONSORED BY: _____

(Representative **HERRICK**)

TOWN: Paris

COSPONSORED BY: _____

(Representative MCCREIGHT)

TOWN: Harpswell

COSPONSORED BY: _____

(Representative MONAGHAN)

TOWN: Cape Elizabeth

COSPONSORED BY: _____

(Representative MOONEN)

TOWN: Portland

COSPONSORED BY: _____

(Representative SHERMAN)

TOWN: Hodgdon

COSPONSORED BY: _____

(Representative WARREN)

TOWN: Hallowell

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND AND SIXTEEN

—
H.P. 1154 - L.D. 1689

An Act To Protect Children in the State from Possible Sexual, Physical and Emotional Abuse by Persons Who Have Been Convicted of Crimes

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the safety of children cared for and supervised by child care providers in this State is of the utmost importance; and

Whereas, child care facilities and family child care providers, as well as the families who rely on them, need to know that the providers of care and staff members do not have disqualifying criminal records from other states; and

Whereas, the 2014 reauthorization of the Child Care and Development Fund program through the federal Child Care and Development Block Grant Act of 2014 has identified that best practices for background checks include fingerprint-based national criminal background checks for all child care providers who supervise children and all persons who have unsupervised access to children who are cared for or supervised by a child care provider; and

Whereas, the transition to the criminal background check process required by federal law raises significant questions, not the least of which are the employment needs of child care providers while waiting for background check results and the costs involved in the more rigorous criminal background checks than the checks currently required under state law; and

Whereas, it is the intent of the Legislature to ensure that the additional criminal background check process will be cost-effective and will not create an undue burden on parents or child care providers; and

Whereas, the development of major substantive rules to comply with the federal Child Care and Development Block Grant Act of 2014 by September 2017 should include the participation of child care facilities and family child care providers; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 22 MRSA §7702-A, sub-§3, ¶C, as enacted by PL 1999, c. 363, §3, is amended to read:

C. Section 8302-A, subsection 1, paragraphs B to ~~¶ J~~ and subsection 2, paragraphs A to F and H to ~~¶ K~~.

Sec. 2. 22 MRSA §8302-A, sub-§1, as amended by PL 2005, c. 530, §8, is further amended to read:

1. Rules for child care facilities. Rules for child care facilities must include, but are not limited to, rules pertaining to the following:

- A. Child to staff ratios;
- B. The health and safety of the children and staff, including training on communicable diseases;
- C. Water for drinking and cooking;
- D. Wastewater;
- E. Rabies vaccinations for pets;
- F. The quality of the program provided;
- G. The age, criminal record and personal history of the provider of care for children and staff members;
- H. The administration of medication; ~~and~~
- I. Licensing procedures; ~~and~~
- J. Requiring a criminal background check for:

(1) Each child care staff member whose activities involve the care or supervision of children; and

(2) Each adult who has unsupervised access to children who are cared for or supervised by a child care facility.

The criminal background check must meet the requirements of 42 United States Code, Section 9858f(b).

Rules adopted pursuant to this subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A, except that rules adopted pursuant to paragraph J to comply with 42 United States Code, Section 9858f(b) are major substantive rules pursuant to Title 5, chapter 375, subchapter 2-A.

Sec. 3. 22 MRSA §8302-A, sub-§2, as amended by PL 2005, c. 530, §8, is further amended to read:

2. Rules for family child care providers. Rules for family child care providers must include, and are limited to, rules pertaining to the following:

- A. Cardiopulmonary resuscitation;
- B. Water for drinking and cooking;
- C. Wastewater;
- D. Rabies vaccinations for pets;
- E. Recording the times, reasons and numbers of children involved when more than 12 children are cared for;
- F. Ongoing training for providers on health and safety issues, including training on communicable diseases. This training must be offered at times that are convenient to the providers;
- G. Child to staff ratios;
- H. Health and safety of the children and staff;
- I. Procedures for waivers of rules and for suspension and revocation of certification; ~~and~~
- J. The age, criminal record and personal history of the family child care provider, staff and members of the household; ~~and~~
- K. Requiring a criminal background check for:
 - (1) The family child care provider;
 - (2) Each child care staff member whose activities involve the care or supervision of children; and
 - (3) Each adult who has unsupervised access to children who are cared for or supervised by the family child care provider.

The criminal background check must meet the requirements of 42 United States Code, Section 9858f(b).

Rules adopted pursuant to paragraphs A to F are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A and rules adopted pursuant to paragraphs G to ~~J~~ **K** are major substantive rules pursuant to Title 5, chapter 375, subchapter 2-A.

Sec. 4. Department of Health and Human Services; adoption of rules.

The Department of Health and Human Services shall adopt rules required by the Maine Revised Statutes, Title 22, section 8302-A, subsections 1 and 2 to require criminal background checks for all providers of care and staff members of child care facilities and family child care providers, to be effective September 1, 2017. The rules must be provisionally adopted and submitted to the Legislature for review by the joint standing committee of the Legislature having jurisdiction over judiciary matters no later than January 12, 2017. The department may submit to the committee recommendations for

legislation to support the rules to implement changes in criminal background checks in a manner that is effective for the department and child care facilities and family child care providers.

Sec. 5. Implementing legislation. The joint standing committee of the Legislature having jurisdiction over judiciary matters may submit a bill, including recommendations provided by the department pursuant to section 4, to the First Regular Session of the 128th Legislature to implement the criminal background checks required by 42 United States Code, Section 9858f(b). In developing the bill, the committee shall take into account the concerns of child care providers, including but not limited to employment needs while waiting for background check results, and shall explore options, including the application of federal grant funds, to defray all or some of the initial and ongoing additional costs.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

TITLE 22, CHAPTER 1691

MAINE BACKGROUND CHECK CENTER ACT

§9051. Short title

This chapter may be known and cited as "the Maine Background Check Center Act."

§9052. Background Check Center

In order to promote and protect the health and safety of children and adults in need of support and care, the Background Check Center is established within the department to operate an Internet-based system that employers use to access criminal records and other background information to determine the eligibility of individuals to work in direct access positions with vulnerable Maine citizens including children, elderly persons, dependent adults and persons with disabilities. The online system is maintained by the Background Check Center in coordination with the Department of Public Safety, State Bureau of Identification and with other state and federal agencies.

§9053. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. **Adult day care program.** "Adult day care program" means an adult day care program licensed pursuant to chapter 1663 or 1679.

2. **Assisted housing program** "Assisted housing program" means a program or facility licensed pursuant to chapter 1663.

3. **Background check.** "Background check" means the collection of personally identifiable information and data for comparison with criminal record repositories and registry databases that are relevant to an individual's identity and background, including monitoring for future offenses through a rap back monitoring program.

4. **Background Check Center.** "Background Check Center" means the entity established under section 9052 to operate the Internet-based system maintained by the department pursuant to section 9054 that is designed to integrate and analyze data streams from various sources and is used by providers when conducting background checks on potential or current direct access workers.

5. **Background check report.** "Background check report" means a comprehensive report generated by the Background Check Center based on a search and analysis of data stored in federal and state criminal record repositories, registry databases or agencies, including, but not limited to, the Federal Bureau of Investigation; the Department of Public Safety, State Bureau of Identification; abuse and neglect, sex offender and employment-related registries; professional licensing authorities; and Medicare and Medicaid exclusion databases. The background check report informs a provider when an offense appears in an individual's record that may disqualify the individual from employment as a

direct access worker.

6. Bureau. "Bureau" means the Department of Public Safety, State Bureau of Identification.

7. Child care facility. "Child care facility" means a child care facility licensed pursuant to chapters 1661 and 1673.

8. Child placing agency. "Child placing agency" means a child placing agency licensed pursuant to chapter 1663.

9. Children's residential care facility. "Children's residential care facility" means a children's home licensed pursuant to chapter 1663.

10. Contingent offer of employment. "Contingent offer of employment" means an offer of employment as a direct access worker that is based upon receipt of a final nondisqualifying background check report and that may be withdrawn if a disqualifying final background check report is issued.

11. Criminal charge without disposition. "Criminal charge without disposition" means a charge that appears on an individual's criminal history record that has not been finally disposed at the time the criminal record is reviewed.

12. Direct access. "Direct access" means access to the property, personally identifiable information, financial information and resources of an individual or physical access to an individual who is a Medicare or Medicaid beneficiary or other protected individual served by a provider subject to this chapter.

13. Direct access employment. "Direct access employment" or "employment" means any activity involving direct access services including employment for wages, contracting for temporary staff or use of unsupervised volunteers or students who perform functions similar to those performed by direct access workers.

14. Direct access worker. "Direct access worker" means an individual who by virtue of employment has direct access to a Medicare or Medicaid beneficiary or other protected individual served by a provider subject to this chapter. "Direct access worker" does not include an individual performing repairs, deliveries, installations or similar services who does not have direct access without supervision. "Direct access worker" includes but is not limited to the following individuals:

- A. An individual seeking employment as a direct access worker;
- B. An employee who is employed upon the effective date of this chapter and who is required to have a background check in accordance with section 9058;
- C. A former employee who consents, prior to leaving employment, to periodic review of that employee's criminal background for a fixed time;
- D. An independent contractor pursuant to Title 26, section 1043, subsection 11, paragraph E or Title 39-A, section 102, subsection 13-A or a worker who is placed with a provider by a temporary nurse agency or a personal care agency or a placement agency registered pursuant to section 1717; and
- E. A volunteer, student or other person with direct access who routinely performs unsupervised functions similar to those performed by a direct access worker for a

provider.

15. Disqualifying offense. "Disqualifying offense" means an event in a person's background that has resulted in a database or registry notation or criminal record report that is relevant to the health and safety of protected individuals and that is included on the list of disqualifying offenses adopted in rules pursuant to this chapter that mandate a prohibition or exclusion from direct access employment.

16. Drug treatment center. "Drug treatment center" means a facility licensed pursuant to chapter 1663.

17. Employer. "Employer" means a person or other legal entity that employs or places a direct access worker or otherwise provides direct access services. "Employer" includes a provider, a temporary nurse agency, a personal care agency and a placement agency.

18. Family child care provider. "Family child care provider" means a child care provider certified pursuant to chapter 1673.

19. Grandfathered employee. "Grandfathered employee" means an individual subject to the requirements of this chapter who has been employed prior to the effective date of this chapter and is subject to section 9058.

20. Home health care provider. "Home health care provider" means an entity licensed pursuant to chapter 419.

21. Hospice provider. "Hospice provider" means an entity licensed pursuant to chapter 1681.

22. Intermediate care facility for individuals with intellectual disabilities. "Intermediate care facility for individuals with intellectual disabilities" means a facility licensed pursuant to chapter 405.

23. Medicare or Medicaid beneficiary. "Medicare or Medicaid beneficiary" means a person enrolled in the Medicare or Medicaid program.

24. Mental health services facility or provider. "Mental health services facility or provider" means a facility or agency licensed pursuant to Title 34-B, section 1203-A.

25. Nursery school. "Nursery school" means a nursery school licensed pursuant to chapter 1675.

26. Nursing facility. "Nursing facility" means a facility licensed pursuant to chapter 405.

27. Personal care agency and placement agency. "Personal care agency" and "placement agency" mean an entity registered pursuant to section 1717.

28. Personally identifiable information. "Personally identifiable information" means information that permits the identity of an individual to whom the information applies to be able to be reasonably inferred or known by either direct or indirect means.

29. Provider. "Provider" means a licensed, certified or registered entity that employs direct care workers to provide long-term care, child care and in-home and community-based services under this chapter.

30. Protected individual. "Protected individual" means a person who is in need of support, who is vulnerable to abuse, neglect and exploitation and who receives services offered by providers subject to this chapter. A protected individual requires special protective measures by criminal justice, social services and health care agencies; may be a patient, consumer, beneficiary or resident; and is typically elderly, a child or an individual with disabilities in need of assistance.

31. Rap back monitoring program. "Rap back monitoring program" means a coordinated system used by federal and state agencies to monitor and generate reports for new criminal record events appearing subsequent to an initial background check pursuant to section 9056.

32. Residential care facility. "Residential care facility" means a residential care facility licensed pursuant to chapter 1663.

33. Supervision. "Supervision" means a supervisor is physically present and immediately able to respond to the needs of protected individuals through an ongoing and verifiable process for the duration of conditional employment.

34. Temporary nurse agency. "Temporary nurse agency" means an agency registered pursuant to chapter 417 or an agency that places temporary health care professionals in direct access positions in the State that is not otherwise required to register in the State.

35. Waiver. "Waiver" means an exemption granted by the department to a specific individual who is banned from employment as a direct access worker for a disqualifying offense.

§9054. Background Check Center; procedures

1. Bureau responsibilities. The bureau is responsible for working with the Background Check Center and federal and state agencies to facilitate background checks.

2. Employer obligations. An employer subject to this chapter shall use the Background Check Center to conduct a comprehensive background check that includes a criminal history records check for all direct access workers. The employer shall comply with the requirements of this chapter when making employment-related decisions for direct access workers.

3. Direct access worker information. An employer seeking to hire, place or continue to employ an individual as a direct access worker shall:

A. Obtain personally identifiable information for the individual that is sufficient to secure the required components of the background check using the Background Check Center;

B. Obtain the individual's executed consent to release information to all entities as needed to conduct the background check investigation, analysis and monitoring process;

C. Secure a release executed by an individual seeking placement through a temporary nurse agency, personal care agency, placement agency or other agency to obtain the results of existing background checks conducted at the direction and expense of the temporary nurse agency, personal care agency, placement agency or other agency; and

D. Use and distribute department-approved forms as required for all pre-hire and post-employment background checks.

4. Placed or temporary direct access workers. A temporary nurse agency, personal care agency or placement agency engaged in the business of securing or attempting to secure direct access employment for individuals or of securing or attempting to secure a direct access worker for placement with another provider shall:

- A. Conduct and pay for the background check process required by this chapter;
- B. Upon request, provide the background check record to the provider seeking to fill a position where the direct access employment will take place; and
- C. Repeat the background check process for placed direct access workers after placement as mandated by rules adopted pursuant to this chapter, until the employment status shifts away from the placing entity to another entity, in which case the other entity then acquires the burden of paying for and conducting periodic background checks for the direct access workers who remain employed.

5. Subsequent background check; 5 years. An employer shall conduct a periodic subsequent background check in accordance with rules adopted pursuant to this chapter. Criminal history record checks for all direct access workers must be completed every 5 years subsequent to the date of hire or the anniversary date of a previous background check completed through use of the Background Check Center.

6. Notice. An employer shall provide a department-approved notice to each individual who is required to participate in a background check.

7. Providers; mandatory use. Use of the Background Check Center is mandatory for the following providers:

- A. Child care facilities;
- B. Child placing agencies;
- C. Children's residential care facilities;
- D. Family child care providers;
- E. Nursery schools;
- F. Hospice providers;
- G. Home health care providers;
- H. Nursing facilities;
- I. Personal care agencies and placement agencies;
- J. Temporary nurse agencies;
- K. Adult day care programs;
- L. Assisted housing programs;
- M. Residential care facilities;
- N. Intermediate care facilities for individuals with intellectual disabilities;
- O. Mental health services facilities or providers; and
- P. Drug treatment centers.

8. Background Check Center responsibilities. The Background Check Center's responsibilities include, but are not limited to, the following:

- A. Operating an online portal used by employers to secure background checks for individuals employed as direct access workers;
- B. Coordinating with the bureau and other federal or state agencies as applicable to obtain data regarding criminal record information and notations that represent disqualifying offenses on relevant databases and registries;
- C. Generating background check reports for employers regarding the presence of disqualifying offenses, including criminal charges without disposition, in a direct access worker's background;
- D. Monitoring and enforcing compliance with the requirements of this chapter;
- E. Providing for a process by which an individual subject to actions taken by the Background Check Center may challenge the accuracy of information in a background check report and correct the information in accordance with rules adopted pursuant to this chapter;
- F. Specifying offenses, including offenses that may appear in publicly available criminal record information, that disqualify an individual from employment as a direct access worker, including, but not limited to, convictions and other events or notations;
- G. Coordinating with federal and state criminal justice agencies as required to facilitate a criminal record rap back monitoring program; and
- H. Providing for an independent process for a waiver based on a criminal conviction that gives an individual with a disqualifying offense who has been banned from employment pursuant to this chapter the opportunity to demonstrate that the ban should be waived because the individual does not pose a risk to patients, facilities, property or others.

9. Background check reports. A background check report under this chapter is considered preliminary until the individual subject to the background check has had the opportunity to challenge or decline to challenge the accuracy of the records obtained, after which the report is considered final.

10. Background check report content. The background check report must inform employers whether the individual submitted for a background check has offenses that disqualify the individual for employment as a direct access worker. The background check report must include information specific to the individual along with information about the source and type of offense sufficient to allow the individual named in the report to challenge the information. The content of the background check report must include, but is not limited to, notice that the individual submitted for a background check has:

- A. No disqualifying offenses;
- B. A disqualifying offense; or
- C. A criminal charge without disposition that upon final disposition may result in a disqualifying offense.

11. List of disqualifying offenses. The department shall adopt rules under section 9065 in accordance with the requirements of this chapter and other federal and state laws to create

and maintain a list of disqualifying offenses that adversely affect an individual's eligibility for employment as a direct access worker. Disqualifying offenses that prohibit employment as a direct access worker include, but are not limited to:

- A. Convictions or notations involving crimes or abuse related to a federally funded health care program or a state-funded health care program that mandate a disqualification from participation or employment with the program;
- B. Substantiated findings that the individual has committed an act of patient or resident abuse or neglect, exploitation or a misappropriation of patient or resident property or other types of acts that the department may specify for purposes of protecting vulnerable individuals receiving care or services;
- C. Convictions under federal or state law of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service;
- D. Convictions under federal or state law of a criminal offense relating to the health and safety of vulnerable individuals receiving care or services;
- E. Convictions relating to health care fraud in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state or local government agency or convictions of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct;
- F. Convictions for a Class A, B or C crime in this State or similar crime in another jurisdiction for an offense relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance; and
- G. Convictions relating to other federal or state laws, provisions of this chapter or rules adopted under this chapter that otherwise mandate an employment prohibition.

12. Appeal by individual. The department shall establish procedures in accordance with the provisions of the Maine Administrative Procedure Act to ensure that each individual submitted for a background check in compliance with this chapter has the opportunity to challenge and correct errors in records created and generated by the Background Check Center.

13. Waiver; disqualifying offense. In the event that no other federal or state law mandates an employment prohibition by an employer subject to this chapter, an individual who is banned from employment because of a disqualifying offense may initiate a request for a waiver under subsection 8, paragraph H in accordance with a process established by rules adopted pursuant to this chapter under the following circumstances:

- A. The individual is seeking to be employed or is currently employed by an employer subject to the requirements of this chapter;
- B. The employer has chosen to sponsor the individual's request for the removal of the ban in order to create or maintain an employment relationship; and
- C. The employer must attest to the department that the decision to sponsor the waiver request occurred after the employer considered the objectively reasonable factors under subsection 15 and the following factors:
 - (1) The nature and gravity of the disqualifying offense or offenses;

- (2) The time that has passed since the disqualifying offense or offenses;
- (3) The nature of the employment held or sought;
- (4) Whether the criminal conduct was employment-related; and
- (5) A reasonable conclusion that the individual does not pose a threat of harm to a protected individual or others in the care and support of the individual.

The waiver must be sought with respect to the prospective or continued employment by a specific employer that is willing to sponsor the individual's request. An employee seeking a waiver may be conditionally employed in accordance with section 9057, subsection 4 and section 9058, subsection 3 until the waiver is denied.

14. Approval of waiver. The department shall specify in rule the criteria for issuing a waiver for a disqualifying offense. The waiver determination is based on a consideration of the facts and circumstances of the specific individual's conviction that include the passage of time, extenuating circumstances, a demonstration of rehabilitation and the relevancy of the particular disqualifying offense with respect to the current or prospective employment with a sponsoring employer. All waivers are contingent on a final determination by the department that the employer has reasonably determined that the health and safety of a protected individual is not in jeopardy and a denial of a waiver request is not otherwise warranted in accordance with federal or state law.

15. Waivers; factors. The department shall specify in rule the minimum factors that an employer must consider when sponsoring a waiver under subsection 13. Any factors that an employer chooses to consider must be objectively reasonable in supporting the attestation that the individual to whom the waiver would apply is unlikely to cause harm to a protected individual or others in the employer's care. Objectively reasonable factors include:

- A. The age of the individual applying for a waiver at the time of the disqualifying offense;
- B. The amount of time that has passed since the disqualifying offense occurred;
- C. The total number and type of disqualifying offenses;
- D. Any proven mitigating circumstances surrounding the disqualifying offense;
- E. Objective evidence that the individual has successfully completed a criminal rehabilitation program;
- F. The relevance of the circumstances pertaining to the disqualifying offense with respect to the nature of the proposed employment;
- G. The length and consistency of similar employment post-conviction if applicable;
- H. Whether the individual is bonded under federal or state law; and
- I. Personal references or recommendations from employers on behalf of the individual.

16. Denial or revocation of waiver. The department shall establish by rule informal and formal review procedures for denial or revocation of a waiver. Denial or revocation of waiver procedures must comply with the Maine Administrative Procedures Act and final determinations may be appealed pursuant to the Maine Administrative Procedures Act in Title 5, Part 18, Chapter 375, subchapter 4. Rules concerning the denial or revocation of waiver procedures include, but are not limited to, the following:

- A. The process of filing a waiver request;
- B. The time frame for filing a waiver request;
- C. The time frame for issuing a waiver request decision;
- D. The rules for employment during the waiver request process; and
- E. A written determination stating the objectively reasonable factors under subsection 15 explaining the department's determination to grant, deny or revoke a waiver.

Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

17. Immunity. A provider that denies employment for an individual selected for hire or continued employment as a direct access worker, including during any period of conditional employment, and that reasonably relies upon information obtained through a final background check report regarding the individual is not liable in an action brought by the individual based on an employment determination resulting from the information.

18. Presumption of good faith. In a proceeding regarding immunity from liability, there is a rebuttable presumption of good faith.

§9055. Background Check Center funding and fees

After the initial construction and operational phase, the Background Check Center is funded through user fees as provided in this section.

1. User fee. The department shall adopt rules to establish Background Check Center user fees. The user fee must reasonably reflect the necessary costs to maintain, operate and develop the Background Check Center. The user fee must be no less than \$25 and no more than \$150. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

2. Special revenue account. Revenue generated pursuant to this section must be deposited in a special revenue account in the Division of Licensing and Regulatory Services and dedicated for Background Check Center operations.

§9056. New event monitoring; rap back monitoring program

1. New disqualifying offenses. A direct access worker's data must be searched and monitored for new events that may disqualify the individual from employment as a direct access worker.

A. The department shall establish procedures regarding the exchange of data among federal or state criminal justice agencies and the Background Check Center, including criminal offenses not reported in earlier background check reports that upon final disposition disqualify the individual from employment as a direct access worker.

B. The department shall establish procedures to search and monitor applicable registries and databases for notations or new information not reported in earlier background check reports that prohibit or disqualify employment as a direct access worker.

2. Rap back monitoring program. The bureau is authorized to initiate and provide services pursuant to federal or state rap back monitoring to report new criminal record events to the Background Check Center for noncriminal justice purposes.

3. Collection of identifier data. The bureau shall coordinate with the Background Check Center to collect the personally identifiable information and relevant data of individuals as needed to meet the requirements of the rap back monitoring program or as otherwise required by this chapter and other laws.

4. Dissemination and storage of data. The Background Check Center and the bureau shall follow protocols established by federal or state law for the use and exchange of information with the rap back monitoring program, the Background Check Center and criminal justice agencies as applicable. The bureau shall:

- A. Maintain the personally identifiable information in the criminal history records repository;
- B. Compare the personally identifiable data or other data or both to criminal records to conduct a criminal record check and disseminate the results of this record check to authorized entities;
- C. Exchange data through the rap back monitoring program with the Background Check Center for noncriminal justice purposes;
- D. Disseminate criminal record event information, including notifications from the rap back monitoring program, to an authorized entity or in a manner consistent with the requirements of this chapter and federal and state laws; and
- E. Secure and coordinate services as needed to effect the provisions and purposes of this chapter.

§9057. Employment

1. Contingent offer of employment. An employer that has made a contingent offer of employment to a direct access worker shall secure a background check and receive a final background check report prior to allowing the individual to commence employment as a direct access worker, except where the individual is conditionally employed as described in this chapter.

2. Opportunity to challenge inaccurate records. An employer that has made a contingent offer of employment under subsection 1 shall provide the individual subject to a background check a copy of the background check report and afford the individual a reasonable amount of time up to the 60th calendar day of conditional employment as described in subsection 4 to allow that individual an opportunity to challenge inaccurate information in the background check report.

3. Employment determination. An employer that has made a contingent offer of employment under subsection 1 shall obtain a final nondisqualifying background check report after an individual has been allowed an opportunity to correct or update that individual's record prior to making an employment determination.

4. Conditional employment. In accordance with subsection 2, an employer may employ an individual as a direct access worker on a conditional basis for up to 60 calendar days before the employer receives a final background check report or from the date the employer receives a disqualifying background report on the following conditions:

- A. The employer initiates the background check by entering the individual into the Background Check Center database as a conditionally employed worker;
- B. The individual is not identified in the Background Check Center database as a disqualified person based on an earlier background check;
- C. The individual has agreed to submit to the steps necessary to comply with this chapter, including taking substantial steps toward correcting inaccurate data in the disqualifying background check report if applicable;
- D. The individual signs a statement declaring that a background check will not reveal a disqualifying offense or that an offense that appears is inaccurate;
- E. The employer verifies and documents that the individual has submitted the mandatory identity verification and employment eligibility documents required by rules adopted in accordance with this chapter; and
- F. The individual is subject to direct personal supervision during the course of the conditional employment as described in rules adopted pursuant to this chapter.

§9058. Grandfathered employees

1. Background check. An employer employing direct access workers on the effective date of this chapter shall use the Background Check Center to secure a background check and a background check report for each direct access worker within 365 calendar days after the Background Check Center becomes operational.

2. Gradual implementation of grandfathered employee background checks. The department shall adopt rules under section 9065 describing a staged and orderly process based on the type of provider and the number of direct access workers employed that employers must follow to implement the background checks for grandfathered employees consistent with this chapter. The department may grant an employer a deadline extension for good cause shown, which may not be unreasonably withheld.

3. Initial background check deadline. A grandfathered employee may continue to work in direct access employment for up to 60 calendar days from the date the grandfathered employee's first background check is initiated in accordance with subsection 2 and if:

- A. The grandfathered employee signs a consent to release information and agrees in writing to submit to the background check process;
- B. The grandfathered employee signs a statement declaring that a background check will not reveal any disqualifying offenses or that an offense that appears is inaccurate;
- C. The employer verifies and documents that the grandfathered employee has submitted the mandatory identity verification and employment eligibility documents required by rules adopted in accordance with section 9065;
- D. The employer initiates the background check by entering the individual into the Background Check Center database as a grandfathered employee; and
- E. The grandfathered employee is not identified in the Background Check Center database as a disqualified person.

4. Disqualified grandfathered employees. A grandfathered employee who receives a

disqualifying background check report is subject to the provisions of subsection 3 and must be able to correct disqualifying offense information that appears in the background check report through the inaccurate records corrections process within 60 calendar days after the disqualifying report is issued. The grandfathered employee is subject to direct personal supervision during the conditional employment period as described in rules adopted pursuant to this chapter until a final background check report indicates that no disqualifying offenses appear in the updated records.

5. Termination; disqualified grandfathered employees. An employer shall terminate or remove from direct access employment any grandfathered employee who has not submitted the documents required in subsection 3 or who fails to receive a final nondisqualifying background check report in accordance with subsection 4.

§9059. Prohibitions

1. Prohibited employment. An employer is subject to the penalties imposed by this chapter for hiring, placing or continuing to employ, other than conditionally as described in this chapter or by rule, an unsupervised direct access worker who has a known disqualifying offense or who has not been subject to a background check and issued a nondisqualifying report from the Background Check Center or who has not been granted a waiver as described in this chapter.

2. Refusal to participate; employer. The Background Check Center shall issue a disqualifying background check report for individuals who refuse to participate in the background check reporting process as described in this chapter, and the employer is subject to the penalties imposed by this chapter for allowing the individual to commence or continue direct access employment.

3. Good cause termination. A disqualifying offense that appears in the record of an individual submitted for a background check or a disqualifying offense that was not reported in an earlier background check report or an offense that an individual concealed from the employer or a failure to obtain or maintain a waiver constitutes good cause for termination of the individual's direct access employment.

4. Refusal to participate; employee. An employee's refusal to participate in the background check reporting process under this chapter constitutes good cause for termination of direct access employment.

§9060. Documentation

1. Employer documentation. An employer subject to this chapter shall conduct and document the background check process in accordance with the requirements of this chapter and rules adopted pursuant to this chapter.

2. Data storage. An employer shall manage and store, electronically or on paper, the data provided by the Background Check Center in a manner that allows for verification that the employer conducted the background check in compliance with this chapter and other relevant state and federal laws. Employer documentation must be made available to the department upon request.

§9061. Confidentiality

A criminal background check record and other personally identifiable information provided to an employer in compliance with this chapter are confidential. An employer may use this information only to determine the eligibility of an individual for new or continued employment, and the personally identifiable information or background check record may not be disseminated in any way that does not comply with this chapter or other applicable laws.

§9062. Penalties

1. Conduct subject to penalties. An employer may be subject to the penalties under this chapter for any of the following:

- A. Failure to conduct a mandatory background check;
- B. Failure or refusal to terminate or remove from direct access employment an employee who is disqualified for employment based on the requirements of this chapter; and
- C. Substantial noncompliance with the procedures established by this chapter.

2. Fines. An employer who fails to comply with the provisions of this chapter is subject to the penalties set out under this subsection.

- A. An employer who fails to secure a background check in accordance with this chapter or knowingly employs a disqualified individual for direct access employment commits a civil violation for which a fine of not less than \$500 but not more than \$10,000 per day may be adjudged, beginning on the first day the violation occurs and for each day of continued violation. Each day constitutes a separate offense.
- B. An employer is subject to the penalties under paragraph A if that employer conditionally employs an individual before receiving verification that the individual has met the requirements of conditional employment described in this chapter.
- C. An employer who fails to comply with the confidentiality requirements and conditional employment requirements of this chapter commits a civil violation for which a fine of not less than \$500 but not more than \$5,000 may be adjudged for each violation.

§9063. Administrative penalties

1. Licensing actions. The penalties and fines described in this chapter do not limit the State's licensing authority to pursue an adverse action against an employer who fails to comply with or who commits a civil violation described in this chapter.

2. Licensing penalties. An employer's failure to comply with the requirements of this chapter may be subject to the following administrative penalties in addition to any other remedies authorized by law:

- A. Denial of a license or certification or registration needed to provide services to protected individuals;
- B. Termination or revocation of the license or certification or registration relied upon to provide services to protected individuals; and
- C. Revocation of rate agreements or service contracts with the State relevant to services authorized by the license or certification.

§9064. Appeal by employer

The imposition of sanctions, other than licensing sanctions, pursuant to this chapter may be appealed by an employer pursuant to Title 5, chapter 375.

§9065. Rules; contracts

1. Rules. The Department of Public Safety and the Department of Health and Human Services shall each adopt rules necessary to achieve the purposes of this chapter. As appropriate, each department shall keep the other department informed regarding rule-making activity. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

2. Contract for services. In accordance with state laws and rules governing contracting for services, the Department of Public Safety and the Department of Health and Human Services may contract with federal and state agencies and nongovernmental entities as necessary to carry out the purposes of this chapter.

United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 105. Community Services Programs

Subchapter II-B. Child Care and Development Block Grant (Refs & Annos)

42 U.S.C.A. § 9858f

§ 9858f. Criminal background checks

Effective: November 19, 2014

(a) In general

A State that receives funds to carry out this subchapter shall have in effect--

- (1) requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of child care providers described in subsection (c)(1); and
- (2) licensing, regulation, and registration requirements, as applicable, that prohibit the employment of child care staff members as described in subsection (c).

(b) Requirements

A criminal background check for a child care staff member under subsection (a) shall include--

- (1) a search of the State criminal and sex offender registry or repository in the State where the child care staff member resides, and each State where such staff member resided during the preceding 5 years;
- (2) a search of State-based child abuse and neglect registries and databases in the State where the child care staff member resides, and each State where such staff member resided during the preceding 5 years;
- (3) a search of the National Crime Information Center;
- (4) a Federal Bureau of Investigation fingerprint check using the Integrated Automated Fingerprint Identification System; and
- (5) a search of the National Sex Offender Registry established under the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901 et seq.).

(c) Prohibitions

(1) Child care staff members

A child care staff member shall be ineligible for employment by a child care provider that is receiving assistance under this subchapter if such individual--

- (A) refuses to consent to the criminal background check described in subsection (b);
- (B) knowingly makes a materially false statement in connection with such criminal background check;
- (C) is registered, or is required 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 (42 U.S.C. 16901 et seq.); or

(D) has been convicted of a felony consisting of--

- (i) murder, as described in section 1111 of Title 18;
- (ii) child abuse or neglect;
- (iii) a crime against children, including child pornography;
- (iv) spousal abuse;
- (v) a crime involving rape or sexual assault;
- (vi) kidnapping;
- (vii) arson;
- (viii) physical assault or battery; or
- (ix) subject to subsection (e)(4), a drug-related offense committed during the preceding 5 years; or

(E) has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes: child abuse, child endangerment, sexual assault, or of a misdemeanor involving child pornography.

(2) Child care providers

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

(d) Submission of requests for background checks

(1) In general

A child care provider covered by subsection (c) shall submit a request, to the appropriate State agency designated by a State, for a criminal background check described in subsection (b), for each child care staff member (including prospective child care staff members) of the provider.

(2) Staff members

Subject to paragraph (4), in the case of an individual who became a child care staff member before November 19, 2014, the provider shall submit such a request--

- (A) prior to the last day described in subsection (j)(1); and
- (B) not less often than once during each 5-year period following the first submission date under this paragraph for that staff member.

(3) Prospective staff members

Subject to paragraph (4), in the case of an individual who is a prospective child care staff member on or after November 19, 2014, the provider shall submit such a request--

- (A) prior to the date the individual becomes a child care staff member of the provider; and
- (B) not less than once during each 5-year period following the first submission date under this paragraph for that staff member.

(4) Background check for another child care provider

A child care provider shall not be required to submit a request under paragraph (2) or (3) for a child care staff member if--

(A) the staff member received a background check described in subsection (b)--

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

(ii) while employed by or seeking employment by another child care provider within the State;

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

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

(e) Background check results and appeals

(1) Background check results

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

(2) Privacy

(A) In general

The State shall provide the results of the criminal background check to the provider in a statement that indicates whether a child care staff member (including a prospective child care staff member) is eligible or ineligible for employment described in subsection (c), without revealing any disqualifying crime or other related information regarding the individual.

(B) Ineligible staff member

If the child care staff member is ineligible for such employment due to the background check, the State will, when providing the results of the background check, include information related to each disqualifying crime, in a report to the staff member or prospective staff member.

(C) Public release of results

No State shall publicly release or share the results of individual background checks, except States may release aggregated data by crime as listed under subsection (c)(1)(D) from background check results, as long as such data is not personally identifiable information.

(3) Appeals

(A) In general

The State shall provide for a process by which a child care staff member (including a prospective child care staff member) may appeal the results of a criminal background check conducted under this section to challenge the accuracy or completeness of the information contained in such member's criminal background report.

(B) Appeals process

The State shall ensure that--

(i) each child care staff member shall be given notice of the opportunity to appeal;

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

(iii) the appeals process is completed in a timely manner for each child care staff member.

(4) Review

The State may allow for a review process through which the State may determine that a child care staff member (including a prospective child care staff member) disqualified for a crime specified in subsection (c)(1)(D)(ix) is eligible for employment described in subsection (c)(1), notwithstanding subsection (c). The review process shall be consistent with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

(5) No private right of action

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

(f) Fees for background checks

Fees that a State may charge for the costs of processing applications and administering a criminal background check as required by this section shall not exceed the actual costs to the State for the processing and administration.

(g) Transparency

The State must ensure that the policies and procedures under this section are published on the Web site (or otherwise publicly available venue in the absence of a Web site) of the State and the Web sites of local lead agencies.

(h) Construction

(1) Disqualification for other crimes

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

(2) Rights and remedies

Nothing in this section shall be construed to alter or otherwise affect the rights and remedies provided for child care staff members residing in a State that disqualifies individuals as child care staff members for crimes not specifically provided for under this section.

(i) Definitions

In this section--

(1) the term "child care provider" means a center-based child care provider, a family child care provider, or another provider of child care services for compensation and on a regular basis that--

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

(B) is licensed, regulated, or registered under State law or receives assistance provided under this subchapter; and

(2) the term "child care staff member" means an individual (other than an individual who is related to all children for whom child care services are provided)--

(A) who is employed by a child care provider for compensation; or

(B) whose activities involve the care or supervision of children for a child care provider or unsupervised access to children who are cared for or supervised by a child care provider.

(j) Effective date

(1) In general

A State that receives funds under this subchapter shall meet the requirements of this section for the provision of criminal background checks for child care staff members described in subsection (d)(1) not later than the last day of the second full fiscal year after November 19, 2014.

(2) Extension

The Secretary may grant a State an extension of time, of not more than 1 fiscal year, to meet the requirements of this section if the State demonstrates a good faith effort to comply with the requirements of this section.

(3) Penalty for noncompliance

Except as provided in paragraphs (1) and (2), for any fiscal year that a State fails to comply substantially with the requirements of this section, the Secretary shall withhold 5 percent of the funds that would otherwise be allocated to that State in accordance with this subchapter for the following fiscal year.

CREDIT(S)

(Pub.L. 97-35, Title VI, § 658H, as added Pub.L. 113-186, § 7, Nov. 19, 2014, 128 Stat. 1990.)

42 U.S.C.A. § 9858f, 42 USCA § 9858f
Current through P.L. 114-165.

End of Document

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 98

[Docket Number ACF-2015-0011]

RIN 0970-AC67

Child Care and Development Fund (CCDF) Program

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Department of Health and Human Services, Administration for Children and Families, proposes to amend the Child Care and Development Fund (CCDF) regulations. This proposed rule makes changes to CCDF regulations to detail provisions of the Child Care and Development Block Grant Act of 2014 in order to protect the health and safety of children in child care; help parents make informed consumer choices and access information to support child development; provide equal access to stable, high quality child care for low-income children; and enhance the overall quality of child care and the early childhood workforce.

DATES: In order to be considered, written comments on this proposed rule must be received on or before February 22, 2016.

ADDRESSES: You may submit comments, identified by docket number ACF-2015-0011 and/or RIN number 0970-AC67, by either of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Submit comments to the Office of Child Care, Administration for Children and Families, 330 C Street SW., Washington, DC 20201, Attention: Office of Child Care Policy Division.

Instructions: All submissions received must include the agency name and docket number or RIN number for this rulemaking. To ensure we can effectively respond to your comment(s), clearly identify the issue(s) on which you are commenting. Provide the page number, identify the column, and cite the relevant paragraph/section from the Federal Register document, (e.g., On page 10999, second column, § 98.20(a)(1)(i)). All comments received are a part of the public record and will be posted for public viewing on www.regulations.gov, without change. That means all personal identifying information (such as name or address)

will be publicly accessible. Please do not submit confidential information, or otherwise sensitive or protected information. We accept anonymous comments. If you wish to remain anonymous, enter "N/A" in the required fields.

FOR FURTHER INFORMATION CONTACT: Andrew Williams, Office of Child Care, 202-205-0750 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Overview. On November 19, 2014, President Barack Obama signed the Child Care and Development Block Grant (CCDBG) Act of 2014 (Pub. L. 113-186) into law following its passage in the 113th Congress. The CCDBG Act (to be codified, as amended, at 42 U.S.C. 9858 *et seq.*, and hereinafter referred to as the "Act") (along with Section 418 of the Social Security Act (42 U.S.C. 618)) authorizes the Child Care and Development Fund (CCDF), which is the

primary Federal funding source devoted to providing low-income families who are working or participating in education or training activities with help paying for child care and improving the quality of child care for all children.

The bipartisan CCDBG Act of 2014 made sweeping statutory changes that will require significant reforms to State and Territory CCDF programs to raise the health, safety, and quality of child care and provide more stable child care assistance to families. It expanded the purposes of the CCDF for the first time since 1996, ushering in a new era for child care in this country. Since 1996, a significant body of research has demonstrated the importance of early childhood development and how stable, high quality early experiences can positively influence that development and contribute to children's futures. In particular, low-income children stand to benefit the most from a high quality early childhood experience. Research has also shown the important role of child care financial assistance in helping parents afford reliable child care in order to get and keep stable employment or pursue education. The reauthorized law recognizes CCDF as an integral program to promote both the healthy development of children and parents' pathways to economic stability.

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

Purpose of this Regulatory Action. The majority of current CCDF regulations at 45 CFR parts 98 and 99 were last revised in 1998 (with the exception of some more recent updates related to State match and error reporting). This proposed regulatory action is needed to update the regulations to accord with the reauthorized law and to update CCDF regulations to reflect what has been learned since 1998 about child care quality and child development, and changes in the law. The purposes of the law, as revised by Congress, have guided regulation development.

Monitoring in-home care. At § 98.42(b)(2)(iv) we propose that Lead Agencies have the option to “develop alternate monitoring requirements for care provided in the child’s home that are appropriate to the setting.” A child’s home may not meet the same standards as other child care facilities and this provision gives Lead Agencies flexibility in conducting a more streamlined and targeted inspection. This flexibility cannot be used to bypass the monitoring requirement altogether. We are actively soliciting comments on this proposal.

Licensing inspector qualifications. Section 658E(c)(2)(K)(i)(I) of the Act requires Lead Agencies to “ensure that individuals who are hired as licensing inspectors in the State are qualified to inspect those child care providers and facilities and have received training in related health and safety requirements, and are trained in all aspects of the State’s licensure requirements.” We propose restating this statutory requirement at § 98.42(b)(1) and clarify that such training should include, at a minimum, the areas listed in § 98.41 as well as all aspects of State, Territory, or Tribal licensure requirements. As inspectors must monitor the health and safety requirements in § 98.41, it follows that the training of inspectors should include these standards.

We also propose to clarify that inspectors be trained in health and safety requirements “appropriate to provider setting and age of children served.” Inspecting care for children of different ages, and in different settings, may require specialized training in order to understand differences in care. We also encourage Lead Agencies to consider the cultural and linguistic diversity of caregivers when addressing inspector competencies and training. *Caring for Our Children: National Health and Safety Performance Standards* recommends that licensing inspectors have “pre-qualified” education and experience about the types of child care they will be assigned to inspect and in the concepts and principles of licensing and inspections. When hired, the standards recommend at least 50 clock hours of competency-based orientation training and 24 annual clock hours of competency-based continuing education.

Licensing Inspector-Provider Ratios. Section 658E(c)(2)(K)(i)(II) of the Act requires Lead Agencies to have policies in place to ensure the ratio of inspectors to providers is sufficient to ensure visits occur in accordance with Federal, State, and local law. We expand on this requirement at § 98.42(b)(3) to ensure applicability with Federal, State,

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

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

The Lead Agency may, at their option, have providers report to a “designated entity” as proposed at § 98.16(ff), which offers some flexibility on the implementation of the requirement. If there are existing structures in place that look at child morbidity, the Lead Agency would be able to work within that structure to establish a designated entity. The reporting mechanism can be tailored to fit with existing policies and procedures. Our purpose is the reporting of incidents so that the Lead Agency and other responsible entities can make the appropriate response.

Exemption for relative providers. Current regulations at § 98.41(e) allow Lead Agencies to exempt relative caregivers, including grandparents, great-grandparents, siblings (if such providers live in a separate residence), and aunts or uncles from health and

safety and monitoring requirements described in this section. This relative exemption remains at § 98.42(c). We propose adding language that would require Lead Agencies, if they choose to exclude such providers from any of these requirements, to “provide a description and justification in the CCDF Plan, pursuant to § 98.16(l), of requirements, if any, that apply to these providers.” Asking Lead Agencies to describe and justify relative exemptions from health and safety requirements and monitoring would provide accountability that any exemptions are issued in a thoughtful manner that does not endanger children.

Criminal Background Checks (Section 98.43)

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

Comprehensive background checks have been a long-standing ACF policy priority. According to an analysis of the FY 2014–2015 CCDF Plans, all States and Territories require that child care center staff undergo at least one type of criminal background check, and approximately 44 require a FBI fingerprint check for centers. Fifty-four States and Territories require family child care providers to have a criminal background check, and approximately 42 require an FBI fingerprint check. For some States and Territories, these requirements are currently limited to licensed providers, rather than all providers that serve children receiving CCDF subsidies.

Background check implementation. The statute requires that States “shall have in effect requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of

child care providers. . . .” Having procedures in place to conduct background checks on child care staff members will require coordination across public agencies. The CCDF Lead Agency must work with other agencies, such as the Child Welfare office and the State Identification Bureau, to ensure the checks are conducted in accordance with the law. In recognition of this effort, we propose to add to the law’s language at § 98.43(a)(1) to clarify that these requirements involve multiple State, Territorial, or Tribal agencies.

Tribes and background checks. ACF is proposing that Tribal Lead Agencies be subject to the background check requirements described in this section, with some flexibility as discussed later in subpart I.

Applicability of background checks requirements. The statutory language identifying which providers must conduct background checks on child care staff members is unclear. It is our interpretation of the statute that all licensed, regulated, and registered child care providers and all child care providers eligible to deliver CCDF services (with the exception of those individuals who are related to all children for whom child care services are provided) are subject to the Act’s background check requirements. At § 98.43(a)(1)(i), we propose to apply this requirement to all licensed, regulated, or registered providers, regardless of whether they receive CCDF funds and all license-exempt CCDF providers (with the exception of individuals who are related to all children for whom child care services are provided).

We acknowledge that the statutory language is not clear about the universe of staff and providers subject to the background check requirement; however, we believe that our interpretation aligns with the general intent of the statute to improve the overall safety of child care services and programs. Furthermore, there is justification for applying this requirement in the broadest terms for two important reasons. First, all parents using child care deserve this basic protection of having confidence that those who are trusted with the care of their children do not have criminal backgrounds that may endanger the well-being of their children. Second, limiting those child care providers who are subject to background checks has the potential to severely restrict parental choice and equal access for CCDF children, two fundamental tenets of CCDF. If not all child care providers are subject to comprehensive background checks, providers could opt to not serve CCDF children, thereby restricting

access. Creating a bifurcated system in which CCDF children have access to only a portion of child care providers who meet applicable standards would be incongruous with the purposes of the CCDBG Act and would not serve to advance the important goal of serving more low-income children in high quality care. We would like to invite comment on the anticipated impacts of requiring background checks for child care staff members of all licensed, regulated, and registered child care providers and all child care providers eligible to deliver CCDF services (other than an individual who is related to all children for whom child care services are provided) based on current State practices and policies.

The law defines a child care staff member as someone (other than an individual who is related to all children for whom child care services are provided) who is employed by the child care provider for compensation or whose activities involve unsupervised access to children who are cared for by the child care provider. We are proposing at § 98.43(a)(2)(ii) to include contract and self-employed individuals in the definition of child care staff members as they may have direct contact with children. We propose to require individuals, age 18 or older, residing in a family child care home be subject to background checks, as well as the disqualifying crimes and appeals processes. We asked for comment on individuals 18 or older in family child care homes receiving background checks in the 2013 NPRM and received support from commenters who agreed this was important for ensuring the safety of children in child care. Forty-three States require some type of background check of family members 18 years of age or older that reside in the family child care home (*Leaving Child Care to Chance: NACCRRA’s Ranking of State Standards and Oversight for Small Family Child Care Homes*, National Association of Child Care Resource and Referral Agencies, 2012).

We are asking for comment on whether additional individuals in the family child care home should be subject to the background check requirements. Volunteers who have not had background checks should not be left with children unsupervised. We encourage Lead Agencies to require that volunteers who have not had background checks be easily identified by children and parents, for example through visible name tags or clothing.

Components of a criminal background check. The CCDBG Act outlines five components of a criminal background check: (1) A search of the State criminal

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

After extensive consultation with the FBI and other subject-matter experts, we propose technical changes to address duplication among these components. We propose to consolidate the list of required components in the regulations at § 98.43(b) to:

- A search of the National Crime Information Center’s National Sex Offender Registry;
- A Federal Bureau of Investigation fingerprint check using Next Generation Identification; and
- A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where such staff member resided during the preceding 5 years:
 - State criminal registry or repository using fingerprints;
 - State sex offender registry or repository; and
 - State-based child abuse and neglect registry and database.

The National Crime Information Center (NCIC) is a law enforcement tool consisting of 21 files, including the National Sex Offender Registry (NSOR). The 21 files contain seven property files that help track missing property and 14 person files with information relevant to law enforcement (e.g., missing persons or wanted persons). State criminal records are not stored in the NCIC. We believe that the only file with information that would aid in determining whether an individual could be hired as a child care employee is the NSOR. The other files do not appear to contain information on the disqualifying crimes listed in the statute. Further, the FBI has advised that a general search of the NCIC database will return records that cannot be made privy to individuals outside of law enforcement (i.e. the Known or Appropriately Suspected Terrorist File). Therefore, we are clarifying that a check of the NCIC will only need to search the NSOR file.

ACF has identified a number of potential challenges in requiring an NCIC check. It is our understanding that

an NCIC check has not been included in any other non-criminal background check law applicable to States to date and so resolving these challenges is in many ways uncharted territory. First, access to the NCIC, including, in some cases, physical access to computers capable of searching the NCIC, is limited, and it is primarily available to law enforcement agencies. Therefore, to conduct this check, Lead Agencies will have to partner with a State, Tribal, or local law enforcement agency. Because the NCIC has not been used this way, we do not know of examples of other State agencies partnering in this way or what such partnerships would entail. We also do not know the implications for Lead Agencies that use third-party vendors to conduct background checks. Third-party vendors do not have authorized access to conduct name-based checks for noncriminal justice purposes. Secondly, the NCIC is a name-based check, rather than fingerprint based. Hit verification of name-based checks may be labor intensive, especially when searching for individuals with common names. While we are concerned about the burden on Lead Agencies to conduct this check, we recognize that the NCIC was included in the statute, and we are concerned about the potential for missing sex offenders by not conducting a comprehensive search. We are very interested in comments on the feasibility of a search of the NCIC as proposed and the level of burden required by Lead Agencies.

The FBI fingerprint check using Next Generation Identification (NGI) (formerly the Integrated Automated Fingerprint Identification System-IAFIS) will provide a person's criminal history record information and will search ten of the NCIC person files, including the NSOR, providing certain identifying information has been entered into the NSOR record. The change in the language from IAFIS to NGI is a technical change and should not impact Lead Agency background check processes. The NGI is the biometric identification system that has now replaced the older IAFIS.

Based on consultation with the FBI, we understand there is significant overlap between the FBI fingerprint check and the NSOR check (via the NCIC), yet there are a number of individuals in the NSOR who are not identified by solely conducting an FBI fingerprint search. The FBI links fingerprint records to the NSOR records via a Universal Control Number, but a small percentage of cases are missing the fingerprints. In some cases, individuals were not fingerprinted at the time of arrest, or the prints were

rejected by the FBI for poor quality. This small percentage of records can be accessed through a name-based search of the NCIC, and a number of those individuals may also be identified by a search of the State sex offender registries.

Although we do not believe it is required, we also encourage an additional search of the National Sex Offender Public Web site (NSOPW) at www.nsopw.gov. The NSOPW acts as a pointer for each State, Territory, and Tribally run sex offender registry. The registries are updated and kept in real time and may be searched by name, but other identifying information may be limited in these records.

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

We are also proposing to require that the search of the State criminal records include a fingerprint check. The 2013 NPRM also proposed to require States to use a fingerprint check when checking the State's criminal history records. Fingerprint searches reduce instances of false positives and also help capture records filed under aliases. We do not believe that a fingerprint search of the State repository would be an additional burden. States can use the same set of fingerprints to check both the State criminal history check and the FBI fingerprint check.

In addition to gaps in the State criminal records, there are a number of instances in which an individual may be listed in the State sex offender registry and not in NSOR, and vice versa. For example, some States have statutes that disallow the removal of offenders, regardless of offender status, while in the NSOR the agency owning the record is required to remove the offender from active status once his/her sentencing is completed. In addition, federal, juvenile, and international sex offender records may be included in the NSOR; whereas, State laws may prohibit the use of this information in the State

sex offender registry. Because of these discrepancies, we believe that it is important to check the State sex offender registries in addition to an FBI fingerprint check and a check of the NCIC NSOR.

The final component of a comprehensive background check included in the new law is the search of the State child abuse and neglect registries. We recognize that implementation of this critically important component of protecting children will vary across States. Every State has procedures for maintaining records of child abuse and neglect, but only 41 States, the District of Columbia, American Samoa, Guam, and Puerto Rico require central registries by statute. The type of information contained in central registries and department records differ from State to State. Some States maintain all investigated reports of abuse and neglect, while others maintain only substantiated reports. The length of time the information is held and the conditions for expunction also vary. Access to information maintained in registries and departments also varies by State and some States may need to make internal changes to meet the requirement to search the State's own child abuse and neglect registry. Approximately 31 States and the District of Columbia allow or require a check of the central registry or department records for individuals applying to be child or youth care providers. (*Establishment and Maintenance of Central Child Abuse Registries*, Children's Bureau, July 2014).

The law requires States to check the State criminal registry or repository; sex offender registry or repository; and child abuse and neglect registry and database for every State that a child care staff member has lived in for the past five years. Based on our preliminary conversations with States, the requirement to conduct cross-state background checks of the three different repositories is another unexplored area for Lead Agencies. We have heard concerns about how to obtain and interpret the results and protect the privacy of individuals. We are asking for comments on whether States have any best practices or strategies to share and how ACF can support Lead Agencies in meeting the cross-State background check requirements.

In particular, we have heard concern about cross-State checks of the child abuse and neglect registries. We understand that States have developed their own requirements for submitting requests, and there is not a uniform method of responding. In addition,

some States prohibit the use of child abuse and neglect registries for employment purposes. As the statute requires cross-state checks, we are soliciting comments on how States will meet this requirement and respond to other State requests.

The cross-State background check requirement has similarities to language at Section 152(a)(1)(C) of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 671(a)(1)(C)) for foster or adoptive parents: “the State shall check any child abuse and neglect registry maintained by the State for information on any prospective foster or adoptive parent and on any other adult living in the home of such a prospective parent, and request any other State in which any such prospective parent or other adult has resided in the preceding five years, to enable the State to check any child abuse and neglect registry maintained by such State for such information, before the prospective foster or adoptive parent may be finally approved for placement of a child . . .” We are requesting comment from States about whether these systems for foster or adoptive parents could be used to support cross-State background checks for prospective child care staff members as well. It is impossible to know exactly how many individuals will require a check from another State. As discussed later in the Regulatory Impact Analysis, Census data on geographic mobility shows an out of state mobility rate of approximately 2 percent for employed adults.

While ACF is still working to understand how we can support cross-State background checks, this rule proposes a couple of provisions to help create transparency around the process. At § 98.43(a)(1)(iii), we propose that Lead Agencies must have “requirements, policies, and procedures in place to respond as expeditiously as possible to other States’, Territories’, and Tribes’ requests for background check results in order to accommodate the 45 day timeframe.” We also propose that Lead Agencies include the process by which another Lead Agency may submit a background check request on the Lead Agency’s consumer education Web site, along with all of the other background check policies and procedures. In addition, this proposed rule would require at § 98.16(o) that Lead Agencies describe in their Plans the procedures in place to respond to other State, Territory, or Tribal requests for background check results within the 45 day timeframe. ACF will use this question in the Plan to help ensure compliance with the background check requirements in the law. These

proposals are intended to minimize confusion about the correct contact information for background check requests and ensure that there are processes in place for timely responses.

Disqualifications. The law specifies a list of disqualifications for child care providers and staff members who are serving children receiving CCDF assistance. Unlike the other requirements in the background check section of the statute, the restriction against employing ineligible child care staff members would only apply to child care providers receiving CCDF assistance. These employment disqualifications specifically do not apply to child care staff members of licensed providers who do not serve children receiving CCDF subsidies. We believe this gives Lead Agencies the flexibility to impose similar restrictions upon child care providers who are licensed, regulated, or registered and do not receive CCDF funds. These proposed disqualification requirements appear at §§ 98.43(a)(1)(ii) and 98.43(c). We are not proposing any additional disqualifications.

The Act did not include child abuse and neglect findings in the list of disqualifying crimes. Because there is so much variation in the information maintained in each registry, we are allowing Lead Agency flexibility in how to handle findings on the child abuse and neglect registries. We believe that the value of findings in these registries is in the identification of patterns of negative behavior.

Even though the law includes a specific list of disqualifications, it also allows Lead Agencies to prohibit individuals’ employment as child care staff members based on their convictions for other crimes that may impact their ability to care for children. If a Lead Agency does disqualify an individual’s employment, they must, at a minimum, give the individual the same rights and remedies described in § 98.43(e). This language from Section 658H(h) of the Act is restated in the proposed rule at § 98.43(h), and we have not proposed any changes. We strongly encourage Lead Agencies that chose to consider other crimes as disqualifying crimes for employment to ensure that a robust waiver and appeals process is in place. A waiver and appeals process should conform to the recommendations of the U.S. Equal Employment Opportunity Commission, including the ability to waive findings based on factors as inaccurate information, certificate of rehabilitation, age when offense was committed, time since offense, and whether the nature of offense is a threat to children. (U.S.

Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). Moreover, we strongly discourage Lead Agencies from considering additional disqualifying crimes for other household members in family child care homes.

Lead Agencies may also consider requiring applicant self-disclosure for child care staff in order to avoid unnecessary checks on individuals who disclose information that would preclude them from passing a background check.

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

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

Section 658H(d)(4) of the Act specifies instances in which a child care provider does *not* need to submit a background check for a staff member. Staff members do not need background check requests if they satisfy three requirements: (1) The staff member received a background check that included the five required parts within

the past five years while employed by, or seeking employment by, another child care provider in the State; (2) the State gave a qualifying result to the first provider for the staff member; and (3) the staff member is employed by a child care provider within the State or has been separated from employment from a child care provider for less than 180 days. These requirements are included in the proposed rule at § 98.43(d)(3). Lead Agencies should consider how to facilitate tracking this type of information and maintaining records of individual providers so that unnecessary checks are not repeated.

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

In recognition of the possible logistical constraints and barriers to parents accessing the care they need, ACF proposes to allow prospective staff members to provide services to children on a provisional basis, while the background checks are being processed. We are proposing at § 98.43(d)(4) that a prospective staff member may begin work for a child care employer after a background check request has been submitted as long as: The staff member is continually supervised by an individual who has already completed the background check requirements. Prospective staff members in family child care homes may work under the continual supervision of a family child care provider, or other caregiver, who has completed the required checks. We encourage Lead Agencies to require child care providers to inform parents about background check policies and any provisional hires they may have. Allowing provisional hiring does offer more flexibility, but it is also important that Lead Agencies ensure that any provisional status is limited in scope and implemented with transparency.

Completion of Background Checks. Once a child care provider submits a background check request, Section 658H(e)(1) of the law requires the Lead Agency to carry out the request as

quickly as possible. The process must not take more than 45 days after the request was submitted. These requirements are included in the proposed rule at § 98.43(e)(1). While we expect checks to be completed in the timeframe established by the law, we propose allowing Lead Agencies discretion on procedures in the event that all of the components of a background check are not complete within 45 days.

We have heard from Lead Agencies that are concerned about not being able to meet the 45 day timeframe. Lead Agencies must work together with the relevant State/Territory entities to minimize delays. After the FBI receives electronic copies of fingerprints, they typically turn around background check results within 24 hours. There can be delays when the submitted fingerprint image quality is poor. Some States use hard copy fingerprints that need to be made electronic for submission to the FBI, which can lead to delays. We encourage Lead Agencies to adopt electronic fingerprinting, which allows for background check results to be processed more quickly.

We encourage Lead Agencies to leverage existing resources to build and automate their background check systems. One potential resource for States is the National Background Check Program (NBCP), as established by the Patient Protection and Affordable Care Act, which aims to create a nationwide system for conducting comprehensive background checks on applicants for employment in the long-term care (LTC) industry. The NBCP is an open-ended funding opportunity that can award up to \$3 million dollars (with a \$1 million dollar State match) to each State to support building State background check infrastructure. The Centers for Medicare & Medicaid Services (CMS) administers the NBCP and since 2010, has awarded nearly \$57 million in grant funds to participating States to design, implement, and operate background check programs that meet CMS's criteria.

Privacy of Results. Section 658H(e)(2) of the Act requires the Lead Agency to make determinations regarding a child care staff member's eligibility for employment. The Lead Agency must provide the results of the background check to the child care provider in a statement that indicates only whether the staff member is eligible or ineligible, without revealing specific disqualifying information. If the staff member is ineligible, the Lead Agency must provide information about each disqualifying crime specific to the staff member, as well as information on how

to appeal the results of the background check to challenge the accuracy and completeness. We have not proposed any additions to the statutory language, and this requirement is found at § 98.43(e)(2) of the proposed regulations.

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

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

Appeal and Review Process. Section 658H(e)(3) of the Act requires Lead Agencies to have a process for child care staff members (including prospective staff members) to appeal the results of a background check by challenging the accuracy or completeness of the information contained in their criminal

background report. An appeals process is an important aspect of ensuring due process for providers. According to statute, each child care staff member should be given notice of the opportunity to appeal and receive instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of their background report. The appeals process must be completed in a timely manner. The statute's appeal requirements appear at § 98.43(e)(3) of the proposed rule. We are not proposing any additional requirements here.

Section 658H(e)(4) of the Act, which is reiterated at § 98.43(e)(4) of the proposed rule, allows Lead Agencies to allow for a review process through which the Lead Agency may determine that a child care staff member (including a prospective child care staff member) convicted of a disqualifying drug-related offense, committed during the preceding five years, may be eligible for employment by a provider receiving CCDF funds. The review process must be consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), which prohibits employment discrimination based on race, color, religion, sex and national origin. Lead Agencies may consider in their review process the nature of the conviction, age at the time of the conviction, length of time since the conviction, and relationship of the conviction to the ability to care for children, or other extenuating circumstances. Lead Agencies can consult the U.S. Equal Employment Opportunity Commission's guidance on the consideration of criminal records in employment decisions to ensure compliance with Title VII's prohibition against employment discrimination (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). Finally, Section 658H(e)(5) of the Act notes that "nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section."

Background Check Fees. Lead Agencies have the flexibility to determine who pays for background checks (e.g., the provider, the applicant, or the Lead Agency) but Section 658H(f) of the Act requires that the fees charged for completing a background check may not exceed the actual cost of processing and administration. The cost of conducting background checks varies

across States and Territories. The FBI fee is \$14.75 to conduct a national fingerprint check, and, according to CCDF State Plan data, most Lead Agencies report low costs to check State registries.

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

Consumer education Web site. The statute requires States and Territories to ensure that their background check policies and procedures are published on their Web sites. These policies and procedures should be included on the consumer education Web site discussed in detail in subpart D at § 98.33(a). We propose that States and Territories also include information on the process by which a child care provider or other State or Territory may submit a background check request in order to increase transparency about the process.

Training and Professional Development (Section 98.44)

Section 658E(c)(2)(G) of the Act requires Lead Agencies to describe in their CCDF Plan their training and professional development requirements designed to enable child care providers to promote the social, emotional, physical and cognitive development of children and to improve the knowledge and skills of caregivers, teachers, and directors in working with children and their families, which are applicable to child care providers receiving CCDF assistance.

At § 98.44 we elaborate on the statute's provisions for professional development at Section 658E(c)(2)(G), provider training on health and safety at Section 658E(c)(2)(I)(i)(XI), and provider qualifications at Section 658E(c)(2)(H)(i)(III), as a cohesive approach to training and professional development. Our proposed regulations build on the pioneering work of States on professional development and reflect current State policies.

Caregiver, Teacher and Director. As discussed earlier, we have added definitions for "teacher" and "director" to § 98.2. We believe adding these terms promotes professional recognition for early childhood and school-age care teachers and directors and aligns with terms used in the field. The Act uses the terms "caregiver" and "provider" and we maintain the use of those terms throughout this section as appropriate. We also use the terms "teacher" and "director" to recognize the different professional roles and their differentiated needs for training and professional development. For example, teachers provide direct services to children and need knowledge of curricula and health, safety, and developmentally appropriate practices. In addition, directors need skills to manage and support staff and perform other administrative duties.

Framework and progression of professional development. At § 98.44(a), we propose that Lead Agencies describe in their CCDF Plan the State or Territory framework for training, professional development and postsecondary education based on statutory language at Section 658E(c)(2)(G)(i). The statute requires the framework to be developed in consultation with the State Advisory Council on Early Childhood Education and Care (SAC). We propose at § 98.44(a)(1) that frameworks be developed in consultation with SACs or similar coordinating body. SAC grants, funded by the American Recovery and Reinvestment Act, along with Race to the Top-Early Learning Challenge grants, leveraged CCDF funds to develop and implement comprehensive professional development systems. An inclusive process for the design of a professional development system with a range of stakeholders (child care resource and referral agencies, State/Territory and local professional associations, entities that grant credentials and certificates, higher education institutions, workforce registries, QRIS administrators, for example) will result in a more effective and credible framework.

Section 658E(c)(2)(G)(ii)(II) allows the Lead Agency to "engage training providers in aligning training opportunities with the State's training framework," which we restate in the proposed rule at § 98.44(a)(2). We encourage the participation of the full range of training and professional development providers, including higher education and entities that grant certificates and credentials in early childhood education, to align with the framework. Training and professional development may be provided through

(e) Lead Agencies shall certify that caregivers, teachers, and directors of child care providers within the State or service area will comply with the State's, Territory's, or Tribe's child abuse reporting requirements as required by section 106(b)(2)(B)(i) of the Child Abuse and Prevention and Treatment Act (42 U.S.C. 5106a(b)(2)(B)(i)) or other child abuse reporting procedures and laws in the service area.

■ 21. Revise § 98.42 to read as follows:

§ 98.42 Enforcement of licensing and health and safety requirements.

(a) Each Lead Agency shall certify in the Plan that procedures are in effect to ensure that child care providers of services for which assistance is made available in accordance with this part, within the area served by the Lead Agency, comply with all applicable State, local, or tribal health and safety requirements, including those described in § 98.41.

(b) Each Lead Agency shall certify in the Plan it has monitoring policies and practices applicable to all child care providers and facilities eligible to deliver services for which assistance is provided under this part. The Lead Agency shall:

(1) Ensure individuals who are hired as licensing inspectors are qualified to inspect those child care providers and facilities and have received training in related health and safety requirements appropriate to provider setting and age of children served. Training shall include, but is not limited to, those requirements described in § 98.41, and all aspects of the State, Territory, or Tribe's licensure requirements;

(2) Require inspections of child care providers and facilities, performed by licensing inspectors (or qualified inspectors designated by the Lead Agency), as specified below:

(i) For licensed child care providers and facilities:

(A) Not less than one pre-licensure inspection for compliance with health, safety, and fire standards, and

(B) Not less than annually an unannounced inspection for compliance with all child care licensing standards, which shall include an inspection for compliance with health and safety, (including, but not limited to, those requirements described in § 98.41) and fire standards (inspectors may inspect for compliance with all three standards at the same time); and

(ii) For license-exempt child care providers and facilities, an annual inspection for compliance with health and safety (including, but not limited to,

those requirements described in § 98.41), and fire standards;

(iii) Coordinate, to the extent practicable, monitoring efforts with other Federal, State, and local agencies that conduct similar inspections.

(iv) The Lead Agency may, at its option:

(A) Use differential monitoring or a risk-based approach to design annual inspections, provided that the contents covered during each monitoring visit is representative of the full complement of health and safety requirements;

(B) Develop alternate monitoring requirements for care provided in the child's home that are appropriate to the setting; and

(3) Ensure the ratio of licensing inspectors to such child care providers and facilities is maintained at a level sufficient to enable the State, Territory, or Tribe to conduct effective inspections on a timely basis in accordance with the applicable Federal, State, Territory, Tribal, and local law;

(4) Require child care providers to report to a designated State, Territorial, or Tribal entity any serious injuries or deaths of children occurring in child care.

(c) For the purposes of this section and § 98.41, Lead Agencies may exclude grandparents, great grandparents, siblings (if such providers live in a separate residence), aunts, or uncles, from the term "child care providers." If the Lead Agency chooses to exclude these providers, the Lead Agency shall provide a description and justification in the CCDF Plan, pursuant to § 98.16(l), of requirements, if any, that apply to these providers.

§§ 98.43 through 98.47

[Redesignated as §§ 98.45 through 98.49]

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

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

§ 98.43 Criminal background checks

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

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

(ii) Licensing, regulation, and registration requirements, as applicable,

that prohibit the employment of child care staff members as described in paragraph (c) of this section; and

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

(2) In this section:

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

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

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

(ii) Child care staff member means an individual age 18 and older (other than an individual who is related to all children for whom child care services are provided):

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

(B) Whose activities involve the care or supervision of children for a child care provider or unsupervised access to children who are cared for or supervised by a child care provider; or

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

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

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

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

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

(i) State criminal registry or repository using fingerprints;

(ii) State sex offender registry or repository; and

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

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

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

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

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

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

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

(B) Child abuse or neglect;

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

(D) Spousal abuse;

(E) A crime involving rape or sexual assault;

(F) Kidnapping;

(G) Arson;

(H) Physical assault or battery; or

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

(v) Has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes: child abuse, child endangerment, sexual assault, or of a misdemeanor involving child pornography.

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

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

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

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

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

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

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

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

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

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

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

(4) A prospective staff member may begin work for a child care provider described in paragraph (a)(2)(i) of this section after the provider has submitted such a request if the staff member is supervised at all times by an individual who received a qualifying result on a background check described in paragraph (b) of this section within 5 years of the request.

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

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

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

(ii) If the child care staff member is ineligible for such employment due to the background check, the State, Territory, or Tribe will, when providing the results of the background check, include information related to each disqualifying crime, in a report to the staff member or prospective staff member.

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

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

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

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

(iii) The appeals process is completed in a timely manner for each child care staff member.

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

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

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

(g) The State or Territory must ensure that its policies and procedures under § 98.43, including the process by which a child care provider or other State may submit a background check request, are published in the Web site of the State or Territory as described in § 98.33(a) and the Web site of local lead agencies.

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

(2) Nothing in this section shall be construed to alter or otherwise affect the

rights and remedies provided for child care staff members residing in a State that disqualifies individuals as child care staff members for crimes not specifically provided for under this section.

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

§ 98.44 Training and professional development.

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

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

(2) May engage training providers in aligning training opportunities with the State's framework;

(3) To the extent practicable, addresses professional standards and competencies, career pathways, advisory structure, articulation, and workforce information and financing;

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

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

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

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

(b) The Lead Agency must describe in the Plan its established requirements for pre-service or orientation (*i.e.*, to be completed within three months) and ongoing professional development for caregivers, teachers, and directors of child care providers of services for which assistance is provided under the CCDF that, to the extent practicable, align with the State framework:

(1) Accessible pre-service or orientation, training in health and safety standards, addressing each of the requirements relating to matters described in § 98.41(a)(1)(i) through (xi) and, at the Lead Agency option, in § 98.41(a)(1)(xii), and child development, including the major domains (cognitive, social, emotional, physical development and approaches to learning) appropriate to the age of children served;

(2) Ongoing, accessible professional development, aligned to a progression of professional development, including the minimum annual requirement for hours of training and professional development for eligible caregivers, teachers and directors that:

(i) Maintains and updates health and safety training standards described in Sec. 98.41(a)(1)(i) through (xi), and at the Lead Agency option, in § 98.41(a)(1)(xii);

(ii) Incorporates knowledge and application of the State's early learning and developmental guidelines for children birth to kindergarten (where applicable);

(iii) Incorporates social-emotional behavior intervention models for children birth through school-age, which may include positive behavior intervention and support models including preventing and reducing expulsions and suspensions of preschool-aged and school-aged children;

(iv) To the extent practicable, are appropriate for a population of children that includes:

(A) Different age groups;

(B) English learners;

(C) Children with developmental delays and disabilities; and

(D) Native Americans, including Indians, as the term is defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) (including Alaska Natives within the meaning of that term), and Native Hawaiians (as defined in section 7207 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7517));

(v) To the extent practicable, awards continuing education units or is credit-bearing; and

(vi) Shall be accessible to caregivers, teachers, and directors supported through Indian tribes or tribal organizations that receive assistance under this subchapter.

■ 25. Amend newly redesignated § 98.45 by:

■ a. Revising paragraph (b);

■ b. Redesignating paragraphs (c) through (e) as (g) through (i);

■ c. Revising newly redesignated paragraphs (g) and (i); and

■ d. Adding paragraphs (c), (d), (e), (f), (j), (k), (l), and (m).

The revisions and additions read as follows:

§ 98.45 Equal access.

* * * * *

(b) The Lead Agency shall provide in the Plan a summary of the data and facts relied on to determine that its payment rates ensure equal access. At a minimum, the summary shall include facts showing:

(1) How a choice of the full range of providers is made available;

(2) How payment rates are adequate and have been established based on the most recent market rate survey or alternative methodology conducted in accordance with paragraph (c) of this section;

(3) How base payment rates support health, safety, and quality in accordance with paragraphs (f)(1)(i) and (f)(2)(ii) of this section;

(4) How payment rates provide parental choice for families receiving CCDF subsidies to access care that is of comparable quality to care that is available to families with incomes above 85 percent of State Median Income;

(5) How the Lead Agency took the cost of higher quality into account in accordance with paragraph (f)(2)(iii) of this section;

(6) How copayments based on a sliding fee scale are affordable, as stipulated at paragraph (k) of this section;

(7) How the Lead Agency's payment practices support equal access to a range of providers by providing stability of funding and encouraging more child care providers to serve children receiving CCDF subsidies, in accordance with paragraph (m) of this section;

(8) How and on what factors the Lead Agency differentiates payment rates; and

(9) Any additional facts the Lead Agency considered in determining that its payment rates ensure equal access.

(c) The Lead Agency shall demonstrate in the Plan that it has developed and conducted, not earlier than two years before the date of the submission of the Plan, either:

(1) A statistically valid and reliable survey of the market rates for child care services (that also includes information on the extent to which child care providers are participating in the CCDF subsidy program and any barriers to participation, including barriers related to payment rates and practices); or

(2) An alternative methodology, such as a cost estimation model, that has been:

WORKING GROUP TO STUDY BACKGROUND CHECKS FOR CHILD CARE FACILITIES AND PROVIDERS
TASKS FROM THE JOINT STUDY ORDER:

TASK 1: Review the requirements for national criminal history background checks based on fingerprints as required by the federal Child Care and Development Block Grant Act of 2014 (42 U.S.C. § 9858f)

AFFECTED PROVIDERS	“Child care provider”: includes both center-based and family child care providers who are licensed, regulated, or registered under State law or who receive assistance with federal grant funds
WHO MUST BE CHECKED	“Child care staff member”: Includes individuals (A) employed by the child care provider for compensation; or (B) whose activities involve the care or supervision of children . . . or unsupervised access to children
WHEN CHECK MUST OCCUR	<ul style="list-style-type: none"> • Prior to the date the individual becomes a child care staff member (unless already checked in past 5 years) • Every 5 years after the first background check
SCOPE OF BACKGROUND CHECK	<ul style="list-style-type: none"> • State criminal, child welfare, and sex offender checks in each state where individual resided during past 5 years • National Crime Information Center search • FBI fingerprint check using Next Generation Identification • National Sex offender registry search
RESULTS DUE	State must provide results “expeditiously” in a time “not to exceed 45 days” after request submitted
PRIVACY	<p>Provider: Must be notified whether the individual is eligible or ineligible for employment “without revealing any disqualifying crime or other related information regarding the individual.”</p> <p>Ineligible staff member: Must be given information related to each disqualifying crime</p>
DISQUALIFYING OFFENSES (STATES MAY ADD TO LIST)	<ul style="list-style-type: none"> • Registered or required to be registered on state or national sex offender registry • Felony consisting of murder, child abuse or neglect, crime against children (including child pornography), spousal abuse, rape or sexual assault, kidnapping, arson, or physical assault or battery • Drug-related felony during preceding 5 years (States may waive this disqualification on individual basis) • Violent misdemeanor committed as an adult against a child
APPEALS	Ineligible staff members must be able to appeal accuracy or completeness of information in the background report
IMPLEMENTATION DEADLINE	<p>September 30, 2017 (States may apply for a 1-year extension)</p> <ul style="list-style-type: none"> • If a State “fails to comply substantially” in any fiscal year, 5% of the grant funds allocated to the State will be withheld the following fiscal year

TASK 2: Recommend how the required background checks should be incorporated into law in this State

Note: P.L. 2015, ch. 497 (enacted last session) amended Maine law (Title 22, Sections 7702-A and 8302-A) to direct DHHS to promulgate major substantive rules requiring criminal background checks for child care facilities and family child care providers. The rules must meet the requirements of the federal Child Care and Development Block Grant Act of 2014 (CCDBG Act). DHHS must submit its draft rules to the Judiciary Committee January 12, 2017, and the rules should be effective September 1, 2017.

TASK 3: Recommend who should be subject to the background checks

	Federal CCDBG Act 42 U.S.C. § 9858f	Proposed Federal Rule 45 C.F.R. § 98.43(a)(2)(ii)	P.L. 2015, ch. 497 directs DHHS's rules to cover
INDIVIDUALS WITH ACCESS TO CHILDREN	"an individual . . . whose activities involve the care and supervision of children . . . or unsupervised access to children" § 9858f(i)(2)(B)	An adult "whose activities involve the care or supervision of children . . . or unsupervised access to children"	"Each child care staff member whose activities involve the care or supervision of children . . . and . . . each adult who has unsupervised access to children"
OTHER CHILD CARE EMPLOYERS	"an individual . . . who is employed by a child care provider for compensation" § 9858f(i)(2)(A)	An adult "who is employed by a child care provider for compensation, including contract employees or self-employed individuals"	
OTHERS		"Any individual residing in a family child care home who is age 18 or older"	

TASK 4: Recommend whether the law should provide for contingent or provisional hiring while background checks are pending

	Federal CCDBG Statute: 42 U.S.C. § 9858f	Proposed Federal Rule 45 C.F.R. § 98.43	Recent Maine law P.L. 2015, ch. 497
WHEN BACKGROUND CHECK REQUEST MUST BE SUBMITTED	Requires child care providers to submit a background check request for a prospective child care staff member "prior to the date the individual becomes a child care staff member of the provider." § 9858f(d)(3)(A).	"The provider shall submit [the background check] request . . . prior to the date an individual becomes a child care staff member of the provider." § 98.43(d)(2)(i).	Does not give DHHS guidance on this issue.
WHETHER INDIVIDUAL MAY WORK WHILE REQUEST IS PENDING	CCDBG Act silent on this issue. <i>However, the CCDBG Act requires background checks to be completed within 45 days.</i>	"A prospective staff member may begin work for a child care provider . . . after the provider has submitted such a request if the staff member is supervised at all times by an individual who received a qualifying result on a background check . . ." § 98.43(d)(4).	Does not give DHHS guidance on this issue. <i>However, P.L. 2015, ch. 497 directs the Judiciary Committee, if it reports out a bill after receiving the proposed rules from DHHS, to "take into account the concerns of child care providers" regarding "employment needs while waiting for background check results."</i>

TASK 5: Recommend who is responsible for payment of costs associated with the background checks (and explore options, including the application of federal grant funds, to defray all or some of the initial and ongoing additional costs)

	Federal CCDBG Statute: 42 U.S.C. § 9858f	Proposed Federal Rule 45 C.F.R. § 98.43	Recent Maine law P.L. 2015, ch. 497
AMOUNT OF FEE	<p>"Fees that a State may charge for the costs of . . . administering a criminal background check . . . shall not exceed the actual costs to the State . . ." § 9858f(f).</p>	<p>"Fees that a State . . . may charge for the costs of . . . administering a criminal background check . . . shall not exceed the actual costs. . ." § 98.43(f).</p>	<p><i>Does not give DHHS guidance on this issue.</i></p>
WHO PAYS	<p>CCDBG Act silent on this issue.</p>	<p>Proposed Rule silent on this issue.</p>	<p><i>Does not give DHHS guidance on this issue.</i></p> <p>However, P.L. 2015, ch. 497 directs the Judiciary Committee, if it reports out a bill after receiving the proposed rules from DHHS, to "take into account the concerns of child care providers" regarding "application of federal grant funds, to defray all or some of the initial and ongoing additional costs."</p>

TASK 6: Recommend how the Background Check Center within the Department of Health and Human Services can help coordinate and streamline the process for child care facilities and providers

Brief Comparison of Maine Background Check Center Act (Title 22, Chapter 1091) and federal CCDBG Act of 2014:

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

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

APPEALS	<i>DHHS must establish procedures for individuals to challenge and correct errors in background check records</i>
FEES	After initial construction phase, DHHS must establish a user fee of "no less than \$25 and no more than \$150," which must "reasonably reflect the necessary costs to maintain, operate and develop the Background Check Center."
RAP-BACK MONITORING PROGRAM	DHHS must establish procedures to provide for continued monitoring of direct access worker's data, searching for new criminal record events appearing subsequent to an initial background check (Use of a rap-back monitoring program is not required by the CCDBG Act but is encouraged in the Executive Summary to the proposed federal rules)

States & Territories	Mandatory	Federal Share of Matching ²	State MOE	State Share Matching Funds FY 2016	Discretionary Including Targeted Funds	Targeted Funds: Toddler & Infant FY 2016	Discretionary Excluding Targeted Funds FY 2016	Total Federal-Only Funds ³ FY 2016
American Samoa					3,611,209	166,377	3,444,832	3,611,209
Guam					5,203,507	239,738	4,963,769	5,203,507
N. Mariana Islands					2,259,071	104,081	2,154,990	2,259,071
Virgin Islands					2,731,213	125,834	2,605,379	2,731,213
Sub Total Territories					13,805,000	636,030	13,168,970	13,805,000
Tribes ⁴	58,340,000				75,927,500		75,927,500	134,267,500
Technical Assistance	14,585,000				13,805,000		13,805,000	28,390,000
Research & Evaluation	4,000,000				10,000,000		10,000,000	14,000,000
Hotline & Website					1,500,000		1,500,000	1,500,000
Totals	1,254,449,781	1,696,484,882	887,607,151	1,290,839,423	2,761,000,000	127,206,000	2,633,794,000	5,711,934,663

¹ The following statistics were used for the State allocations: population under 5 and population under 13 from the Census Bureau published Summer 2015; FY 2014 participants in Free and Reduced School Lunch Program from the Department of Agriculture; and Per Capita Personal Income for 2010, 2011 and 2012 from the Department of Commerce published April 2014.

² Includes nearly \$34 million in FY 2015 Federal matching funds that were redistributed in FY 2016.

³ FY 2016 appropriations law includes targeted funds for infant and toddler quality. Unlike prior fiscal years, FY 2016 does not include targeted funds for quality expansion or school-age/resource and referral. In addition to targeted funds, States and Territories must meet the 7% quality spending requirement for FY 2016.

⁴ Federal-Only Funds are the totals of Discretionary, Mandatory and the Federal Share of Matching Funds.

⁵ Tribes were allocated \$58,340,000 for Mandatory funds (2% of funds) and \$75,927,500 for Discretionary funds (2.75% of funds).

FY 2016 CCDF ALLOCATIONS BASED ON APPROPRIATION (Including Redistributed Funds)										
States & Territories	Mandatory	Federal Share of Matching ^a	State MOE	FY 2016 FMAP Rate	State Share Matching Funds	Discretionary Including Targeted Funds	Targeted Funds: Infant & Toddler Quality ^b	Discretionary Excluding Targeted Funds	Total Federal-Only Funds ^c	
Alabama	16,441,707	25,388,144	6,896,417	69.87%	10,948,115	50,467,735	2,414,131	48,053,604	92,297,586	
Alaska	3,544,811	4,406,113	3,544,811	50.00%	4,406,113	5,151,169	246,407	4,904,756	13,102,087	
Arizona	19,827,025	37,602,443	10,092,936	68.92%	16,957,109	68,258,215	3,265,141	64,993,074	125,687,683	
Arkansas	5,900,283	16,403,520	3,886,543	70.00%	7,030,080	32,512,148	1,555,223	30,956,925	54,215,951	
California	85,593,217	212,275,530	85,593,217	50.00%	212,275,533	303,728,916	14,528,916	289,200,074	601,597,737	
Colorado	10,173,800	29,160,269	8,985,901	50.72%	28,332,375	34,568,412	1,653,585	32,914,827	73,902,481	
Connecticut	18,738,357	16,885,074	18,738,358	50.00%	16,885,074	17,427,993	833,670	16,594,323	53,051,424	
Delaware	5,179,330	4,743,616	4,743,616	54.83%	3,907,881	7,176,149	343,272	6,832,877	17,099,095	
District Of Columbia	4,566,974	2,889,933	4,566,972	70.00%	1,238,114	4,376,661	209,358	4,167,303	11,832,568	
Florida	43,026,524	92,877,112	33,415,872	60.67%	60,273,443	158,564,377	7,584,948	150,979,429	294,568,013	
Georgia	36,548,223	57,775,551	22,182,651	67.55%	27,754,502	114,452,441	5,474,848	108,977,593	208,776,215	
Hawaii	4,971,633	7,353,972	4,971,630	53.98%	6,269,540	9,869,127	472,091	9,397,036	22,194,732	
Idaho	2,867,578	9,814,787	1,175,819	71.24%	3,962,286	16,249,505	777,287	15,472,208	28,931,870	
Illinois	56,873,824	68,672,855	56,873,825	50.89%	66,270,857	95,659,624	4,575,891	91,083,733	221,206,303	
Indiana	26,181,995	36,395,396	15,356,947	66.60%	18,232,346	63,183,212	3,022,282	60,158,930	125,758,607	
Iowa	8,507,792	16,846,873	5,078,586	54.91%	13,834,010	23,640,956	1,130,868	22,510,088	48,995,621	
Kansas	9,811,721	16,521,414	6,673,024	55.93%	13,002,199	25,461,286	1,217,944	24,243,342	51,794,421	
Kentucky	16,701,653	23,468,750	7,274,537	70.32%	9,905,488	48,475,760	2,318,844	46,156,916	88,646,163	
Louisiana	13,864,552	25,988,448	5,219,488	62.21%	15,786,906	48,227,500	2,306,969	45,920,531	89,080,500	
Maine	3,016,598	5,685,254	1,749,818	63.67%	3,386,477	8,567,201	409,813	8,157,388	17,271,053	
Maryland	23,301,407	31,257,824	23,301,407	50.00%	31,257,824	33,756,559	1,614,750	32,141,809	88,315,790	
Massachusetts	44,973,373	31,599,957	44,973,368	50.00%	33,559,957	33,555,410	1,605,128	31,950,282	110,128,740	
Michigan	32,081,922	49,061,369	24,411,364	65.60%	25,727,303	83,473,355	3,992,959	79,480,396	164,616,646	
Minnesota	23,367,543	29,873,499	19,690,299	50.00%	29,873,499	36,891,990	1,764,733	35,127,257	90,133,032	
Mississippi	6,293,116	16,945,360	1,715,430	74.17%	5,901,290	37,941,582	1,814,941	36,126,641	61,180,058	
Missouri	24,668,568	31,447,522	16,548,755	63.28%	18,248,309	52,031,269	2,488,923	49,542,346	108,147,359	
Montana	3,190,691	5,243,660	1,313,990	65.24%	2,793,832	7,827,048	374,408	7,452,640	16,261,399	
Nebraska	10,594,637	10,761,156	6,498,998	51.16%	10,273,160	15,531,068	742,930	14,788,128	36,886,851	
Nevada	2,580,422	15,406,357	2,580,421	64.93%	8,321,284	24,415,064	1,167,898	23,247,166	42,403,843	
New Hampshire	4,581,870	5,926,981	4,581,866	50.00%	5,926,881	5,954,193	284,820	5,669,373	16,462,944	
New Jersey	26,374,178	46,000,341	26,374,178	50.00%	46,000,341	48,935,602	2,340,841	46,594,761	121,310,121	
New Mexico	8,307,587	11,730,084	2,895,259	70.37%	4,999,070	22,849,778	1,093,022	21,756,756	42,887,449	
New York	101,983,998	97,536,863	101,983,998	50.00%	97,536,863	123,273,098	5,896,785	117,376,313	322,793,959	
North Carolina	69,639,228	52,933,092	37,927,282	66.24%	26,977,977	91,174,018	4,361,321	86,812,697	213,746,338	
North Dakota	2,506,022	4,051,850	1,017,036	50.00%	4,051,850	4,484,482	214,516	4,269,966	11,042,354	
Ohio	70,124,656	60,232,507	45,409,943	62.47%	36,185,785	93,745,462	1,885,827	91,859,635	224,102,625	
Oregon	24,909,979	22,379,057	10,630,233	60.99%	14,313,937	39,423,465	4,484,327	34,939,138	86,712,501	
Oklahoma	19,408,790	19,803,354	11,714,966	64.38%	10,956,749	30,673,300	1,467,261	29,206,039	69,885,444	
Pennsylvania	55,336,804	61,652,128	46,629,051	52.01%	56,886,861	80,442,258	3,847,966	76,594,292	197,431,190	
Puerto Rico	0	0	0	55.00%	0	33,398,108	1,597,603	31,800,505	33,398,108	
Rhode Island	6,633,774	4,817,252	5,321,126	50.42%	4,736,996	6,437,756	307,951	6,129,805	17,888,782	
South Carolina	9,867,439	24,586,970	4,085,269	71.08%	10,003,590	48,029,886	2,297,516	45,732,370	82,484,295	
South Dakota	1,710,801	4,987,254	802,914	51.61%	4,676,094	6,808,104	325,667	6,482,437	13,506,159	
Tennessee	37,702,188	34,512,592	18,975,782	65.05%	18,542,891	62,216,464	2,976,133	59,240,331	134,431,244	
Texas	59,844,129	166,602,872	34,681,421	57.13%	125,017,769	287,678,510	13,761,140	273,917,370	514,125,511	
Utah	12,591,564	21,488,161	4,474,923	70.24%	9,104,323	31,913,129	1,526,569	30,386,560	65,992,854	
Vermont	3,944,887	2,720,340	2,666,323	53.90%	2,326,673	3,590,527	171,753	3,418,774	10,255,754	
Virginia	21,328,766	42,479,023	21,328,762	50.00%	42,479,023	53,213,500	2,545,475	50,668,029	117,021,293	
Washington	41,883,444	37,317,141	38,707,605	50.00%	37,317,141	48,073,918	2,299,622	45,774,296	127,274,503	
West Virginia	8,727,005	8,752,532	2,971,392	71.42%	3,502,483	17,026,653	814,472	16,212,182	34,506,191	
Wisconsin	24,511,351	29,867,072	16,449,406	58.23%	21,424,482	41,639,474	1,991,830	39,647,643	96,017,896	
Wyoming	2,815,041	3,256,758	1,533,707	50.00%	3,256,758	3,541,021	169,385	3,371,636	6,612,820	
Sub Total States	1,177,524,781	1,696,484,882	887,607,151		1,290,839,423	2,645,962,500	126,569,970	2,519,392,530	5,519,972,163	