

PUBLIC COMMENT

In accordance with the Administrative Procedures Act, R.I. Gen. Laws § 42-35-2.6, following is a concise explanatory statement:

AGENCY: Department of Children, Youth and Families

DIVISION: General Administration and Management

RULE IDENTIFIER: 214-RICR-10-00-1

REGULATION TITLE: General Administration

REASON FOR RULEMAKING: This rule is being promulgated to replace several existing General Administration regulations.

R.I. Gen. Laws § 14-1-36.2 provides that children and youth placed in the custody of the Department of Children, Youth and Families receive suitable treatment, rehabilitation and care in the least restrictive environment.

ANY FINDING REQUIRED BY LAW AS A PREREQUISITE TO THE EFFECTIVENESS OF THE RULE: N/A

TESTIMONY AND COMMENTS: The Department received the following comments in response to the proposed regulation:

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COMMENTS ON PROPOSED DCYF REGULATIONS GOVERNING GENERAL

ADMINISTRATION AND MANAGEMENT [214-RICR-10-00-1]

November 2018

This testimony is being submitted on behalf of the ACLU of Rhode Island, the Rhode

Island Commission for Human Rights, and JustLeadershipUSA.

These proposed regulations are, to a large extent, a repromulgation of rules already in effect

at DCYF. However, we believe that the proposed adoption of this new rule provides the necessary opportunity for the Department to revise its policies governing criminal record checks for employees, volunteers, and others. This proposal, like the current regulations, unduly burdens individuals with past criminal records from obtaining licensing or employment or providing volunteer services, and does so without good cause or reason to assume any threat to public safety. In other respects, the regulation is confusing or misleading. Our organizations have been concerned for many years about the use, and continued expansion, of criminal record checks for job applicants and for professional occupational licensing. People exiting the criminal justice system already face enormous barriers to basic human needs including employment, and broad-based criminal background check disqualifications only exacerbate those barriers. Just as importantly, they are almost certain to have a disproportionate impact on Black and Latino applicants. The proposed rules perpetuate those barriers. This testimony highlights only some of our major concerns and is not meant to be an exhaustive list of the problematic nature of the regulations.

2

Section 1.8.6 establishes a two-tier system for evaluating an applicant's past criminal record. The first tier is a lengthy list of offenses for which the person is automatically barred from any employment, volunteering, licensing, etc. The second tier includes a separate lengthy list of offenses which do not automatically disqualify an applicant, but presumptively do so unless he or she can provide written references "attesting to the applicant's long-standing record of excellence in child care." As explained in more detail below, however, this second tier is essentially an automatic ban as well. We find these broad-based provisions problematic for a host of reasons, including the following:

- The list of disqualifying offenses (both automatic and presumptive) encompasses not only

convictions, but also arrests not followed by convictions. However, an employer's consideration of a job applicant's arrest record is generally illegal under the state's Fair Employment Practices Act. R.I.G.L. §28-5-7(7). It is also a potential violation of Title VII of the Civil Rights Act of 1964, since the Equal Employment Opportunity Commission's 2012 guidance has determined that excluding jobseekers based solely on their criminal record may have a discriminatory impact on the basis of race and national origin. The regulation thus appears to encourage employers to violate the law and maintain practices that have a clear racial bias. In any event, consideration of a person's arrest history is an inappropriate undermining of the presumption of innocence and such information should play no role in an organization or facility's consideration of a candidate.

- More generally, no category of offense should serve as a permanent and automatic disqualifier for employment or licensing. Instead, consistent with EEOC guidelines, employers should always take various factors into account in making these decisions, such as the amount of time that has elapsed since the crime occurred, the relevance of the conviction to the job in question, evidence of rehabilitation or mitigating circumstances, and other pertinent matters.

3

Automatic disqualification, no matter what the circumstances, unfairly denies people with records access to economic stability.

- The list of Level 1 offenses is problematic even with the time limits established for a few of the disqualifying crimes. For example, without diminishing the seriousness of a "felony assault" conviction, it is worth noting that felony assault need not actually result in any injury to a third party. R.I.G.L. §11-5-2(a). "Felony drug offenses" also cover a broad range of activities that should not serve as an insurmountable barrier to employment or licensing for five years.
- Although the regulations routinely refer to "disqualifying information," that phrasing is

very misleading. State law gives the Department the authority to propose what constitutes a “disqualifying” criminal record, but the regulations go on to give DCYF authority to consider – and deny employment based on – any criminal history information of convictions or arrests “if it is determined that the conduct of the applicant impacts upon the fitness and suitability of the applicant to provide child care.” This is so broad and vague that it gives DCYF the authority to deny employment to an individual as a result of just about any past criminal record history, and it further makes the notion of “disqualifying information” meaningless. ¹ At bottom, it also undermines the privacy rights of applicants that the limitations on “disqualifying information” were designed to protect, and encourages widespread discrimination against formerly incarcerated jobseekers.

- The Level 2 offenses are, unfortunately, just as troubling. Making all felony drug offenses and prostitution offenses presumptively disqualifying for employment shows a woeful disregard for rehabilitation and redemption, and for the positive benefits that individuals who have overcome

¹ It is also extremely confusing in places. For example, Section 1.8.4(E)(3) states that the “Department is informed in writing only that disqualifying information has been found.” But Section 1.8.4(E)(2) talks about the Department receiving for review “criminal history information that is not disqualifying.”

4

that criminal history can bring to employment like this. It is deeply disturbing to know that a teenager who was forced to engage in prostitution to financially survive and who turns their life around will still have to prove their worth in order to qualify for a job in this field. Similarly, individuals who ran afoul of drug offenses in their younger days can, for precisely that reason, serve as exemplary employees helping youth with substance use disorders. Further, since criminal record checks are required of all adult “family child care home” household members, many households – and particularly those in poorer communities – may be disqualified from serving in

that capacity because of a family member's irrelevant drug-related criminal history.

- More to the point, the regulatory standard for allowing somebody with these Level 2 offenses to be employed will be impossible for almost anybody to meet. That is because, in order to rebut the presumption of disqualification, applicants must, as noted above, demonstrate a "longstanding record of excellence in child care." That means that virtually the only people who will be able to rebut the presumption are those who were already working in this field when they committed their crime. If it occurred beforehand, they will never be able to show a long-standing record of excellence because they will never be able to qualify for a job involving child care in the first place. This is a true Catch-22.

Regulations like these impact a startling number of Rhode Islanders; not only do we have a staggering 23,000-plus citizens currently under probation or parole supervision, the number of Rhode Islanders with a past felony record is estimated to be between 39,000 and 51,000—this is to say nothing of people with misdemeanor records. In addition, there are at least 875 state and federal laws and statutes that impede Rhode Islanders with records from obtaining gainful employment.²

² National Inventory of Collateral Consequences of a Conviction, Council of State Governments, 2018.

5

We also firmly believe that this is an equity issue that should be of the utmost importance to an agency like DCYF. As in other states, Rhode Islanders involved in the criminal justice system are disproportionately people of color, who are already more likely than their white peers to face discrimination in employment.³ DCYF should be a critical agency working to reduce, not increase, this discrimination and disparity. We therefore strongly urge DCYF to reexamine and significantly revise these regulations and their criminal record check requirements to take into account the various concerns we have raised about their reach and impact.

If the concerns we have raised are not addressed, we request that, pursuant to R.I.G.L. §42-

35-2.6, you provide us with a statement of the reasons for not accepting our arguments. Thank you

for considering our views.

Submitted by:

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3 Studies suggest that the impact of a criminal record on employment is 40% more damaging for black men

than their white counterparts. Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology*

(2003).

SUMMARY OF CHANGES

The following changes have been made to 214-RICR-10-00-1 in response to the comments received:

1.8 Criminal Record Background Checks

1.8.1 General Requirements

- A. A nationwide criminal record background check includes the taking of fingerprints. An individual subject to a criminal record background check may also be required to undergo an employment background check, and/or a sex offender check, and/or a ~~clearance-of-agency-activity~~ child abuse and neglect registry check for substantiated allegations of child abuse and neglect.

1.8.2 Criminal Record Background Checks – Prospective Foster and Adoptive Parents

- A. Statewide and nationwide criminal record background checks are completed on all prospective foster and adoptive parents and prospective visiting resources for children receiving Department services and their household members over age eighteen (18). All nationwide criminal record background checks include the taking of fingerprints. A visiting resource is an individual who agrees to maintain regular contact, which may include overnight and weekend visitation, with a child in care and is a prospective foster care resource.

B. Children ~~will~~ are not ~~be~~ placed in foster homes pending licensure until all required background checks are completed.

C. Statewide Criminal Record Background Check:

1. ~~It is the responsibility of the child placing agency,~~ In the case of a foster or adoptive home licensed through a child placing agency, it is the responsibility of the child placing agency to ensure that the statewide criminal record background check is completed on applicants and their household members eighteen (18) and over.

D. Nationwide Criminal Record Background Check

1. The applicant or adult household member is instructed by the assigned Department or child placing agency staff to apply to the ~~b~~Bureau of ~~e~~Criminal ~~i~~Identification of the state police or the local police department for a nationwide criminal record background check.
 - a. The applicant is provided with and instructed to bring to law enforcement agency a Fingerprint Affidavit. The Fingerprint Affidavit includes the Criminal Record Background Checks Addendum - Disqualifying Information and informs the law enforcement agency where to send the results (either to the Department or the Child Placing Agency).
 - b. A criminal record background check is conducted without charge to prospective foster parents and/or adoptive parents. In the case of prospective adoptive parents, the Department or the ~~private~~-child placing agency conducting the adoption home study is responsible for all costs relating to the checks.
2. The Department is provided with details of criminal convictions in addition to being notified that there is disqualifying information.
 - a. If the Department receives information regarding a history of non-disqualifying criminal information, this information is reviewed prior to proceeding with licensing.
 - b. An applicant with a conviction of an offense that is not automatically disqualifying may be denied licensure if it is determined that the conduct of the applicant impacts upon the fitness and suitability of the applicant to provide child care.
 - c. The Department considers the following factors to make a determination on the suitability of the caretaker to care for a child:

- _____ (1) Type of conviction
- _____ (2) Number of convictions
- _____ (3) The age of the individual at the time of the conviction
- _____ (4) The length of time that has elapsed since the last conviction
- _____ (5) The relationship between the crime and the capacity to care for children
- _____ (6) Evidence of rehabilitation
- _____ (7) Current relationships with biological children or history of caring for children

1.8.3 Criminal Record Background Checks – Prospective Facility Operators and Employees

- E. Results of the criminal record background check, identifying the nature of any disqualifying information, are sent to the Department.
 - 1. If the Department receives information regarding a history of non-disqualifying criminal information:
 - a. The information is reviewed prior to proceeding with licensing.
 - b. An applicant with a conviction of an offense that is not automatically disqualifying may be denied licensure if it is determined that the conduct of the applicant impacts upon the fitness and suitability of the applicant to provide child care.
 - c. The Department considers the following factors to make a determination on the suitability of the caretaker to care for a child:
 - _____ (1) Type of conviction
 - _____ (2) Number of convictions
 - _____ (3) The age of the individual at the time of the conviction
 - _____ (4) The length of time that has elapsed since the last conviction
 - _____ (5) The relationship between the crime and the capacity to care for children
 - _____ (6) Evidence of rehabilitation

(7) Current relationships with biological children or history of caring for children

- F. Employees of residential child care facilities, child placing facilities, child care centers, community-based programs requiring Department licensing and of family child care homes:
1. Family child care home assistants and individuals providing emergency coverage are subject to statewide and nationwide criminal record background checks.
 2. Family child care home operator ensures that the applicant completes the Employment History Affidavit and Criminal History Affidavit and forwards to Department Licensing.
 3. Family child care home operator instructs the applicant to apply to the Bureau of Criminal Identification of the state police or the local police department for a nationwide criminal record background check. The applicant is provided with, and brings to law enforcement agency, the Fingerprint Affidavit, which includes the Criminal Record Background Checks - Addendum, Disqualifying Information and informs the law enforcement agency where to send results.

Results are sent to the Department, indicating that the applicant does or does not have disqualifying information.

- a. If there is no criminal history, the Department informs the family child care home operator that the prospective employee is eligible for employment.
- b. If the Department receives criminal history information that is not automatically disqualifying, this information is reviewed. An applicant with a conviction of an offense that is not automatically disqualifying may be denied licensure if it is determined that the conduct of the applicant impacts upon the fitness and suitability of the applicant to provide child care.

c. The Department considers the following factors to make a determination on the suitability of the caretaker to care for a child:

(1) Type of conviction

(2) Number of convictions

(3) The age of the individual at the time of the conviction

(4) The length of time that has elapsed since the last conviction

(5) The relationship between the crime and the capacity to care for children

(6) Evidence of rehabilitation

(7) Current relationships with biological children or history of caring for children

G. Employees of residential child care facilities, child placing facilities, child care centers and community-based programs requiring Department licensing:

1. Facility operator requires all persons who are offered employment, volunteers and consultants, in positions that involve supervisory or disciplinary power over a child or involve routine contact with a child without the presence of other employees, to undergo statewide and nationwide criminal record background checks, statewide and nationwide sex offender registry check, a Rhode Island Child Protective Services check and a -Child Protective Service check (also known as Adam Walsh clearance) for each state the individual has lived in the past five (5) years.
2. The Operator ensures that the applicant completes the Employment History Affidavit and Criminal History Affidavit.
3. The Operator instructs the applicant to apply to the Bbureau of Criminal Identification of the state police or the local police department for a nationwide criminal record background check. The applicant is provided with, and brings to law enforcement agency, the Fingerprint Affidavit and informs the law enforcement agency where to send the results. Results of the check are sent to the employer, indicating that the applicant does or does not have disqualifying information.
5. Upon receipt of notification that disqualifying information has been discovered, the facility administrator immediately notifies the applicant that his/her application is rejected or, if an individual is already employed, that employment will be terminated in ten (10) working days.
 - a. This notification letter informs the employee of his/her right to appeal in conformance with Complaints and Appeals and Criminal Record Background Checks, Disqualifying Information §1.9.6.

- b. A copy of this letter is provided to Department Licensing and to the EOHHS Hearing Officer.
 - c. Any notifications by the EOHHS Hearing Officer to the Licensing staff within the context of the appeal are shared with the facility administrator.
- 6. Employees, volunteers or consultants who do not have supervisory or disciplinary power over or routine contact with children without the presence of others need not undergo the criminal record background checks.
 - a. The facility operator certifies in writing that the individual has no supervisory or disciplinary power over or routine contact with child(ren).
 - b. A copy of this certification is provided to the Department's Licensing staff and filed in the employee's personnel file.
- 7. A facility operator's failure to require the criminal record background check or failure to maintain the written results of the check or the above referenced certification on file constitutes grounds to revoke the license of the operator.
- 8. As part of re-licensing, the facility operator is responsible to ensure that a statewide criminal record background check is completed for each full or part time employee, and volunteer or consultant who has supervisory or disciplinary power over or routine contact with child(ren) without the presence of others.
- 9. Expungement of the results of the employee's criminal record background check is-must be consistent with the facility's policy on expunging the employee's personnel file after termination of employment.

H. Prior nationwide criminal record background checks for employees:

- 1. An applicant for employment may is not be required to submit to fingerprinting if he/she has submitted to the nationwide criminal record background check eighteen (18) months prior to the date of application.
- 2. Employer may request, from the Bureau of Criminal Identification of the state police or the local police department or the Attorney General's Office for employees of residential child care facilities, child placing facilities, child care centers or community-based programs requiring Department

licensing, a letter indicating if any disqualifying information was discovered.

1.8.4 Criminal Record Background Checks – Employees of the Department

- D. For a nationwide criminal record background check, the Department instructs applicants to apply to the Bbureau of Criminal Identification of the Department of the Attorney General, state police or the local police department.
- E. Upon receipt of the results of the criminal record background check, the Department may take action relative to the applicant's employment:
 - 1. If there is no criminal history, the applicant and the Department are informed in writing.
 - 2. If the Department receives criminal history information that is not automatically disqualifying, this information is reviewed. An applicant with a conviction of an offense that is not automatically disqualifying may be denied employment if it is determined that the conduct of the applicant impacts upon the fitness and suitability of the applicant to provide child care, could endanger the health or welfare of a child and would be inconsistent with the purpose and intent of the Department.
 - a. The Department considers the following factors to make a determination regarding the suitability of the applicant for employment at the Department:
 - (1) Type of conviction
 - (2) Number of convictions
 - (3) The age of the applicant at the time of the conviction
 - (4) The length of time that has elapsed since the last conviction
 - (5) Evidence of rehabilitation
 - 3. ~~If disqualifying information has been found, the applicant is informed in writing of the nature of the disqualifying information. The Department is informed in writing only that disqualifying information has been found.~~
 - 4. ~~Upon receipt of notification that disqualifying information has been discovered, the Department immediately notifies the applicant/employee in~~

writing that he/she will not be hired. Upon the discovery of any disqualifying information with respect to an applicant, the Department informs the applicant of the disqualifying information.

1.8.5 Appeals of Denial/Revocation of Licensure or Denial/Termination of Employment

A. If an individual is disqualified for the ~~arrest and/or~~ conviction for any Level 1 Offense (refer to Criminal Record Background Checks, Disqualifying Information, § 1.9.6(A) of this Part), that individual has a right to appeal the denial or revocation of a license or the denial or termination of employment for the purpose of demonstrating that he or she has not been ~~arrest and/or~~ convicted for such an offense.

1. Within thirty (30) days of receipt of an adverse agency decision, the applicant/employee must inform the Department of his or her intent to appeal by filing a Formal Request for an Appeal with the Executive Office of Health and Human Services.
 - a. The applicant/employee must attach a copy of his/her disqualifying information report, which identifies the specific disqualifying offense(s).
 - b. The applicant/employee provides evidence that he or she has not been ~~arrest and/or~~ convicted of any Level 1 offense.
2. The Hearing Officer reviews the materials submitted on behalf of the applicant/employee and conducts the appeal process and provides a written decision in accordance with timeframes and procedures established in § 1.10 of this Part, Complaints and Appeals.

B. If an individual is disqualified for the ~~arrest and/or~~ conviction for any Level 2 Offense (refer to Criminal Record Background Checks, Disqualifying Information, § 1.9.6(B) of this Part), that individual has a right to appeal the denial or revocation of a license or the denial or termination of employment for the purpose of demonstrating his/her long standing record of excellence in child care or by demonstrating that he or she has been rehabilitated.-

3. The applicant/employee must provide written references attesting to the applicant's long-standing record of excellence in child care. Such references must be from individuals who are qualified by ~~virtue of~~ education ~~and/or~~ experience to testify to the abilities of the applicant/employee. Such individuals include:

- a. Licensed child care providers;
- b. Current or previous child care professionals; **and**
- c. Other professionals with credentials to effectively judge the applicant's qualifications in providing child care; **or**
- d. The Department considers the following factors that may mitigate the Level 2 disqualifying information/offense by a showing that the individual has successfully rehabilitated him or herself. Those factors include:
 - (1) Number of convictions
 - (2) The age of the individual at the time of the conviction
 - (3) The length of time that has elapsed since the last conviction
 - (4) The relationship between the crime and the capacity to care for children
 - (5) Evidence of rehabilitation
 - (6) Current relationships with biological children or history of caring for children
- d. The Department considers the following factors that may mitigate the Level 2 disqualifying information/offense by a showing that the individual has successfully rehabilitated him or herself. Those factors include:
 - (1) Number of convictions
 - (2) The age of the individual at the time of the conviction
 - (3) The length of time that has elapsed since the last conviction
 - (4) The relationship between the crime and the capacity to care for children
 - (5) Evidence of rehabilitation
 - (6) Current relationships with biological children or history of caring for children

1.8.6 Criminal Record Background Checks- Disqualifying Information

A. LEVEL 1 OFFENSES

1. If an individual is disqualified for the ~~arrest and/or~~ conviction for any of the following offenses, that individual has a right to appeal for the purpose of demonstrating that he or she has not been ~~arrest and/or~~ convicted for such an offense.

e. Felony Involving Violence

- (1) Murder
- (2) Manslaughter
- (3) Rape
- (4) 1st degree Sexual Assault
- (5) 2nd Degree Sexual Assault
- (6) Kidnapping
- (7) Car-Jacking
- (8) 1st Degree Arson
- (9) 2nd Degree Arson
- (10) Mayhem
- (11) Felony Assault, including Domestic Violence, committed less than five (5) years ago

f. Human Trafficking

g. Illegal Possession of a Firearm less than five (5) years ago

B. LEVEL 2 OFFENSES

1. If an individual is disqualified for the ~~arrest and/or~~ conviction for any of the following offenses, that individual has a right to appeal for the purpose of demonstrating his or her long standing record of excellence in child care.
 - a. Felony Assault committed over five (5) years ago
 - b. Felony Battery committed over five (5) years ago
 - c. Robbery

- d. Breaking and Entering
- e. Burglary
- f. Illegal Possession of a Firearm over five (5) years ago
- g. Misdemeanor Domestic Assault ~~over five~~ less than five (5) years ago
- h. 3rd Degree Sexual Assault
- i. Felony Drug Offense committed over five (5) years ago

~~j. Prostitution~~

- 2. If an individual is disqualified for the ~~arrest and/or~~ conviction for any of the following offenses, when the offense does not involve a child, that individual has a right to appeal for the purpose of demonstrating his or her long standing record of excellence in child care: or by demonstrating that he or she has been rehabilitated.

- a. Transportation for Indecent purposes
- b. Harboring
- c. Pandering

~~d. Deriving support or maintenance from prostitution~~

- e. Circulation of obscene publications and shows