

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

8.8.3.1 ISSUING AGENCY: Children, Youth and Families Department
[8.8.3.1 NMAC - Rp, 8.8.3.1 NMAC, 11/20/2024]

8.8.3.2 SCOPE: This rule applies to CYFD-contracted, direct care providers and their employees, sub-contractors, volunteers, and student interns. This rule applies to all operators, employees, and volunteers; and prospective operators, employees, and volunteers of all CYFD-contracted programs and facilities that have primary custody of children for 20 hours or more per week, including juvenile treatment facilities.
[8.8.3.2 NMAC - Rp, 8.8.3.2 NMAC, 11/20/2024]

8.8.3.3 STATUTORY AUTHORITY: The statutory authority for these rules is contained in the Criminal Offender Employment Act Section 28-2-1 NMSA 1978 to 28-2-6 NMSA 1978 and in the New Mexico Children's and Juvenile Facility Criminal Records Screening Act Section 32A-15-1 NMSA 1978 to 32A-15-4 NMSA 1978.
[8.8.3.3 NMAC - Rp, 8.8.3.3 NMAC, 11/20/2024]

8.8.3.4 DURATION: Permanent
[8.8.3.4 NMAC - Rp, 8.8.3.4 NMAC, 11/20/2024]

8.8.3.5 EFFECTIVE DATE: November 20, 2024, unless a later date is cited at the end of a section.
[8.8.3.5 NMAC - Rp, 8.8.3.5 NMAC, 11/20/2024]

8.8.3.6 OBJECTIVE:
A. The purpose of these rules is to set out general provisions regarding background checks and employment history verification required in settings to which these rules apply.
B. Background checks are conducted to identify information in applicants' backgrounds bearing on whether they are eligible to provide services in settings to which these rules apply.
C. Abuse and neglect screens of databases in New Mexico are conducted by CYFD Background Check Unit (BCU) employees to identify those persons who pose a threat of abuse or neglect to care recipients in settings to which these rules apply.
[8.8.3.6 NMAC - Rp, 8.8.3.6 NMAC, 11/20/2024]

8.8.3.7 DEFINITIONS:
A. **"Administrative Review"** means an informal process of reviewing a decision that may include an informal conference, hearing, or a review of written records.
B. **"Administrator"** means the manager in charge of the day-to-day operation of a facility. The administrator may be the licensee or an authorized representative of the licensee and be at least 18 years of age.
C. **"Adult"** means a person who has a chronological age of 18 years or older, except for persons under Medicaid certification up to the age of 21.
D. **"Appeal"** means a review of a determination made by the BCU, which may include a record review or a hearing.
E. **"Applicant"** means any person who is required to obtain a background check under these rules and Section 32A-15-3 NMSA 1978.
F. **"Arrest"** means notice from a law enforcement agency about an alleged violation of law.
G. **"Background Check"** means a screen of CYFD's information databases, state and federal criminal records, and any other reasonably reliable information about an applicant.
H. **"Care Recipient"** means any person under the care of a licensee.
I. **"Child"** means a person who has a chronological age of less than 18 years, and persons under applicable Medicaid certification up to the age of 21 years.
J. **"Criminal History"** means information possessed by law enforcement agencies of arrests, indictments, or other formal charges, as well as dispositions arising from these charges.

K. “Direct, Physical Supervision” means continuous visual contact or live video observation by a direct care provider who has been found eligible by a background check of an applicant during periods when the applicant is in immediate physical proximity to care recipients.

L. “Direct Care Provider” means any individual who, as a result of employment, contractual service, or volunteer service (including student interns) has direct care responsibilities or potential unsupervised physical or virtual access to any child or care recipient in the settings to which these rules apply.

M. “Eligibility” means the determination that an applicant does not pose an unreasonable risk to care recipients after a background check is conducted.

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

O. “Licensed” means authorized to operate by the licensing authority by issuance of an operator’s license or certification certificate.

P. “Licensee” means the holder of, or applicant for, a license, certification, or registration pursuant to 7.20.11 NMAC, 7.20.12 NMAC, 7.8.3 NMAC, or other program or entity within the scope of these rules.

Q. “Licensing Authority” means CYFD or entity having authority over the licensee.

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

S. “Unreasonable Risk” means the level of risk that a reasonable person would be unwilling to take with the safety or welfare of care recipients.

[8.8.3.7 NMAC - Rp, 8.8.3.7 NMAC, 11/20/2024]

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

- A.** behavior management skills development;
- B.** case management services;
- C.** group home services;
- D.** day treatment services;
- E.** residential treatment services;
- F.** treatment foster care services agencies;
- G.** licensed shelter care;
- H.** comprehensive community support services;
- I.** contractors and any programs or facilities receiving CYFD funding or reimbursement; and
- J.** supervised visitation and safe exchange programs.

[8.8.3.8 NMAC - Rp, 8.8.3.8 NMAC, 11/20/2024]

8.8.3.9 NON-APPLICABILITY:

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

- (1)** hospitals or infirmaries;
- (2)** intermediate care facilities;
- (3)** children’s psychiatric centers;
- (4)** home health agencies;
- (5)** diagnostic and treatment centers; and

- (6) childcare centers and homes.
- B. These rules do not apply to the following adults:
 - (1) treatment foster care parents;
 - (2) relative care providers who are not otherwise required to be licensed or registered;
 - (3) foster grandparent volunteers; and
 - (4) all other volunteers for any program or entity within the scope of these rules if the

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

[8.8.3.9 NMAC - Rp, 8.8.3.9 NMAC, 11/20/2024]

8.8.3.10 COMPLIANCE:

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

B. The licensee is required to:

- (1) submit an electronic fingerprint submission receipt and the required forms for all direct care providers, or any employee, contractor, volunteer, or student intern present while care recipients are present, or other adult as required by the applicable rules prior to the commencement of service, whether as employee, contractor, or volunteer;

- (2) verify the employment history of any prospective direct care provider by contacting references and prior employers/agencies to elicit information regarding the reason for leaving prior employment or service; the verification shall be documented and available for review by the licensing authority;

- (3) provide such other information BCU employees determine to be necessary; and

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

C. If there is a need for any further information from an applicant at any stage of the process, the BCU shall request the information in writing from the applicant. If the BCU does not receive the requested information within 15 calendar days of the date of the request, the BCU shall deny the application and send a notice of background check denial for failure to respond.

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

[8.8.3.10 NMAC - Rp, 8.8.3.10 NMAC, 11/20/2024]

8.8.3.11 COMPLIANCE EXCEPTIONS:

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

- (1) the licensee shall send the BCU a completed application form and an electronic fingerprint submission receipt;

- (2) until receiving background eligibility, the applicant shall at all times be under direct, physical supervision; and

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

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

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

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

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

[8.8.3.11 NMAC - Rp, 8.8.3.11 NMAC, 11/20/2024]

8.8.3.12 PROHIBITIONS:

A. Any CYFD licensee who violates these rules is subject to revocation, suspension, sanctions, denial of licensure, certification, or registration; or termination of participation in any other program within the scope of these rules.

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

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

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

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

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

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

H. Any firm, person, corporation, individual, or other entity that violates this section shall be subject to appropriate sanctions up to and including immediate emergency revocation of license or registration pursuant to the rules applicable to that entity or termination of participation in any other program within the scope of these rules. [8.8.3.12 NMAC - Rp, 8.8.3.12 NMAC, 11/20/2024]

8.8.3.13 ARRESTS, CONVICTIONS AND REFERRALS:

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

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

(2) a conviction, regardless of the degree of the crime or the date of the conviction, of human trafficking, criminal sexual penetration or related sexual offenses, or child abuse;

(3) a substantiated referral, regardless of the date, for sexual abuse;

(4) the applicant's child is currently in CYFD's or another state's custody; or

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

B. A disqualifying conviction may be proven by:

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

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

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

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

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

C. If a background check shows pending charges for a felony offense, regardless of the degree of the crime, of human trafficking, criminal sexual penetration or related sexual offenses, or child abuse; or an arrest but no disposition for any felony offense, there shall be a determination of unreasonable risk if a conviction as charged would result in a determination of unreasonable risk.

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

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

[8.8.3.13 NMAC - Rp, 8.8.3.13 NMAC, 11/20/2024]

8.8.3.14 UNREASONABLE RISK:

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

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

- (1) reliable disclosures by the applicant or a victim of abuse or neglect;
- (2) orders of protection from domestic abuse (note: circumstances indicating an applicant is or has been a victim of domestic violence may be used as a mitigating factor in assessing risk);
- (3) child or adult protection investigative evidence that indicates a likelihood that an applicant engaged in inappropriate conduct but there were reasons other than the credibility of the evidence to not substantiate; or
- (4) any other evidence with similar indications of reliability.

[8.8.3.14 NMAC - Rp, 8.8.3.14 NMAC, 11/20/2024]

8.8.3.15 REHABILITATION PETITION: Any applicant whom the BCU concludes may be an unreasonable risk, as identified in Subsection A (1) of 8.8.3.13 NMAC, may submit to the BCU a rehabilitation petition describing with specificity all information that tends to demonstrate that the applicant is not an unreasonable risk. The petition may include a description of what actions the applicant has taken subsequent to any events revealed by the background check to reduce the risk that the same or a similar circumstance will recur. The BCU may consider the age of the applicant at conviction, time since conviction, and participation and completion in mitigating programs, treatment, and education.

[8.8.3.15 NMAC - Rp, 8.8.3.15 NMAC, 11/20/2024]

8.8.3.16 ELIGIBILITY SUSPENSIONS, REINSTATEMENTS AND REVOCATIONS:

A. An applicant's background check eligibility may be suspended for the following:

- (1) an arrest or criminal charge for any felony offense, as charged would result in a determination of unreasonable risk;

- (2) a pending child protective services referral or any other CYFD investigation of abuse or neglect;

- (3) an outstanding warrant; or

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

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

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

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

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

- (2) If the matter causing the suspension is resolved within six months of the suspension, the applicant may provide documentation to the BCU showing how the matter was resolved and requesting

reinstatement of background check eligibility. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If, the applicant's eligibility is revoked, the applicant may appeal the revocation.

(3) If the matter causing the suspension is resolved after six months of the suspension, the applicant may reapply for clearance for the same licensee by submitting an electronic fingerprint submission receipt and the required forms. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If the applicant's eligibility is revoked, the applicant may appeal the revocation.
[8.8.3.16 NMAC - Rp, 8.8.3.16 NMAC, 11/20/2024]

8.8.3.17 APPEAL RIGHTS:

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

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

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

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

[8.8.3.17 NMAC - Rp, 8.8.3.17 NMAC, 11/20/2024]

HISTORY OF 8.8.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: HED 85-6 (HSD), Regulations Governing Criminal Records Check and Employment History of Licensees and Staff of Child Care Facilities, 8/30/85.

History of Repealed Material:

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

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

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

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

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

8.8.3 NMAC, Governing Background Checks and Employment History Verification, filed 10/1/2016 - Repealed effective 11/20/2024.