

STATE OF MAINE

CHILD CARE PROVIDER
BACKGROUND CHECK LICENSING RULE

10-148 CODE OF MAINE RULES
CHAPTER 34



Maine Department of Health and Human Services
Office of Child and Family Services
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Augusta, Maine 04333-0111

Emergency Major Substantive Rule
Effective September 25, 2020

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10-148 C.M.R. Ch. 34

**Department of Health and Human Services
Office of Child and Family Services**

CHILD CARE PROVIDER BACKGROUND CHECK LICENSING RULE

SUMMARY STATEMENT

This rule is established to govern comprehensive background checks for licensed child care providers in accordance with the requirements of 42 U.S.C. § 9858f(b) and to protect the health, safety, and welfare of the Children served.

AUTHORITY

This rule is promulgated under the authority of 22 M.R.S. §§ 42(1) and 8302-A(1)(J),(2)(K).

EFFECTIVE DATE

September 25, 2020

SECTION 1. STATEMENT OF PURPOSE

- A. Statement of Purpose.** The purpose of this rule is to establish comprehensive background check licensing standards for Child Care Providers. This rule is promulgated pursuant to 22 M.R.S. §§ 8301-A(8), 8302-A(1)(J),(2)(K), and 8302-C and describes the requirements of a comprehensive background check and the process for appealing specific disqualifying conditions.

NOTICE OF EMERGENCY MAJOR SUBSTANTIVE RULE MAKING

The Maine Legislature has designated this rule as major substantive.

The emergency adoption of this Rule, 10-148 Ch. 34 CHILD CARE PROVIDER BACKGROUND CHECK LICENSING RULE repeals the following background check requirements currently in effect for licensed child care providers:

10-148 C.M.R. Ch.32, §§ 2.21 and 11.2.3.7 (Rules for the Licensing of Child Care Facilities);
10-144 C.M.R. Ch. 33, §§ 2(A)(4)(e) and 6(A)-(I) (Family Child Care Provider Licensing Rule);
10-148 C.M.R. Ch. 36, §§ III(U) and XIII(A)(3)(g) (Rules for the Licensing of Nursery Schools).

In the event of conflict between the Child Care Provider Background Check Licensing Rule and these provisions, or any other provisions of the licensing rules for child care providers, the terms of this rule supersede such other rules and shall apply.

SECTION 2. DEFINITIONS

- A. Definitions.** As used in this rule, unless the context otherwise indicates, the following terms have the following meanings:
1. **Abuse or Neglect** means a threat to a Child's health or welfare by physical, mental or emotional injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these, by a person responsible for the Child.
 2. **Adult** means a person 18 years of age and over.
 3. **Child Care Program** means a house or other place in which a person maintains or otherwise carries out a regularly scheduled program, for any part of a day, providing care and protection for three or more children between 6 weeks and 12 years of age. Child Care Programs provide this service to children who are not the children of the provider or who are not residing in the provider's home, for consideration.
 - a. A Child Care Program includes:
 - i. A program operated in a private residence, caring for 3-12 children, as defined at 22 M.R.S. § 8301-A(1-A)(C) ("Family Child Care");
 - ii. A program operated in a building owned or leased by the provider, serving 3 or more children, as defined at 22 M.R.S. § 8301-A(1-A)(B) ("Child Care Facility") and 22 M.R.S. § 8301-A(1-A)(E) ("Small Child Care Facility"), otherwise known as a Child Care Center; and
 - iii. A program serving children between 33 months and 8 years of age, for a session no longer than three- and one-half hours in duration, as defined at 22 MRS § 8301-A(1-A)(D) ("Nursery School").
 - b. A Child Care Program does not include a:
 - i. Residential or overnight summer camp established solely for recreational and educational purposes, licensed in accordance with 10-144 CMR Chapter 208, Rules Relating to Youth Camps, Primitive, and Trip Camping;
 - ii. Program offering relevant instruction to children during their entire period of attendance for the purpose of teaching a singular skill such as karate, dance or basketball;
 - iii. Private school recognized by the Department of Education as a provider of equivalent instruction for the purpose of equivalent school attendance; or
 - iv. Formal public or private school in the nature of a kindergarten or elementary or secondary school approved by the Commissioner of Education in accordance with Title 20-A.
 4. **Department** means the Office of Child and Family Services within the Department of Health and Human Services.

5. **Finding** means a decision reached by the Department based on the facts and evidence gathered during an Investigation to support a decision that a person responsible for a Child has, by a preponderance of the evidence, abused or neglected a Child.
6. **Household Member** means any person residing in the Family Child Care home of an Applicant or Provider.
7. **License** means written permission, whether provisional, temporary, conditional, or full, by the Department that authorizes the Provider to operate. For purposes of this rule, License has the same meaning as “certification” in 22 MRS §8301-A.
8. **Provider** means an individual holding a license to operate a Child Care Program. Provider also means an applicant seeking licensure to operate a Child Care Program.
9. **Provider Letter of Eligibility** means a letter sent by the Department to the individual who is the subject of the comprehensive background check that reports eligibility status exclusively and does not reveal specific disqualifying information or any confidential information regarding the individual.
10. **Staff Member** means an individual not related to all Children for whom childcare services are provided who is employed by a Provider for compensation (including independent contractors) whose activities involve the care or supervision of Children or who otherwise have unsupervised access to Children who are cared for or supervised by a Provider.
11. **Staff Member Letter of Eligibility** means a letter sent by the Department to the individual who is subject to the comprehensive background check (including Household Members) that reports eligibility status, provides basis for determination when ineligible, and provides information regarding the individual’s right to appeal.

SECTION 3. BACKGROUND CHECKS

- A. Individuals subject to comprehensive background checks.** Every Provider must request a comprehensive background check for themselves, all current and prospective Staff Members, all Household Members in a Family Child Care, over the age of eighteen, and any other individuals whose activities involve the care or supervision of Children or who have unsupervised access to Children while in the care of the Provider.
1. Under limited circumstances in which an individual, age 18 or older, residing in a Family Child Care is unable to be fingerprinted, the Department may conduct name-based State and Federal criminal background checks. A statement from the individual's medical provider must be provided to the Department and include a general statement regarding the individual's condition that impedes the ability to be fingerprinted. This may include that the individual is homebound due to age or disability.
- B. Individuals not subject to comprehensive background checks.** Individuals who are not subject to comprehensive background checks may only have supervised access to children who are served by the provider. Comprehensive background checks are not required for individuals who only have infrequent and irregular supervised access to children, including but not limited to, parents, delivery persons, contractors performing maintenance and repairs and waste removal persons.
- C. Individuals changing employers.** An individual with a qualifying background check that complies with this section, completed within the last five years, and is currently employed as a Staff Member or has been employed as a Staff Member within the past 180 days is not required to request a new background check when seeking employment by a different Provider.
- D. Components of a comprehensive background check.** The following registries, repositories, and databases will be checked for each individual for whom a background check is requested, with the mandatory use of fingerprints as described below:
1. National Crime Information Center (NCIC) National Sex Offender Registry and Federal Bureau of Investigation (FBI) fingerprint check using Next Generation Identification.
 2. In the State where the individual resides: State Child Abuse and Neglect registry/ database, State Bureau of Identification (SBI) or comparable State agency's crime repository with fingerprints, and State Sex Offender Registry.
 3. In each State where the individual has resided for the previous five years: State Child Abuse and Neglect registry/ database, SBI or comparable State agency's crime repository with or without fingerprints, and State Sex Offender Registry.
- E. Process required.** Any individual for whom a Provider is required to request a background check must consent to having their fingerprints taken. The State Police will take (or cause to be taken) the individual's fingerprints and will forward the fingerprints to the State Bureau of Identification to check the required registries, repositories, and databases listed above.
1. The Department upon receipt of the individual's criminal history report will conduct a search of Maine's Child Abuse and Neglect database.

2. As applicable, the Department will request a search of all registries, repositories, and databases for each State where the individual has resided for the previous five years.
- F. Frequency.** Background checks must be requested at least once every five years for each individual requiring a background check under this Rule.
- G. Letter of Eligibility.** The Department shall provide results of the background check, in the form of two letters, a Provider Letter of Eligibility and a Staff Member Letter of Eligibility. Both letters are sent directly to the individual indicating eligibility or ineligibility within 45 days of the submitted request.
1. A prospective Staff Member may not begin working for a Provider until after furnishing the Provider with a Provider Letter of Eligibility that indicates that the Staff Member is eligible.
 2. When the Department has requested out of state searches in accordance with 3(E)(2) of this rule and has not yet received results and has reached 45 days from the submitted request, the Department may issue a Provider Letter of Eligibility based on all other available information. The Department will issue a second Provider Letter of Eligibility and Staff Member Letter of Eligibility if additional information from the out of state search changes the individual's eligibility.
- H. Appeal Rights.** If an individual is ineligible due to the results of the background check the Staff Member Letter of Eligibility will include the basis for the individual's ineligibility along with information about how to appeal the result in accordance with Section 4 of this rule.
- I. Confidentiality.** The results of individual background checks shall not be publicly released or shared, unless the data is unidentifiable and/or aggregated.
- J. Ineligible for Employment.** Any of the following is considered disqualifying information:
1. Registration on a State or National Sex Offender Registry, or information that the individual is required to be listed on such a registry;
 2. A substantiated Finding of Child Abuse or Neglect by the Department, or any comparable Department of another State;
 3. Felony conviction for any of the following crimes:
 - a. Murder,
 - 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,

SECTION 4. APPEAL PROCESS AND RIGHTS

- A. Factual Accuracy of Information.** An individual who is determined ineligible because of disqualifying information found in one of the registries, repositories, and/or databases searched and who disputes the factual accuracy of the disqualifying information may request review of the disqualifying information directly to the agency that maintains that registry, repository, or database. Instructions on how to dispute the factual accuracy of the report will be included in the letter sharing the results of the background check with the individual.
- B. Substantiation of Child Abuse or Neglect.** Individuals who receive a letter with ineligibility due to a substantiated finding may request an appeal pursuant to the Code of Maine Rules 10-148 Chapter 201 Rules for *Procedures for the Abuse or Neglect Substantiation Process, for Appeals for Persons Substantiated as perpetrators of Abuse or Neglect of Children and Appeals for Denial of Access to Confidential Records*.
1. Individuals may request an appeal if the individual has not requested or received an appeal previously.
 - a. A request for an appeal must be sent within 30 days;
 - b. Exceptions to the 30 day requirement are limited to certain circumstances where the finding was made before 11/1/03 (see page 19 of the rules, Section XIV(B)) and findings which qualify for reconsideration under Section XV of the rules (page 20);
 - c. A substantiated individual who is eligible for an appeal should submit any information they wish the reviewer to have as they consider whether or not the finding was founded;
 - d. The appeals process has two stages, first is a paper review where a specialized Department employee reviews all of the Department's records regarding the finding along with anything submitted by the appellant and makes a determination as to whether the finding is upheld or overturned;
 - e. If the finding is upheld the appellant has the right to request an Administrative Hearing pursuant Title 5: Administrative Procedures and Services Chapter 375: Maine Administrative Procedure Act.
- C. Conviction of a misdemeanor.** An individual who received a Letter of Eligibility with a disqualifier due to a conviction of a misdemeanor, as specified by the Department in Section 3(J)(5) of this rule within the preceding 10 years may request an appeal of the disqualification.
1. A written request for an appeal must be sent within 30 days of the date in which the Letter of Eligibility was issued and include;
 - a. Documentation demonstrating that the misdemeanor conviction within the preceding 10 years was the only disqualifying result in the comprehensive background check and;
 - b. Documentation demonstrating that there have been no additional criminal convictions of any class following the disqualifying conviction and;
 - c. Documentation that the individual is no longer under any sanction or conditions of the court system. This may include, but is not limited to, probation.

2. The Department will review all documentation submitted within 10 days of receipt of the documentation.
 - a. When criteria 4(C)(1)(a)-(c) have been met the Department will reverse the ineligible decision and provide the individual with notice of the decision and an updated Letter of Eligibility will be mailed.
 - b. When the individual has failed to make a timely request for appeal or does not provide adequate documentation of criteria 4(C)(1)(a)-(c) the Department will provide the individual with a notice of the decision that eligibility status has not changed and will provide instructions regarding the individual's right to request an Administrative Hearing pursuant Title 5: Administrative Procedures and Services Chapter 375: Maine Administrative Procedure Act.

STATUTORY AUTHORITY: 22 M.R.S. §§ 42(1) AND 8302-A(1)(J),(2)(K).

EFFECTIVE DATE: SEPTEMBER 25, 2020 (EMERGENCY ADOPTION)