

Policy Title: **Background Check Requirements for Home and Community Based Services (HCBS) Providers**

Policy number: **CW0001**

Effective date: **April 1, 2019**

Last revised:

Applicable to: This policy pertains to designated children's Waiver Home and Community Based Services (HCBS) providers that serve members under the age of 21.

Purpose

The purpose of this policy is to establish procedures for conducting the required background checks for HCBS providers and their applicable agency employees, to better protect members under the age of 21 and to help ensure their safety. Chapter 57 of the Laws of 2018 includes new statutory requirements related to Criminal History Record Checks (CHRC), Mandated Reporter requirements, and Statewide Central Register (SCR) Database checks.

Scope

HCBS providers and their applicable agency employees complete three (3) required clearances:

- Staff Exclusion List (SEL) through the NYS Justice Center for the Protection of People with Special Needs (Justice Center)
 - NYS Social Services Law 495
 - For HCBS providers that will have regular and substantial contact with individuals under the age of 21
- Criminal History Record Check (CHRC) through NYS Department of Health (DOH)
 - NYS Public Health Law Article 28-E
 - For unlicensed HCBS provider employees who provide direct care to members under the age of 21 or have access to their property and belongings
- Statewide Central Register Database Check (SCR) through the Office of Children and Family Services (OCFS)
 - NYS Social Service Law 424-a
 - For HCBS provider employees that will have the potential for regular and substantial contact with members under the age of 21

NOTE: Please note that the employer of record is the agency responsible for completing the required background checks.

HCBS providers are responsible for ensuring that their employees have complied with all the necessary background check requirements as outlined below prior to delivering services (and prior to meeting alone with the HCBS participant). HCBS providers must have policies and procedures in place that outline the background check requirements, including all the necessary steps for compliance, including training and documentation, as required.

In addition, HCBS providers and their applicable agency employees are required to be mandated reporters of child abuse and maltreatment, per NYS Social Services Law 413.

Specific requirements relating to each of these checks are outlined below.

Staff Exclusion List (SEL) through NYS Justice Center

The SEL is a Statewide Register maintained by the NYS Justice Center. The SEL contains the names of people found responsible for serious or repeated acts of abuse and neglect. The SEL check is required for all newly hired staff that will have regular and substantial contact with individuals under the age of 21. The SEL should be completed prior to all other required background checks for practical purposes.

- The SEL check is free and is required for all prospective HCBS providers and other applicable agency employees who require a SCR Database Check. Because the results of the SEL check are not transferrable from agency to agency, the check will need to be conducted for new hires even if they have previously cleared the check.

The SEL Check Process:

- HCBS providers are responsible for registering an Authorized Person with the NYS Justice Center and meeting any additional requirements to ensure completion of the SEL checks.
- Authorized person(s) are the staff at each agency that can request SEL checks online and receive results via email.
- Employers are required to retain documentation of the result for each SEL check.

Criminal History Record Check (CHRC) through NYS Department of Health

The Criminal History Record Check (CHRC) is a fingerprint-based, national FBI criminal history record check. These checks are submitted and processed using the Criminal History Record Check (CHR) application, which is housed within the Health Commerce System (HCS).

Effective April 1, 2018, Article 28-E of the Public Health Law requires a CHRC be conducted for all prospective employees that provide direct care to members under the age of 21, including HCBS providers and other applicable agency employees. The CHRC must be completed for staff who will provide direct care or supervision. HCBS providers who previously had Criminal Background Checks (CBC) completed through the NYS Justice Center are required to have the CHRC because the previously conducted checks do not transfer, and the CBC does not meet the requirements of the CHRC.

The following titles are only exempt from the CHRC requirements if they are operating within their title:

- Professionals licensed under Title 8 of the NYS Education Law
- Licensed nursing home administrators, security guards, volunteers and students enrolled in a program leading to a professional license under Title 8 are not subject to the CHRC

An employee is operating within their title if their license was specifically required for their position. If a Title 8 licensee is not operating within their title, they are still subject to the CHRC.

Authorized Persons:

- Individual(s) within the “Administrator” role are responsible for maintaining CHRC “Authorized Person” (AP) access. When entering the CHRC application, select “Manage AP” in the toolbar or the “Manage Authorized Persons” quick link to add and/or remove a CHRC “Authorized Person”. Routine monitoring of CHRC AP access should be completed by the individual(s) within the “Administrator” role for continued compliance.
- Any designated AP may be contacted by the Department regarding the status of an employee. While providers are highly encouraged to assign more than one AP for backup purposes, providers are discouraged from having more than five assigned APs.
- Only individuals designated as a CHRC “Authorized Person” may contact CHRC for status updates, inquiries, results, etc.
- Authorized Persons should monitor the Document Viewer in the CHRC application on a daily basis to ensure timely receipt and review of time sensitive documents, including but not limited to Live Scan Requests, notification letters, and arrest notifications after hire.

Timeframes:

A provider must immediately, but no later than 30 calendar days after the event, notify the Department when:

- o an individual is subject to CHRC via 103 submission; and
- o an individual is no longer subject to CHRC via 105 termination. Terminations include when an employee is no longer subject to CHRC; is no longer employed by the provider; employee death; or when a prospective employee is no longer being considered by the provider.

Upon receipt of the request for fingerprint (LiveScan), an appointment must be scheduled for the employee to be fingerprinted, along with indication of the method of payment.

The CHRC Process:

Employers of covered persons are responsible for requesting and processing the checks.

- Employers must ensure appropriate direct observation and evaluation of the *temporary employees*, effective July 1, 2019.
- Temporary employees are those whose CHRCs are pending.
- Per Chapter 57 of the Laws of 2019, effective July 1, 2019, temporary employees will not be able to provide direct care without supervision by an employee whose check has been successfully completed or by exempt staff.
- If an employee is later employed by another agency that requires a CHRC, the CHRC process will be expedited once the direct employer (the HCBS provider) submits their request for a CHRC. If the applicant has already been evaluated by

DOH/CHRC, the direct employer will not receive a Live-Scan Request Letter. However, they will receive a letter of determination concerning employment eligibility. There is no additional fee in this situation and the expedited checks are typically processed in one (1) to two (2) weeks.

- There is a cost for the CHRC (2020 total cost of CHRC is \$102.00. Please note this is subject to change). The employer of record is responsible for the cost. These costs are statutorily prohibited from being passed on to the employee.
- There are some crimes which may statutorily disqualify a person from obtaining employment pursuant to Executive Law 845-b (5)(a). If the prospective employee has one of the listed convictions, he/she may only be approved for employment if the DOH determines, in its discretion, that approval of the application ... “will not in any way jeopardize the health, safety or welfare of the beneficiaries of such services.” This is a very high standard of review and the applicant will need to provide significant information to overcome a denial of employment eligibility. If the prospective employee’s convictions are for crimes other than those mentioned above, the DOH “may approve or disapprove the prospective employee’s eligibility for employment by the provider, consistent with article twenty-three-A of the correction law.” See, Executive Law Sec. § 845-b (5) (b). The agency will receive CHRC Legal Determination Letters which are based on legal review of NYS and FBI criminal histories.
- Sample notification letters that are favorable to the applicant and which are sent only to the health care provider include the following:
 1. **No Hits No Violations** letter issued when both the Department of Criminal Justice Services (DCJS) and FBI report the applicant has no criminal history at all.
 2. **Legal no conviction/no hit** letter issued following receipt of a criminal history record indicating charges or convictions by the DCJS or the FBI which upon investigation and legal determination are not reportable convictions for any felony or misdemeanor (for example violations, infractions, sealed records, family court, military non-judicial punishment).
 3. **DOH non-denial (a)** letter issued when an applicant has submitted, in advance of an initial attorney review, sufficient rehabilitation materials to attenuate a statutorily disqualifying conviction.
 4. **DOH non-denial (b)** letter issued following application of Article 23-A of the NYS Correction Law and initial attorney review of an applicant’s record and legal determination made finding no direct relationship or unreasonable risk to the granting of employment eligibility regarding that criminal history (for example, a 1999 Class U misdemeanor DWI).

5. **Open charges/not held in abeyance** letter issued when the applicant has a pending minor misdemeanor matter which does not relate to the proposed employment in a health care setting or creates an unreasonable risk to patients or where the applicant has received an adjournment in contemplation of dismissal with respect to an open charge.
6. **Final non-denial (a)** letter issued following the issuance of a pending denial letter where the applicant has submitted sufficient rehabilitation materials to attenuate a statutorily disqualifying conviction.
7. **Final non-denial (b)** letter issued following the issuance of a pending denial letter where the applicant has submitted sufficient rehabilitation materials to attenuate a discretionarily disqualifying conviction.

Note, Letters #2 through #5 above are issued after the criminal history check is perfected and a comparative law analysis performed, and do not require an applicant response, leaving the final hiring decision with the health care provider. Letters #6 and #7 communicate favorable final decisions rendered after the applicant submits rehabilitation information. These are issued following an attorney review of the applicant's complete rehabilitation submission and a thorough DOH investigation concerning the circumstances of a crime.

- Sample notification letters that are unfavorable to the applicant and which are sent to both the health care provider and the applicant include the following:
8. **Pending denial to provider/pending denial to employee** letters issued following attorney review of a perfected rap sheet where the applicant has misdemeanor and/or felony convictions which, upon legal review, contain either a statutorily or discretionarily disqualifying conviction and requesting the submission of rehabilitation documentation from the applicant.
 9. **Final denial (a)** letter to provider/employee issued following the issuance of a pending denial letter where the applicant has not submitted sufficient rehabilitation materials to attenuate a statutorily disqualifying conviction.
 10. **Final denial (b)** letter to provider/employee issued following the issuance of a pending denial letter where the applicant has not submitted sufficient rehabilitation materials to attenuate a discretionarily disqualifying conviction.
 11. **Hold in abeyance** letter to provider/employee issued when the applicant has a pending felony, or a pending misdemeanor which relates to the proposed employment in a health care setting or creates an unreasonable risk to individuals enrolled in HCBS.

In addition, following the DOH issuance of a pending denial letter to the provider and employee, a favorable final employment eligibility determination can also be made by DOH attorneys in the form of a final non-denial (a) or final non-denial (b) letter (letters 6 and 7) as referenced above.

12. A 12th type of letter, referred to as a **Charge notification-after hire** letter, concerning a subsequent arrest, is sent only to the health care employer. When subsequent arrests involve particularly egregious circumstances, DOH attorneys may also telephone the employer to read the charges to that employer, thereby allowing the employer to make a timely risk management decision concerning ongoing employment.

Results of CHRCs must be kept confidential unless provided to an authorized party. Access to results must be restricted to the employee, the provider and/or the provider's authorized designee, others involved in the hiring decision, and the Department of Labor. Criminal history record information must remain strictly confidential and be kept in a separate area that only authorized persons have access to.

Terminations:

- Please note that if the Department issues a denial of employment eligibility in the form of a final denial (a) or final denial (b) letter (letters 10 and 11) as referenced above, or when an employee is no longer employed by an agency, the employee must be terminated in the CHRC application.
- Within the CHRC application, select “Terminate an Employee.” Click each checkbox associated with an employee(s) to be terminated. Then click the “Terminate” button. A confirmation page will appear, listing the employee(s) selected for termination. To process the termination(s), click the “Terminate” button. After successful termination, click the “Print” button on the next screen to print a CHRC 105 (Termination Form) for each employee terminated, to be retained in your files for a minimum of six years. Ongoing monitoring will occur to ensure compliance.
- Please note that in addition to the Termination Form, CHRC 102 (Fingerprint Consent Form) and 103 (Submission Receipt) forms must also be retained even if the individual was not hired by your agency.

Statewide Central Register Database Check (SCR) through NYS OFCS

The Statewide Central Register (SCR) maintains a database of records of child abuse and maltreatment reports. The purpose of the Database Check is to find out if a prospective employee of a HCBS provider is a confirmed subject of an indicated report of child abuse or maltreatment. The SCR Database Check is required for those employees that will have regular and substantial contact with members, which includes but is not limited to HCBS providers.

SCR Database Checks will be required for prospective employees hired on or after April 1, 2019 that will have the potential for regular and substantial contact with individuals under the age of 21. SCR Database Checks are not transferable and are prohibited from being re-disclosed. There is a cost for the SCR Database Check (2018-2019 SCR Database Check is \$25.00) that may be paid by either the employer or the employee. The payment must be submitted when the SCR Database Check request is submitted. Please note that if an SCR check was conducted within the last 6 months, and the results are still accessible in the Online Clearance System, the request for a new SCR check may not be submitted until the results are no longer in the system.

The SCR Database Process/Results:

If the prospective employee is not found to be a confirmed subject of an indicated report, the employer will receive notification that the SCR has no record of the applicant being an indicated subject of a report of child abuse or maltreatment.

- If the prospective employee is found to be the subject of an indicated report, the SCR is required to send a letter informing the applicant of their due process rights. The applicant is given ninety (90) days to respond back to the SCR in writing that they want to exercise their due process rights through an administrative review and fair hearing process. If the SCR does not hear back from the applicant within that timeframe, the SCR will then notify the HCBS provider that the SCR has a record of the applicant being an indicated subject of a report.
 - If a HCBS provider is notified that the SCR has a record of an applicant being an indicated subject of a report, the notification will not contain any details related to the report of abuse or maltreatment.
 - An indicated SCR report is not an automatic exclusion from employment.
 - The HCBS provider can request that the prospective employee sign an authorization for release of information allowing the prospective employer to request and obtain a copy of the indicated SCR report. After reviewing the records, it is the prospective employer's discretion as to whether they hire or do not hire the prospective employee.

Mandated Reporter Requirements

HCBS providers and other applicable agency employees are mandated to report suspected child abuse or maltreatment. Reports of suspected child abuse or maltreatment are to be made immediately by telephone, to the mandated reporter line at 1-800-635-1522. The mandated reporter line is available 24 hours a day, 7 days a week. This line is dedicated to mandated reporters. Please do not provide this number to the public, who can report child abuse or maltreatment by calling 1-800-342-3720. In addition to the report made by phone, the mandated reporter must complete a written form (form LDSS 2221A) and submit it, within 48 hours, to the child protective services of which the child resides.

The Office of Child and Family Services offers free training online for mandated reporters that can be completed at any time of day, any day of the week. Upon completion of the online training, participants will electronically receive a certificate of attendance. There are no costs associated with this requirement.

- Free training for mandated reporters on the OCFS website:
https://ocfs.ny.gov/main/cps/Mandated_Reportor_Training.asp
- Register for Mandated Reporter Training at the following link:
<https://www.nysmandatedreporter.org/RegistrationInstructions.aspx>

Training Requirements

The HCBS provider Human Resources staff must receive training on these requirements to ensure that staff receive the appropriate required clearances and to ensure that the HCBS provider is in compliance.

Quality Monitoring and Oversight

HCBS providers are responsible for monitoring their employees to ensure that they are in compliance with these requirements. HCBS providers should have a process in place to monitor and ensure that the appropriate employees are receiving the required checks.

As outlined above, employers are required to retain the following, which will be subject to audit by the State:

- Criminal History Record Checks
 - Employers must retain the approval or disapproval letter for each employee, as well as the CHRC 102 (Fingerprint Consent Form), CHRC 103 (Submission Receipt), and CHRC 105 (Termination Form).
 - These letters are housed within the CHRC application in HCS.
 - Please note that criminal history information cannot be shared.
- Statewide Central Register Database Checks
 - Employers must retain the results of each SCR check.
 - Please note that results are maintained in the Online Clearance System for only 6 months. For this reason, employers will need to print or save the results to make sure they remain available.
- Staff Exclusion List Checks
 - Employers must maintain the results of each SEL check.
 - These results are sent via email.
- Mandated Reporter
 - Employers must maintain the certificate of attendance that employees receive upon completion of the required training.

For more information on this requirement, please refer to the Department's *Health Home Serving Children (HHSC)* webpage at:

https://www.health.ny.gov/health_care/medicaid/program/medicaid_health_homes/hh_children/index.htm - Under: *HHSC Policy Guidance (See: Mandatory Background Check Requirements for HCBS Providers and Health Homes)*