April 27, 2022

TO: Interested Persons

FROM: Chris Parvin, Provider Supports Administrator

SUBJECT: CONCISE EXPLANATORY STATEMENT (RCW 34.05.325)

For rules proposed under notice filed as WSR 21-22-038 on October 27, 2021:

Repealed WAC 110-04-0100; 110-04-0110; and 110-04-0130, and

REASON FOR ADOPTION: Explain when certificates of restoration of opportunity (CROP) and certificates of parental improvement (CPI) will be included in criminal history record reports, qualifying letters, or other assessments during a background check and when they will not.

For early learning programs’ background checks:

- Better clarify that the background check process includes requesting information from other states in which an applicant has lived during the five years before their background check;
- More clearly explain which criminal convictions must disqualify an individual from being licensed, contracted, certified, or authorized to have unsupervised access to children and which trigger further review to determine whether the background check results demonstrate that an applicant possesses the character, suitability, and competence to have unsupervised access to children;
- Make fees consistent for manually and electronically submitted applications;
- Clarify that background check decisions are issued within 45 days from the application date.

CHANGES MADE SINCE THE RULE WAS PROPOSED:

- Adopted WAC 110-04-0140(2) revised to better clarify the impacts of a CPI or CROP on a background check.
- Proposed WAC 110-06-0042(2) deleted and not adopted.
- Adopted WAC 110-06-0043(1) contains the phrase, “associated with their services,” that was proposed for deletion.
- Proposed WAC 110-06-0043(1)(b) deleted and not adopted.
- Twenty four dollar fee for manually submitted applications proposed in WAC 110-06-0044(1)(b) is removed from the adopted version, leaving the $12 fee applicable to all applications.
- Proposed 110-06-0070(2) and (3) deleted and not adopted.
- Clarification that DCYF issues background check decision within 45 days of receiving applications inserted at WAC 110-06-0070(6).

<table>
<thead>
<tr>
<th>SUMMARY OF COMMENTS RECEIVED</th>
<th>THE DEPARTMENT CONSIDERED ALL THE COMMENTS. THE ACTIONS TAKEN IN RESPONSE TO THE COMMENTS, OR THE REASONS NO ACTIONS WERE TAKEN, FOLLOW.</th>
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<td>110-06: allow DCYF to disqualify a previously authorized provider who: (1) I read this as substance abuse OUTSIDE of the facility/contract and not necessarily being under the influence while working/caring for children. Will there be clarification that even if you're sober/unaltered at work the behaviors related to addiction can affect a person's background check clearance?</td>
<td>Agreed. The concerning language, which was proposed as WAC 110-06-0042(2), is not in the final adopted rule.</td>
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<td>I feel that if there are any convictions in the household, either by the licensee, spouse, significant other, they should not get to have a childcare license. This puts the children at risk.</td>
<td>DCYF must balance its primary concern for the safety of children enrolled in child care with the need to remove barriers that prevent individuals from opening or staffing child care programs so that adequate child care options are available across the state for families who need child care. The proposed and adopted rules rely on the federal government’s categorization of crimes that permanently or temporarily disqualify individuals from having unsupervised access to children in child care.</td>
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<td>I feel all past criminal records should be included in a background check pertaining to a person who is looking to be employed or is volunteering to work with children. Both out of state and instate information should be included</td>
<td>See answer above. The proposed and adopted rules include the federal and state requirement to obtain out-of-state and in-state background information and to consider the information that is either federally disqualifying or may relate directly to child safety, permanence or well-being.</td>
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<td>The rule mandating background check results for a new employee are received BEFORE employment can begin makes on-boarding part-time employees of early childhood care centers like ours untenable. Previously, before DCYF began aligning the rule with a national mandate, centers like ours could have the employee complete the background check application electronically. Within a</td>
<td>DCYF has and continues to request relief to this federal requirement, but has not yet been successful. The proposed and adopted rules align with the federal requirement for pre-employment background checks.</td>
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short time they would receive a personal email from DCYF instructing them to go to an authorized location for fingerprinting. The employee could provisionally work at the childcare center while awaiting clearance of the background check as long as they had no unsupervised access to children. We took this charge seriously and made it work for many years. Recently DCYF adopted an exception due to the pandemic. I would like to urge DCYF to keep this current provisional rule.

Our center serves 70 children each day with a regular staff of 28 full and part-time staff and 5 to 8 on-call substitutes. Although our 14 full-time classroom teachers have very long tenures, many of our new hires for part-time assistants and on-call substitutes are university students. They tend to only stay with us for two to four years and move away when finished with university. So we hire every year for several of these positions. If a student must wait for a background check to fully clear before they can step foot in the door, they are quickly going to take jobs elsewhere. These students are often majoring in education, ECE, or an allied field of study and are ideal employees for these part-time positions that are key to maintaining proper class ratios in our high quality care center. It is hard to attract quality candidates for part-time positions. They already must meet requirements other types of jobs don't have, like getting a TB test and proof of Measles vaccine, completing a Safe Sleep training course, going through our three-hour orientation, etc. It's a lot of hoops to jump through for a 3 hour per day part-time job.

I want to urge DCYF to petition whatever entities they must on the state and national level to amend the regulation so that employees may begin in our licensed childcare setting after applying for the background check (we pay for this and we guide them through the on-line form to apply, help them get a STARS number and register with MERT, etc. as part of the hiring process) as long as they are never left alone with children until DCYF alerts us that the background check has cleared. This is reasonable and workable. It helps ensure full staffing of childcare centers which is of utmost importance to children's safety and wellbeing and quality operations.

Thank you for reading this request. We are a well-respected childcare center and have been serving children and families with a high-quality program for 40 years in the Queen Anne neighborhood of Seattle. We have trained
and mentored countless employees and always supervised them properly. We believe this requirement is a hardship for most centers and urge DCYF to continue the provisional practice you've adopted during the pandemic of allowing new employees to begin work fully supervised/never alone with children until notice from DCYF that the background check has cleared.

Also, I would like to urge DCYF to contract with MANY more fingerprinting businesses to facilitate background checks. Students with no cars and a full academic schedule have a big challenge getting an appointment time that works and public transportation to Lynwood and South Seattle (the two closest fingerprinting locations to our center, both more than 8 miles away). There are many fingerprinting providers within just one or two miles of our location. There's got to be a way to open up access to more fingerprint providers.

DCYF also considered the comments received in the attached letter and responded by:

- Defining “pending criminal charge” to better ensure only actively pending charges will be considered in background checks,
- Not adopting proposed WAC 110-06-0070(2) and (3), which would have allowed DCYF to disqualify a previously authorized individual under certain conditions.
- Revising the broad 24-hour reporting requirement for providers to disclose new potentially disqualifying information to DCYF about any early learning provider, so that the adopted requirement limits the providers’ disclosure requirement to only individuals associated with the reporting providers’ own programs.

This document also serves as the summary of public hearing comments to the agency head required under RCW 34.05.325(4).

cc: DCYF Rules Coordinator
To: DCYF Rules Coordinator  
P.O. Box 40975  

October 25, 2021  

Sent by email: dcyf.dcyfrulescoordinator@dcyf.wa.gov  

Subject: Comment by the American Civil Liberties of Washington, Civil Survival Project, and the Public Defender Association on proposed rulemaking contained in a continuance of WSR 21-18-107  

We, the undersigned organizations, are writing to comment on proposed rulemaking by the Department of Children Youth and Families (DCYF). On September 22, 2021, DCYF issued a CR-102 proposing changes to various WACs that impact background checks and the employment of individuals with prior criminal history in areas regulated by the Department. The deadline to provide comment on the proposed changes is currently October 26, 2021. However, given the scope of the changes proposed, we are asking for an extended deadline such that we may provide more substantive comments to the proposal in such a way that reflects the communities we represent. The communities that we represent include individuals impacted by the criminal legal system, and it is vital that they have a meaningful opportunity to review the proposals and to provide feedback. Further, to highlight the need for additional time and the importance of DCYF to confer with people who have been impacted by the criminal legal system, we outline some of our concerns below.  

First, the overarching basis of our concern with respect to the consideration of criminal history in licensing, contracting, certification, and employment decisions arises from the criminal legal system’s well-documented disproportionate impact on Black, Indigenous and People of Color (BIPOC) communities.¹ BIPOC communities are disparately charged with crimes, and therefore plea bargaining within these communities (the overwhelmingly predominate way in which criminal cases are resolved) is also much higher within BIPOC communities.² Further, there is growing evidence that there is racial bias in the way in which BIPOC communities are

offered plea bargains in the first place.\textsuperscript{3} Because of these factors, individuals in BIPOC communities are more likely to have a conviction on their record after their interaction in the criminal legal system. Given this evidence, DCYF must acknowledge that any decision-making on the basis of criminal history will necessarily have reverberating impacts on communities of color.

Second, while the proposal indicates that the changes are necessitated by federal law, the specific federal law cited is 42 USC § 9858, which is solely about the provision of federal funds to states. This provision does not provide, to the person reviewing the changes and hoping to provide comment, sufficient notice as to the necessity of the substantive changes to the rules proposed in this CR-102. Without such notice, the process for these important changes remains opaque and inaccessible to most people, and certainly those most affected by the proposed revisions to the rules.

Third, the proposed change to WAC 110-04-0120 indicates that the WAC will provide some guidance to individuals with respect to agency actions when the individual has a pending criminal charge. It is not clear in the WAC whether the pending criminal charge will be considered, however we strongly urge DCYF to remove pending criminal charges from any consideration in licensing, contractual, certification, and employment decisions. To complement this point, it is concerning that the proposed WAC 110-04-0140 requires DCYF to either disqualify a person when their background information contains a Certificate of Parental Improvement (CPI) or Certificate of Restoration of Opportunity (CROP), if they have a pending charge or conviction of a crime or pending negative action, or assess character, suitability or competence under WAC 110-04-0120. First, it is problematic that this provision applies to pending charges as they should not be considered as presumptive evidence that a crime has been committed. Second, the mere fact that the person has a CPI or CROP should be sufficient grounds to remove any barriers for the individual on the basis of the criminal history to which the CPI or CROP applies. Third, providing unfettered discretion to the decision-maker as to whether to disqualify the person, or conduct a character, suitability, and fitness assessment will naturally result in individuals taking the path of least resistance, that is, disqualification. Again, our concern is that the proposed rules will result in the perpetuation of racial disparities for people who have fought their way out of the criminal legal system and are now only seeking to care for their loved ones, or other vulnerable people. This was certainly the case in the case of Christal Fields in \textit{Fields v. Department of Early Learning}, 189 Wn. 1031 (2018), in which she demonstrated that despite her criminal history, she was an exemplary child care provider.

Fourth, the sections of the proposed rules that include the consideration of whether an individual “used illegal drugs or misused or abused prescription drugs or alcohol that either affected the subject individual’s ability to perform their job duties on the premises when children were presented a risk of harm to any child receiving early learning services,” are problematic. This proposed language in WAC 110-06-0042 (Departmental investigation and redetermination) is very broad and gives the decision-maker a great deal of discretion without any evidentiary

standards to limit that discretion. Further, this standard is subject to abuse by the person or entity who brings the complaint and it is our concern that these complaints are most likely to be leveled against people of color. We are similarly concerned about the consideration of attempted conduct, specifically the consideration of whether a person “attempted, committed, permitted or assisted in an illegal act on the premises. For purposes of this subsection, a subject individual attempted, committed, permitted or assisted in an illegal act if they knew or reasonably should have known that the illegal act occurred or would occur.” Because there are no standards as to the manner in which such an investigation would occur, there is a significant likelihood of disparate outcomes that skew against BIPOC individuals.

Fifth, we are concerned generally about the way in which CROPs and CPIs are considered throughout the proposed changes. Rather than utilizing the CROP and CPI as tools to consider individuals’ efforts at rehabilitation and applying them as tools to create additional opportunities, the proposed rules appear to limit their usefulness. This seems to contradict the legislative purposes of both tools and discourage potentially excellent applicants from applying for work in areas regulated by DCYF.

Finally, we want to acknowledge that DCYF has worked with us in the past and recognized the role and impact of the criminal legal system on BIPOC communities. We want to encourage the same kind of conversation with respect to these proposed changes. In order to engage meaningfully with impacted communities, it is imperative that rule comment deadline is extended and that we discuss any necessary changes further. We look forward to hearing from you regarding this letter. Please contact Nancy Talner at talner@aclu-wa.org, Kelly Olson at kelly.olson@defender.org, or Prachi Dave at Prachi.dave@defender.org.

Sincerely,

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