ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on September 25, 2019, the Office of Children and Family Services (OCFS) received over 400 comments regarding the regulatory package for licensed and registered providers. These comments came from parents, providers, service providers, and child care advocacy groups. After a careful review of public comment, OCFS has revised its regulations where possible to ease burdens on providers, parents, and to allow children to obtain necessary services under Individuals with Disabilities Education Act (IDEA). Such revisions are done in a manner that will not jeopardize the health and safety of children in care, and to align with federal and state law.

GENERAL

COMMENT: One responder felt that the new regulation 417.15(b)(26), which requires programs to follow safety plans when allegations of risk to harm to children are under investigation, was too vague, and needed more information.

OFFICE RESPONSE: OCFS will issue guidance to further clarify the process for the safety plan and investigations. No change to the regulation is warranted.

COMMENT: Twelve responders expressed that they are unhappy with the regulations in general and should be changed. Concerns include that providers were not made aware of regulatory changes in a timely manner, that the regulations create an impossible hardship, that the regulations will delay hiring staff, and that regulations pose a problem for providers.

OFFICE RESPONSE: Where responders were specific, OCFS has addressed the issue below in subject-specific categories. As to the general concerns, the regulations are necessary to comply with federal and state statute and thus OCFS must proceed with regulatory changes. OCFS has made revisions to the regulations as specified in more detail below.

COMMENT: Three responders expressed concern over the volume of regulations and paperwork. In addition, one responder expressed that the burden of trying to comply with the regulations is what leads to illegal care. One responder raised concern that the regulations created an impossible hardship.

OFFICE RESPONSE: The need for the regulations is to comply with federal and state statute. OCFS has attempted to control the volume of regulations. No changes in the proposed regulations are necessary in response to these comments.

COMMENT: One responder requested that one regulatory package should also include the new smoking regulations as well as the requirement to anchor dressers and televisions to the walls.
OFFICE RESPONSE: OCFS has reviewed the comment and determined no change is warranted in this regulatory package.

COMMENT: Two responders expressed concern regarding the forms being repetitive, and another responder had specific recommendations to make the forms clearer and easier to understand. One responder asked if completed forms could be made available for existing employees.

OFFICE RESPONSE: OCFS will review the forms that are provided for ease and understandability. No changes in the proposed regulations are necessary in response to these comments.

COMMENT: Several responder suggested to allow clearance notifications to be received by e-mail. Responders also suggested to create centralized online databases for background checks and other recordkeeping.

OFFICE RESPONSE: System support is not in place to support this function at this time. OCFS will take these comments into consideration as time and resources allow. No change in regulation is necessary.

COMMENT: One responder was not able to access the text of the regulations in the register.

OFFICE RESPONSE: The text has been sent to the responder. No changes in the proposed regulations are necessary in response to this comment.

DEFINITIONS

COMMENT: One responder was confused about the definition of volunteer, where it says that volunteers means a person who has the potential for unsupervised contact and is not allowed to be left unsupervised. Two responders were also concerned about why volunteers can’t be left alone with children if they have received a background check. In addition, one responder was confused about whether volunteers needed to have a background check if not providing child care block grant funded services.

OFFICE RESPONSE: OCFS has revised the definition of volunteer found at 18 NYCRR 413.2(c)(15) and included a more expansive definition for the term within the background check section of the regulations found at 18 NCRR 413.4. Such revisions will allow volunteers who have been cleared through the background check process to be unsupervised with children, however, they cannot count in ratio. Social Services Law requires volunteers undergo the background check regardless of whether the program is providing child care services that are funded by the child care block grant.

COMMENT: One responder suggested the creation of temporary staff, who would be allowed to work at multiple sites.
OFFICE RESPONSE: All employees are required to undergo the background check process regardless of whether they are employed on a contract, temporary, or full-time basis. Employees and volunteers can be associated with multiple sites and are therefore able to work or volunteer at each site. No changes in the proposed regulations are necessary in response to this comment.

COMMENT: One responder raised concerns regarding the equal enforcement of the regulation, for instance, who is considered a volunteer if the program does not offer Child Care Development Fund funded services.

OFFICE RESPONSE: As referenced above, the regulations, including the definition of volunteer, apply to all licensed and registered programs, regardless of whether or not they offer child care services funded by the child care block grant. The Office has, and will continue to, work with all regional offices in regard to training of consistent enforcement of all regulations. No change in regulation is warranted.

BACKGROUND CLEARANCES

COMMENT: Seventy-six responders expressed concern that OCFS has gone above the federal requirement by not allowing those who have been fingerprinted to work under the supervision of cleared staff through a conditional approval process. Over 90 responders expressed concern that the background check process will delay the hiring and on-boarding of new staff, and then staff may leave entirely instead of waiting to begin work because it is not realistic to be out of work for an extended period of time. Within this group, 32 responders expressed concern that the existing registrars would not be able to interpret, educate and execute new policies in order to process the background checks of individuals in a timely manner, and so suggest that individuals be able to begin under supervision. Other suggested staff can begin after two weeks. In addition, two responders expressed that not allowing individuals to start while under supervision could move programs to close, and ten suggested this could delay children’s care if the children cannot be served.

OFFICE RESPONSE: The regulation has been revised based on public comment to align with the federal requirement, which will allow employees to begin work after completing either the State criminal background clearance, or the FBI clearance, provided that employees shall require to be supervised until they have successfully completed the full background check process.

COMMENT: Several responders have stated that the background check requirements will negatively impact proper ratios in programs, or program will have to ask families to leave.

OFFICE RESPONSE: The regulation has been revised based on public comment to align with the federal requirement, which will allow employees to begin work after completing either the
State criminal background clearance, or the FBI clearance, provided that employees shall require to be supervised until the background check eligibility determination has been provided to the program. However, providers must be in compliance with all supervision ratio regulatory requirements.

**COMMENT:** Twenty-six responders expressed concern that the time-frame and turnaround process for the background check takes too long. Some have indicated the process will take up to 90 days, other cited a three-week delay. One has noted different processing times in different parts of the state. In addition, three responders suggested that OCFS shorten the response from 45 days to 15 days and require SCR result response within 5 days.

**OFFICE RESPONSE:** OCFS has worked diligently to expedite the process. Timely completion is dependent on the required documentation packet being completed with accurate information. If persons believe that the process is taking a long time for completion, they should contact their licensor/registrar. No changes in the proposed regulations are necessary in response to these comments.

**COMMENT:** Twelve responders inquired about clearer directions of the background process, including where the clearances should be sent, what are the steps of the process, how will they know an individual has been cleared, and where shall they direct questions?

**OFFICE RESPONSE:** Regulations are not appropriate locations for detailed instructions on completion of paperwork. Detailed instructions on the clearance process is outlined on the OCFS-6000 form. When the comprehensive background check process is completed, the program and the person will receive written notification from OCFS. Questions should be directed to the regulator. No changes in the proposed regulations are necessary in response to these comments.

**COMMENT:** One responder provided suggestions to make the background forms more user-friendly, such as ensuring that comprehensive background clearances forms are fillable.

**OFFICE RESPONSE:** OCFS will review the forms that are provided for ease and understandability. OCFS has forms available in word and pdf files to provide responders with their preferred option. No changes in the proposed regulations are necessary in response to this comment.

**COMMENT:** Three responders expressed concern that those who have already completed a background check (current employees) should not have to get another background check.

**OFFICE RESPONSE:** The requirement that background checks be conducted on all current employees conforms to federal requirements as well as social services law. No change to regulation is warranted.

**COMMENT:** One responder specifically raised concern that the purpose was to collect an additional $25 for the State.
OFFICE RESPONSE: No change was made to the fee for database checks under the proposed regulations. The $25 fee for a database check of the Statewide Central Register of Child Abuse and Maltreatment is a statutory requirement pursuant to Section 424-a(1)(f) of the Social Services Law. As such, no change in the proposed regulation is necessary in response to this comment.

COMMENT: One responder expressed concern that the clearance process needs to be completed again every five years.

OFFICE RESPONSE: The requirement that background checks be conducted no less than once every five years is mandated in federal law and regulation. No changes to the proposed regulations are warranted in response to this comment.

COMMENT: One responder expressed the need for an alternate schedule for existing staff, including an extension of an additional year. They are concerned that the two-week window to seek screening could violate provisions for medical or family related leave. They request an alternative schedule be created should staff miss their 14-day window.

OFFICE RESPONSE: The requirement that background checks be conducted on all current/existing employees conforms to federal requirements as well as social services law, which includes a deadline of September 30, 2020. Should a staff person miss their 14-day window, they should contact their regional office. No change in the proposed regulation is necessary in response to this comment.

COMMENT: One responder expressed concern over summer intern staff having to go through the clearance process each year if they have been separated for more than 180 days.

OFFICE RESPONSE: The requirement that background checks be conducted when an individual is separated from child care for more than 180 days is mandated in federal law and regulation. If staff are known to be returning to work in a program, they may be left on the active staff list so to not be considered separated from the program. No changes in the proposed regulations are necessary in response to this comment.

COMMENT: One responder suggested that while relatives who are household members are being cleared for group family or family day care, the program could be temporarily approved while the background checks are being reviewed, provided that the family members not be left alone with a child.

OFFICE RESPONSE: For an initial application, no temporary approval is possible. All people residing in the group family or family day care need to be fully cleared before the program can operate. For an existing program, the program can operate while the background clearances are occurring, provided that the family member is never left unsupervised with a child in care. No change in the proposed regulation is necessary in response to this comment.
COMMENT: One responder expressed concern that the requirement to include the results of tuberculosis (Tb) testing in the medical clearance packet will delay staff start time.

OFFICE RESPONSE: The proposed regulations did not change the requirement for a Mantoux tuberculin or other federally approved tuberculin test to be included in the medical statement. No changes in the proposed regulations are necessary in response to this comment.

COMMENT: One responder questioned whether current employees had to have a new medical and Tb test done.

OFFICE RESPONSE: Current employees with an approved medical statement can use the medical forms on file. The proposed regulations did not change the medical statement requirements. No changes in the proposed regulations are necessary in response to this comment.

COMMENT: Four responders requested that applicants be able to submit background clearance documents online, and that notification of eligibility/ineligibility be provided by email or an electronic database.

OFFICE RESPONSE: When all background checks completed, OCFS will notify the program and individual of their eligibility by mail. Additional technology solutions may be available in the future, however, at this time, no such system is in place. No regulatory change would be necessary to make functional system changes. No changes in the proposed regulations are necessary in response to these comments.

COMMENT: One responder raised the need for better coordination between the agencies that process the comprehensive background checks, especially OCFS and New York City Department of Health and Mental Hygiene (DOHMH).

OFFICE RESPONSE: OCFS is working with partners at DOHMH to provide greater coordination and consistency. No change in regulation is necessary.

COMMENT: One responder asked if OCFS could establish an upper-age limit for background checks. They were concerned about an elderly relative having to leave the house and get fingerprinted.

OFFICE RESPONSE: Neither federal law nor regulation provides for exemptions to the requirement to be fingerprinted for all household members over 18. There are alternative solutions that can assist in the fingerprinting process. If there are specific concerns, individuals should follow-up with their licensing office for assistance. No changes in the proposed regulations are necessary in response to this comment.
COMMENT: One responder expressed concern that a person is required to be cleared to work for each individual program, as opposed to being qualified to work in any program once initially cleared.

OFFICE RESPONSE: Once an individual successfully completes the comprehensive background clearance requirements within NYS, the clearance requirements can be associated (in the field, this is commonly referred to as “waived”) to another child care program within NYS provided that the individual has not separated from their role in a child care program within NYS for a period of more than 180 consecutive days. However, anytime an individual joins a new program, a new check of the Statewide Central Register of Child Abuse and Maltreatment (SCR) and Staff Exclusion list (SEL) must be completed. The individual can begin in the new program while the SCR and SEL clearances are in process. No change in the regulation is necessary.

COMMENT: Two responders expressed concern that a person to be cleared to work for an individual program would have to be re-cleared because of separate requirements imposed by the State Education Department and OCFS.

OFFICE RESPONSE: Current state law requires that individuals be cleared by each agency that has regulatory oversight over their program. No changes in the proposed regulations have been made in response to this comment.

COMMENT: One responder expressed concern that the background check process is burdensome for part time employees.

OFFICE RESPONSE: The federal law does not provide an exemption for part-time employees. All employees must undergo a comprehensive background clearance. No change in the proposed regulation is necessary in response to this comment.

ITINERANT SERVICES

COMMENT: Nearly 100 (98) responders expressed concern regarding itinerant services (which includes special education services such as occupational therapy, speech therapy, physical therapy among others) are not allowed to provide services one-on-one without direct supervision. Many raise concerns that the requirement is not aligned with the child’s Individualized Educational Plan (IEP) or Individual Family Service Plan (IFSP) and is restricting their ability to provide quality care. Six responders specifically state that not allowing the itinerant service provider to be alone with children is not in the child’s best interest. One asked a question about whether itinerant service providers could work in the hallway unsupervised or one on one. Others suggest that the providers existing background check should be sufficient, or that they should be able to get a background clearance. One suggested that there should be a database of cleared itinerant staff persons who could be alone with the children. Seven responders specifically asked that itinerant providers be exempted from background clearances.
if working through another government-funded program. One responder expressed concern that insurance claims could be denied if services weren’t provided aligned with the IEP in regard to the provision of one on one services. One raised concern that this regulation is not in compliance with other federal requirements regarding the provision of special education services.

OFFICE RESPONSE: Federal statute requires that all individuals with unsupervised access to children undergo comprehensive background checks, and state statute gave OCFS the authority to commence background checks for employees, operators, and volunteers. OCFS has distributed an Informational Letter (INF) regarding a short-term waiver process in order to facilitate access to outside service providers, and alleviate concerns regarding requirements of Health Insurance Portability and Accountability (HIPAA), Americans with Disabilities Act (ADA) and Individuals with Disabilities Education Act (IDEA). In addition, in response to the overwhelming public comment, OCFS has revised the regulation to authorize itinerant providers to receive a comprehensive background check by considering them volunteers solely for the purpose of the background check process. Itinerant service providers who undergo the full background clearance process as volunteers will be able to serve children one on one.

SAFE SLEEP

COMMENT: Two responders expressed concern over the updated regulation regarding safe sleep, specifically the prohibition against having a blanket in the crib, and whether this should be best left to parent discretion. One also expressed a wish that the center can use a “sleep sac.”

OFFICE RESPONSE: The regulation was updated to align with NYS Dept of Health’s Safe Sleep Initiative and American Academy of Pediatrics. The use of a wearable blanket, such as a sleep sack is not prohibited by this regulation. No changes in the proposed regulations are necessary in response to these comments.

TRAINING

COMMENT: Two responders recommend reducing the 30 hours of training required for SACC programs, as many workers only work between 125-250 hours a year. The responders raise concerns regarding the difficulty of obtaining part-time employees.

OFFICE RESPONSE: The requirement to complete 30 hours of training every two years is established in Social Services Law 390-a. As the regulation conforms to statute, no change is warranted.

COMMENT: Six responders suggested a reduction in the number of training hours for substitutes, sharing concerns that this would cause a hardship in providing services.
OFFICE RESPONSE: The requirement for all employees to complete 30 hours of training every two years is established in Social Services Law 390-a. For these purposes, substitutes are considered employees. As the regulation conforms to statute, no change is warranted.

COMMENT: One responder expressed concern that 15 hours of training per year would create a hardship for providers.

OFFICE RESPONSE: Federal law required the states to establish an annual training requirement. The requirement to complete 30 hours of training every two years is established in Social Services Law 390-a. The regulation allows an individual to complete the training at their own pace over the course of the year, but does impose a requirement to complete a minimum of 5 hours per year, to comply with the federal requirement for annual training. No changes in the proposed regulations are necessary in response to these comments.

INSPECTIONS

COMMENT: One responder expressed concern regarding whether inspectors will have rights to inspect the entire dwelling, as opposed to the part of the dwelling where the daycare is located. They feel this is an invasion of their privacy, and the inspection should only be within the actual child care setting.

OFFICE RESPONSE: The proposed regulations did not change the parameter of the inspection. No change in the proposed regulation is necessary in response to this comment.

EMERGENCY MEDICAL SERVICES

COMMENT: One responder expressed concern that the requirement that the child not be left alone with a person not cleared extends to emergency medical services—such as sending a child in an ambulance.

OFFICE RESPONSE: The regulation that children can only be with a person who is cleared specifically relates individuals seeking to be enrolled/licensed/registered, volunteer, work, visit, or live at a day care program. The provider must arrange for emergency medical services necessary for the health and safety of the children in the program. No changes to the proposed regulations are necessary in response to this comment.