

OCFS Division of Child Care Services
Regulations for Criminal History Disqualification Reviews

Parts 413 and 415 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) are hereby amended to read as follows:

Subdivision (h) of Section 413.4 of Title 18 NYCRR is amended to read as follows:

(h) Any person who the Office determines, pursuant to this section, should be denied employment or a volunteer position at a child day care program based on an offense not listed in paragraph (1) of subdivision (e) of this section and to which Article 23-A of the Correction Law is applicable, shall have the ability to request a de novo review of the determination[in an administrative hearing before an administrative law judge], to be held and completed before the employer is notified of such determination. Such person shall have reasonable notice concerning the determination, information regarding how to request a [hearing to], review of that determination, and an opportunity to provide any additional information that such person deems relevant to such determination. Such person may choose whether the review will be conducted either through submission of written materials to a hearing officer, or to be heard in person in an administrative hearing before a hearing officer, or by video conference in an administrative hearing before a hearing officer if reasonably available], or through submission of written materials]. Regardless of the method in which the review is conducted, where such request is made, the Office shall also have an opportunity to be heard.

Section 413.5 of Title 18 NYCRR is amended to read as follows:

Enforcement [H]hearings

Subdivision (n) of Section 413.5 of Title 18 NYCRR is amended to read as follows:

(n) Hearing Report. After the hearing has been concluded, the hearing officer will submit a report to the Commissioner of the Office or his or her designee containing findings of fact, conclusions of law, and a recommended and/or final decision. Findings of fact will be based exclusively on the record of the hearing.

(1) Examination of the record after a hearing. Upon reasonable notice to the Office, the record of the hearing may be examined by any party to the hearing at the offices of the Bureau of Special Hearings during regular business hours or by the Office providing a copy to the requesting party, whichever is deemed more practicable by the Office.

Section 413.7 is added to Title 18 NYCRR as follows:

Criminal History Disqualification Review Process

(a) Any person who the Office determines, pursuant to Section (4) of this Part, should be denied employment or a volunteer position at a child day care program based on an offense not listed in paragraph (1) of subdivision (e) of section (4) of this Part and to which Article 23-A of the Correction Law is applicable, shall have the ability to request a de novo review of the determination, to be held and completed before the employer is notified of such determination. Such person shall have reasonable notice concerning the determination, information regarding how to request a review of that determination, and an opportunity to provide any additional information that such person deems relevant to such determination. Such person may choose whether the review will be conducted either through the submission of written materials to a hearing officer or, to be heard in person in an administrative hearing before a hearing officer, or by video conference in an administrative hearing before a hearing officer if reasonably available.

Regardless of the method in which the review is conducted, where such request is made, the Office shall also have an opportunity to be heard.

(b) A review pursuant to this section must be requested within thirty days of receipt of the letter notifying the applicant he or she is ineligible for employment or a volunteer position at a child day care program and that they have a right for review.

(c) The pleadings in a review pursuant to this section will consist of the notice of review and any additional information submitted by either party as being relevant to the determination.

(d) Neither formal discovery procedures nor formal procedures for bills of particulars will apply.

(e) Disclosure of evidence by deposition will not be permitted.

(f) The review will be conducted by a hearing officer who is an attorney employed by the Office for that purpose and who has not been involved in any way with the matter. He or she will have all the powers conferred by law and regulations of the Office to administer oaths, issue subpoenas, require the production of records and the attendance of witnesses, rule upon requests for adjournment, rule upon objections to the introduction of evidence, and to otherwise regulate the review, preserve requirements of due process, and effectuate the purpose and provisions of applicable law and regulations.

(g) The rules of evidence as applied in a court of law will not apply, except that privileges recognized by law will be given effect. The hearing officer may exclude evidence that is irrelevant or unduly repetitious. The burden of proof at such reviews shall be on the applicant to show that the denial is not supported by substantial evidence and that such person should not have been denied employment and/or the ability to volunteer at a child day care program.

(h) The review may be adjourned only for good cause by the hearing officer on his or her own application or at the request of either party.

(i) An individual, other than an attorney, representing the applicant must have an appropriate written authorization for representation signed by the applicant.

(j) Review

(1) Through submission of written materials

(i) A review through submission of written materials must be scheduled within a reasonable time period of the request.

(ii) Where an applicant for employment or a volunteer position at a child day care program timely requests a review pursuant to this section and requests that the review be conducted through the submission of written materials to a hearing officer, a notice must be sent to the applicant and the Office, and must specify:

(a) the date and location of where such materials must be submitted to the hearing officer and opposing party;

(b) the manner in which the review will be conducted;

(c) the offense(s) which are the basis for the denial, including the statute(s);

(d) that he or she has the opportunity to submit written materials, including evidence of rehabilitation;

(e) that he or she has the right to be represented by an attorney or other representative of his or her choice; and

(f) that he or she has the right to examine any document or item submitted.

(iii) The applicant will be entitled to present relevant and material evidence on his or her behalf, be represented by an attorney or other representative of his or her choice, and examine any document or item submitted.

(iv) The Office will be entitled to submit proof of the conviction(s), the safety assessment, and review of the factors enumerated in Article 23-A of the Correction Law. The hearing officer will accept the information provided to the Office by the Division of Criminal Justice Services as proof of the criminal convictions.

(v) The record of a review on written materials will include:

(a) all pleadings;

(b) all written materials submitted;

(c) any matters officially noticed;

(d) all proposed findings and exceptions;

(e) any report rendered by the hearing officer; and

(f) any request for disqualification of a hearing officer.

(2) To be heard in person in an administrative hearing

(i) A hearing pursuant to this section must be scheduled to commence within a reasonable time period of the request.

(ii) Where an applicant for employment or a volunteer position at a child day care program timely requests a review pursuant to this section and requests that the review be conducted through an administrative hearing before a hearing officer, a notice must be sent to the applicant and the Office, and must specify:

(a) the date, time, and place of the hearing;

(b) the manner in which the hearing will be conducted;

(c) the offense(s) which are the basis for the denial, including the statute(s);

(d) that he or she has the opportunity to call witnesses, present evidence and arguments on issues of fact and law at the hearing, including evidence of rehabilitation;

(e) that he or she has the right to be represented by an attorney or other representative of his or her choice;

(f) that he or she has the right to cross-examine witnesses and examine any document or item offered into evidence;

(g) that all witnesses will be sworn; and

(h) that the hearing will be recorded verbatim.

(iii) The applicant will be entitled to be represented by an attorney or other representative of his or her choice, to have witnesses give testimony, to present relevant and material evidence on his or her behalf, to cross-examine witnesses, and to examine any document or item offered into evidence.

(iv) The Office will be entitled to submit proof of the conviction(s), the safety assessment, and review of the factors enumerated in Article 23-A of the Correction Law. The hearing officer will accept the information provided to the Office by the Division of Criminal Justice Services as proof of the criminal convictions.

(v) The applicant, his or her representative(s), counsel, other representatives of the Office, witnesses of both parties, and any person who may be called by the hearing officer may be present at the hearing, together with such other persons as may be admitted by the hearing officer in his or her discretion. Upon his or her own application, or upon the application of either party, the hearing officer may exclude potential witnesses and those who have given prior testimony from the hearing during the testimony of other witnesses.

(vi) The hearing officer will preside and will make all procedural rulings. He or she will make an opening statement describing the nature of the proceedings, the issues, and the manner in which the hearing will be conducted.

(vii) All testimony will be given under oath or affirmation.

(viii) All hearings will be recorded verbatim by either the Office or a private contractor. Where the hearing is recorded by other than a private contractor, on request made upon the Office by any party to a hearing, the Office will prepare any transcript of the proceedings, and will furnish a copy of the transcript or any part thereof to any party as requested. At the applicant's request, the Office can provide a digital audio file of the hearing in a file format determined by the Office at a lower cost rather than furnishing a transcript. The Office is authorized to charge not more than its cost for the preparation of the transcript. Where a private contractor records the hearing, the party requesting a transcript must

make all arrangements for the obtainment thereof directly with the private contractor.

(ix) The record of a hearing will include:

- (a) all pleadings and intermediate rulings;
- (b) the transcript or recording of the hearing;
- (c) all exhibits received into evidence;
- (d) any matters officially noticed;
- (e) all questions and offers of proof, objections thereto, and rulings thereon;
- (f) all proposed findings and exceptions;
- (g) any report rendered by the hearing officer; and
- (h) any request for disqualification of a hearing officer.

(k) After the hearing has concluded, the hearing officer will submit a report to the Commissioner of the Office or his or her designee containing findings of fact, conclusions of law, and a recommended and/or final decision. Findings of fact will be based exclusively on the record of the review.

(l) The decision will be made and issued by the commissioner or his or her designee and must be based exclusively on the record of the review.

(1) The decision will be in writing and will describe the issues, recite the relevant facts and pertinent provisions of law and regulations, make appropriate findings, determine the issues, state reasons for the determination, and direct specific action.

(2) A copy of the decision will be mailed to the applicant and his or her attorney or other designated representative and the Office, together with a notice of the right to judicial review in accordance with Article 78 of the Civil Practice Law and Rules.

(3) If the decision determines that an application for employment and/or the ability to volunteer at a child day care program should not have been denied, the applicant's criminal history shall not be a bar when considering his or her eligibility pursuant to section 4 of this Part.

(4) In the event the decision is adverse to the applicant, the employer will be notified that the applicant has been denied such role.

(m) Upon reasonable notice to the Office, the record of review may be examined by any party to the review at the offices of the Bureau of Special Hearings during regular business hours or by the Office preparing and providing a copy of the record to any party as requested, whichever is deemed more practicable by the Office.

Subdivision (i) of Section 415.15 of Title 18 NYCRR is amended to read as follows:

(i) Any person who the Office determines, pursuant to this section, should be denied enrollment, a volunteer position, and/or employment at a child care program based on an offense not listed in paragraph (1) of subdivision (f) of this section and to which Article 23-A of the Correction Law is applicable, shall have the ability to request a de novo review of the determination [in an administrative hearing before an administrative law judge], to be held and completed before the employer is notified of such determination. Such person shall have reasonable notice concerning the determination, information regarding how to request a [hearing to]review of that determination, and an opportunity to provide any additional information that such person deems relevant to such determination. Such person may choose whether the review will be conducted either through submission of written materials to a hearing officer, or to be heard in person in an administrative hearing before a hearing officer, or by video conference in an administrative hearing before a hearing officer if reasonably available], or through submission of written materials]. Regardless of the method in which the review is conducted[Where such request is made], the Office shall also have an opportunity to be heard.

Section 415.17 is added to Title 18 NYCRR as follows:

Criminal History Disqualification Review Process

(a) Any person who the Office determines, pursuant to Section (15) of this Part, should be denied enrollment, employment, or a volunteer position at a child care program based on an offense not listed in paragraph (1) of subdivision (f) of section (15) of this Part and to which Article 23-A of the Correction Law is applicable, shall have the ability to request a de novo review of the determination, to be held and completed before the employer is notified of such determination. Such person shall have reasonable notice concerning the determination, information regarding how to request a review of that determination, and an opportunity to provide any additional information that such person deems relevant to such determination. Such person may choose whether the review will be conducted either through the submission of written materials to a hearing officer or, to be heard in person in an administrative hearing before a hearing officer, or by video conference in an administrative hearing before a hearing officer if reasonably available. Regardless of the method in which the review is conducted, the Office shall also have an opportunity to be heard.

(b) A review pursuant to this section must be requested within thirty days of receipt of the letter notifying the applicant he or she is ineligible for enrollment, employment, or a volunteer position at a child care program and that they have a right for review.

(c) The pleadings in a review pursuant to this section will consist of the notice of review and any additional information submitted by either party as being relevant to the determination.

(d) Neither formal discovery procedures nor formal procedures for bills of particulars will apply.

(e) Disclosure of evidence by deposition will not be permitted.

(f) The review will be conducted by a hearing officer who is an attorney employed by the Office for that purpose and who has not been involved in any way with the matter. He or she will have all the powers conferred by law and regulations of the Office to administer oaths, issue subpoenas, require the production of records and the attendance of witnesses, rule upon requests for adjournment, rule upon objections to the introduction of evidence, and to otherwise regulate the review, preserve requirements of due process, and effectuate the purpose and provisions of applicable law and regulations.

(g) The rules of evidence as applied in a court of law will not apply, except that privileges recognized by law will be given effect. The hearing officer may exclude evidence that is irrelevant or unduly repetitious. The burden of proof at such reviews shall be on the applicant to show that the denial is not supported by substantial evidence and that such person should not have been denied enrollment, employment, and/or the ability to volunteer at a child care program.

(h) The review may be adjourned only for good cause by the hearing officer on his or her own application or at the request of either party.

(i) An individual, other than an attorney, representing the applicant must have an appropriate written authorization for representation signed by the applicant.

(j) Review

(1) Through submission of written materials

(i) A review through submission of written materials must be scheduled within a reasonable time period of the request.

(ii) Where an applicant for enrollment, employment, or a volunteer position at a child care program timely requests a review pursuant to this section and requests that the review be conducted through the submission of written materials to a hearing officer, a notice must be sent to the applicant and the Office, and must specify:

(a) the date and location of where such materials must be submitted to the hearing officer and opposing party;

(b) the manner in which the review will be conducted;

(c) the offense(s) which are the basis for the denial, including the statute(s);

(d) that he or she has the opportunity to submit written materials, including evidence of rehabilitation;

(e) that he or she has the right to be represented by an attorney or other representative of his or her choice; and

(f) that he or she has the right to examine any document or item submitted.

(iii) The applicant will be entitled to present relevant and material evidence on his or her behalf, be represented by an attorney or other representative of his or her choice, and examine any document or item submitted.

(iv) The Office will be entitled to submit proof of the conviction(s), the safety assessment, and review of the factors enumerated in Article 23-A of the Correction Law. The hearing officer will accept the information provided to the

Office by the Division of Criminal Justice Services as proof of the criminal convictions.

(v) The record of a review on written materials will include:

- (a) all pleadings;
- (b) all written materials submitted;
- (c) any matters officially noticed;
- (d) all proposed findings and exceptions;
- (e) any report rendered by the hearing officer; and
- (f) any request for disqualification of a hearing officer.

(2) To be heard in person in an administrative hearing

(i) A hearing pursuant to this section must be scheduled to commence within a reasonable time period of the request.

(ii) Where an applicant for enrollment, employment, or a volunteer position at a child care program timely requests a review pursuant to this section and requests that the review be conducted through an administrative hearing before a hearing officer, a notice must be sent to the applicant and the Office, and must specify:

- (a) the date, time, and place of the hearing;
- (b) the manner in which the hearing will be conducted;
- (c) the offense(s) which are the basis for the denial, including the statute(s);
- (d) that he or she has the opportunity to call witnesses, present evidence and arguments on issues of fact and law at the hearing, including evidence of rehabilitation;
- (e) that he or she has the right to be represented by an attorney or other representative of his or her choice;
- (f) that he or she has the right to cross-examine witnesses and examine any document or item offered into evidence;
- (g) that all witnesses will be sworn; and
- (h) that the hearing will be recorded verbatim.

(iii) The applicant will be entitled to be represented by an attorney or other representative of his or her choice, to have witnesses give testimony, to present

relevant and material evidence on his or her behalf, to cross-examine witnesses, and to examine any document or item offered into evidence.

(iv) The Office will be entitled to submit proof of the conviction(s), the safety assessment, and review of the factors enumerated in Article 23-A of the Correction Law. The hearing officer will accept the information provided to the Office by the Division of Criminal Justice Services as proof of the criminal convictions.

(v) The applicant, his or her representative(s), counsel, other representatives of the Office, witnesses of both parties, and any person who may be called by the hearing officer may be present at the hearing, together with such other persons as may be admitted by the hearing officer in his or her discretion. Upon his or her own application, or upon the application of either party, the hearing officer may exclude potential witnesses and those who have given prior testimony from the hearing during the testimony of other witnesses.

(vi) The hearing officer will preside and will make all procedural rulings. He or she will make an opening statement describing the nature of the proceedings, the issues, and the manner in which the hearing will be conducted.

(vii) All testimony will be given under oath or affirmation.

(viii) All hearings will be recorded verbatim by either the Office or a private contractor. Where the hearing is recorded by other than a private contractor, on request made upon the Office by any party to a hearing, the Office will prepare any transcript of the proceedings, and will furnish a copy of the transcript or any part thereof to any party as requested. At the applicant's request, the Office can provide a digital audio file of the hearing in a file format determined by the Office at a lower cost rather than furnishing a transcript. The Office is authorized to charge not more than its cost for the preparation of the transcript. Where a private contractor records the hearing, the party requesting a transcript must make all arrangements for the obtainment thereof directly with the private contractor.

(ix) The record of a hearing will include:

(a) all pleadings and intermediate rulings;

(b) the transcript or recording of the hearing;

(c) all exhibits received into evidence;

(d) any matters officially noticed;

(e) all questions and offers of proof, objections thereto, and rulings thereon;

(f) all proposed findings and exceptions;

(g) any report rendered by the hearing officer; and

(h) any request for disqualification of a hearing officer.

(k) After the hearing has concluded, the hearing officer will submit a report to the Commissioner of the Office or his or her designee containing findings of fact, conclusions of law, and a recommended and/or final decision. Findings of fact will be based exclusively on the record of the review.

(l) The decision will be made and issued by the commissioner or his or her designee and must be based exclusively on the record of the review.

(1) The decision will be in writing and will describe the issues, recite the relevant facts and pertinent provisions of law and regulations, make appropriate findings, determine the issues, state reasons for the determination, and direct specific action.

(2) A copy of the decision will be mailed to the applicant and his or her attorney or other designated representative and the Office, together with a notice of the right to judicial review in accordance with Article 78 of the Civil Practice Law and Rules.

(3) If the decision determines that an application for enrollment, employment, and/or the ability to volunteer at a child care program should not have been denied, the applicant's criminal history shall not be a bar when considering his or her eligibility pursuant to section 15 of this Part.

(4) In the event the decision is adverse to the applicant, the employer will be notified that the applicant has been denied such role.

(m) Upon reasonable notice to the Office, the record of review may be examined by any party to the review at the offices of the Bureau of Special Hearings during regular business hours or by the Office preparing and providing a copy of the record to any party as requested, whichever is deemed more practicable by the Office.