

14 NYCRR is amended by ADDING a new Part 805 to read as follows:

CRIMINAL HISTORY INFORMATION REVIEWS

[Statutory Authority: Mental Hygiene Law sections 19.07, 19.09, 19.20, 19.20-a, 19.21, 19.40, 32.02; Executive Law sections 296, 495; Civil Service Law section 50; Corrections Law Article 23-A; Chapter 501 of the Laws of 2012]

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§ 805.1 Background and intent

(a) The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) requires that criminal history information reviews be conducted on:

(1) each prospective treatment provider, operator, employee, contractor, or volunteer of treatment facilities certified by the NYS Office of Alcoholism and Substance Abuse Services (“OASAS” or “Office”) who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities; and

(2) any individual seeking to be credentialed by the Office.

(b) This legislation is intended to enable providers of services to persons seeking treatment for substance use disorders to secure appropriate and properly trained individuals to staff their facilities and programs, by

verifying criminal history information received for individuals seeking employment or volunteering their services and those credentialed by the Office.

(c) The purpose of this Part is to establish standards and procedures for such criminal history information reviews.

§ 805.2 Applicability

(a) This Part shall apply to every provider of substance use disorder services certified or licensed by the Office, or any entity which contracts with, or is otherwise approved by the Office to provide services, except:

(1) a facility or program that is directly operated by the Office of Alcoholism and Substance Abuse Services;

(2) a hospital, as defined in section 2801 of the New York State Public Health Law, that is licensed by the Department of Health; or

(3) a professional licensed pursuant to Title 8 of the New York State Education Law, who does not have employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with the clients of such provider.

(b) This Part shall also apply to every applicant to be an operator of a provider of substance use disorder services that meets the criteria set forth in subdivision (a) of this Section.

(c) This Part shall also apply to every applicant for a credential, renewal or reinstatement of such credential issued by the Office pursuant to Part 853 of this Title.

§ 805.3 Legal base

(a) Section 19.07(c) of the Mental Hygiene Law charges the Office with the responsibility for ensuring that persons in need of treatment for substance use disorder receive high quality care and treatment, and that the personal and civil rights of persons receiving care, treatment and rehabilitation are adequately protected.

(b) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(c) Section 19.20 of the MHL authorizes the Office to receive and check criminal history information related to employees and volunteers of providers of services who contract with, or are approved or otherwise authorized by the Office to provide services.

- (d) Section 19.20-a of the MHL authorizes the Office to receive and check criminal history information related to persons seeking to be credentialed by the Office or applicants for an operating certificate issued by the Office.
- (e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.
- (f) Section 32.02 of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary to ensure quality services to those suffering from compulsive gambling.
- (g) Subdivisions (15) and (16) of section 296 of the Executive Law identify unlawful discriminatory practices with regard to the employment and the issuance of licenses.
- (h) Civil Service Law section 50 authorizes the Department of Civil Service to request criminal history checks for applicants for state employment.
- (i) Article 23-A of the Correction Law provides the factors to be considered concerning a person's previous criminal convictions in making a determination regarding employment and the issuance of a license.
- (j) The Protection of People with Special Needs Act (Chapter 501 of the laws of 2012) establishes the Justice Center for the protection of people with special needs, the Vulnerable Persons Central Register, and the Register of Substantiated Category One Cases of Abuse and Neglect.

§ 805.4 Definitions

- (a) "Applicant" means a natural person who has initiated the process of applying to the Office for an Operating Certificate pursuant to Part 810 of this Title, or who has initiated the process of applying for any credential, renewal or reinstatement of such credential issued by the Office pursuant to Part 853 of this Title.
- (b) "Authorized person" means any person designated by a provider of services authorized to request, receive and check criminal history information in accordance with this Part.
- (c) "Commissioner" means the Commissioner of the New York State Office of Alcoholism and Substance Abuse Services.
- (d) "Criminal history information" means a record of pending criminal charges, criminal convictions which are not vacated or reversed, and certificates filed pursuant to subdivision (2) of section 705 of the Correction Law, and which the New York State Division of Criminal Justice Services is authorized to maintain pursuant to subdivision (6) of section 837 of the Executive Law. For purposes of this Part, "criminal history information," "criminal background," or "criminal history record" shall also include information from the federal bureau of

investigation as a result of a national criminal history information check.

(e) "Designated fingerprinting entity" means an entity designated by the Office to fingerprint persons who are required to have criminal history information reviews in accordance with The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012), sections 19.20 and 19.20-a of the Mental Hygiene Law, and this Part.

(f) "Division" means the New York State Division of Criminal Justice Services.

(g) "Justice Center" means the Justice Center for the Protection of People with Special Needs.

(h) "Natural person" means a human being, as distinguished from an artificial person created by law (e.g., a corporation).

(i) "Operator" means any natural person with an ownership interest in a provider of services.

(j) "Prospective employee" means any person to be employed or utilized by the provider of services, (including those persons employed by a contract agency if the subject contract is approved, or is otherwise authorized by the Office), who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted contact with clients.

(k) "Prospective volunteer" means a person who has applied to participate in activities with or for the benefit of persons receiving services from an Office service provider, under the supervision of staff or management of such provider, for which he or she receives no salary or remuneration, who will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted contact with clients.

(l) "Provider of services" means a provider of OASAS approved services which is expressly required to request a check of criminal history information pursuant to section 19.20 of the Mental Hygiene Law, The Protection of People with Special Needs Act, and this Part.

(m) "Register of Substantiated Category One Cases of Abuse and Neglect" means the statewide register established pursuant to section 495 of the Executive Law maintained by the Justice Center for the Protection of People with Special Needs.

(n) "Subject individual" means a person with regard to whom a provider of services or the Office is required to request a check of criminal history information pursuant to section 19.20 or 19.20-a of the Mental Hygiene Law, The Protection of People with Special Needs Act, and this Part.

§ 805.5 Submission of fingerprints by prospective employees, contractors or volunteers

(a) The Office shall perform a criminal history information check on behalf of any provider of services seeking to hire, contract with or utilize services of a prospective employee, contractor or volunteer. For

purposes of this Part, the inclusion of a national criminal history information check shall apply to all prospective employees, contractors or volunteers whose requests are submitted to the Office for a criminal history information check because such persons will have the potential for, or may be permitted, regular and substantial unsupervised or unrestricted physical contact with the clients in such treatment facilities.

(b) Criminal history information checks required in accordance with this Section shall apply only to persons who are prospective employees, contractors or volunteers as defined in this Part or as identified by the Office or the provider of services.

(c) The Division shall supply the Office, or every provider of services subject to the provisions of this section, with information identifying the designated fingerprinting entities which may be utilized to facilitate compliance with this Part.

(d) *Fingerprint submission process.* Upon receipt of an application from a prospective employee, contractor or volunteer every provider of services subject to this Part shall:

(1) Check the Justice Center's Register of Substantiated Category One cases of Abuse and Neglect. If the applicant's name appears on the register, the provider of services shall not process the application. If the applicant's name does not appear on the register, the provider of services may proceed with the fingerprint submission process and shall obtain and maintain documentation regarding paragraphs (2) through (4) below:

(2) Inform the individual, in writing, that the provider is authorized, and in some cases required, to request a check of his or her criminal history information and check the results of such check in accordance with section 19.20 of the Mental Hygiene Law;

(3) Obtain signed informed consent from the subject individual on a form acceptable to the Division indicating that such person has:

(i) been informed of the right and procedures necessary to obtain, review and seek correction of his or her criminal history information;

(ii) been informed of the reason for the request;

(iii) been informed that the criminal history information sought will include both a New York state and a national criminal history information check;

(iv) consented to such request for a report of his or her New York state and national criminal history;

(v) or has not, to the best of his or her knowledge, ever been convicted of a crime in New York state or any other jurisdiction;

(vi) or has not, to the best of his or her knowledge, any felony or misdemeanor charges currently pending against him or her that remain unresolved; and

(vii) supplied the provider with his or her current mailing or home address.

(4) Upon receiving such consent, the provider shall:

(i) refer the prospective employee, contractor or volunteer to the designated fingerprinting entity for fingerprinting; and

(ii) complete and submit a form provided by the designated fingerprinting entity, such form to be completed by the authorized person and maintained by the provider, and include a sworn statement from the authorized person attesting that:

(a) the authorized person identifies the name of each person for whom a criminal history information check is being requested, and attests that each such person is either a prospective employee, contractor or volunteer of the provider of services, and, as such, the person is a subject individual, as defined in section 805.4 of this Part;

(b) the authorized person identifies the specific duties which qualify the provider of services to request a check of the subject individual's criminal history information;

(c) the results of the criminal history information check will be used by the provider of services solely for the purposes authorized by law; and

(d) the provider of services, its agents, and employees are aware of and will abide by the confidentiality requirements of section 845-b of the Executive Law.

(iii) maintain documentation demonstrating that the provider of services has complied with paragraph (3) of this subdivision.

(e) *Temporary approval.* A provider of services may temporarily approve a subject individual while the results of the criminal history information check are pending, but shall not allow such person(s) to have unsupervised physical contact with clients during such time.

(1) For purposes of this Part, unsupervised physical contact shall mean in-person, face to face communication or interaction with clients, or the reasonable opportunity for such communication or interaction, while not at all times in the reasonable physical proximity of another person, who is employed or under contract with the provider of services and who:

(i) has management or oversight authority over the prospective employee or volunteer; or

(ii) has had at least six months of experience as an employee of the provider of services and has been deemed by such provider to be qualified to provide adequate oversight of temporarily approved prospective employees, contractors or volunteers.

(2) Such provider must establish policies and procedures to implement the provisions of this subdivision. Such policies and procedures shall address the need for supervision to monitor the activities of the temporarily approved prospective employee or volunteer in order to ensure the health, safety, and welfare of clients, taking into consideration the nature of the environment (e.g., physical plant considerations), staffing patterns, employee responsibilities, and the characteristics of clients, and must include provisions which:

(i) ensure that temporarily approved prospective employees or volunteers who are to be assigned personal care activities which require privacy for people receiving services (e.g., bathing, dressing and toileting), are supervised in accordance with paragraph (1) of this subdivision, and that the individual designated to supervise such temporarily approved prospective employee or volunteer is always present in the same room as such prospective employee or volunteer at all times while such personal care activities are occurring;

(ii) prevent any person with a conviction or pending charge of one or more of the following from being temporarily approved, provided that the provider of services has been previously informed by the prospective employee or volunteer in the application process, or by the Office prior to issuance of its determination, of such conviction or pending charge:

(a) a felony sex offense;

(b) a felony within the past ten years involving violence;

(c) endangering the welfare of an incompetent or physically disabled person as defined in sections 260.24 and 260.25 of the Penal Law or endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person as defined in sections 260.32 and 260.34 of the Penal Law; or

(d) any comparable offense in any other jurisdiction; and

(iii) provide that, in cases where the temporarily approved prospective employee or volunteer has a conviction or pending felony charge other than as specified in subparagraph (ii) of this paragraph, or any conviction or pending misdemeanor charge, the provider of services must document its reasons for granting temporary approval, including an explanation as to why such action will not place clients at risk of harm, provided that the provider of services has been previously informed by the prospective employee or volunteer in the application process, or by the Office prior to issuance of its determination, of such conviction or pending charge.

(f) A subject individual may withdraw from the application process, without prejudice, at any time regardless of whether he or she, the Office or the provider has reviewed his or her criminal history information,

provided that upon such withdrawal from the application process, any fingerprints and/or criminal history information received by the Office or provider shall be destroyed.

§ 805.6 Submission of fingerprints by applicants for certification or credentialing

(a) *Certification applicants.* Any applicant for an operating certificate as a provider of services pursuant to Part 810 of this Title, whose application is initiated on or after June 30, 2013, shall require a criminal history information check of all natural persons with an ownership interest in such providers; and

(1) Any change in the ownership interest of any provider on or after June 30, 2013, for which a new natural person becomes or joins as an operator shall require a criminal history information check of such new natural person or persons; and

(2) As part of an applicant's initial application for an operating certificate, part of a previously certified provider's recertification review, or change in ownership status or configuration, the applicant or provider shall designate authorized person(s) who shall be responsible for furnishing the Division with the fingerprints of the prospective operator of the provider, as well as those of any prospective employee, contractor, volunteer or any operator who joined the organization subsequent to June 30, 2013 or who previously did not have a criminal history information check performed.

(3) The process for requesting fingerprints of applicants and submitting to the Division shall be consistent with the provisions of subdivision (d) of section 805.5 of this Part.

(4) A subject individual may withdraw from the application process, without prejudice, at any time regardless of whether he or she, or the Office, has reviewed his or her criminal history information, provided that upon such withdrawal from the application process, any fingerprints and criminal history information received by the Office and/or the provider shall be destroyed.

(b) *Credentialing applicants.* Any applicant for a credential issued by the Office pursuant to Part 853 of this Title, or renewal of such credential, whose application is initiated on or after June 30, 2013 shall require a criminal history information check, provided however, that:

(1) persons credentialed prior to June 30, 2013 shall require such criminal history information check only upon initial employment by a service provider or a change in employment by a service provider; and

(2) The process for requesting fingerprints of applicants and submitting to the Division shall be consistent with the provisions of subdivision (d) of section 805.5 of this Part wherein the Office shall perform the function of the provider of services.

(3) An applicant may withdraw from the application process, without prejudice, at any time regardless of whether he or she, or the Office, has reviewed his or her criminal history information, provided that upon such withdrawal from the application process, any fingerprints and/or criminal history information received by the Office shall be destroyed.

§ 805.7 Criminal history information review

(a) Upon receipt of criminal history information, if such information indicates the subject individual has been convicted of a criminal offense in New York, in any state other than New York, or in a federal jurisdiction, the Division shall promptly provide such information to the Office only by a method of secure and confidential delivery, and such information shall at all times be maintained by the authorized person(s) for the Office in a secure place.

(b) Upon receipt of any criminal history information from the Division, the Office shall check the information to consider and determine whether to recommend that the provider approve or disapprove the prospective employee, contractor, volunteer or applicant in accordance with the provisions of article 23-A of the correction law and subdivisions (15) and (16) of section 296 of the executive law.

(c) If the criminal background check indicates that the subject individual has no known criminal history, the Office and the provider shall continue consideration of the subject individual's application.

(d) For those individuals whose criminal history includes convictions for crimes only committed within New York state, the Office's review will result in a recommendation that the nature of the person's criminal history makes him or her suitable or unsuitable for a job in which there will be regular and substantial unsupervised physical contact with the provider's clients.

(e) For those individuals with an out-of-state criminal history, the Office will make a binding hiring decision for the provider.

(f) If a provider has received from the Office a summary of the New York state criminal history information and a determination by the Office that such subject individual is appropriate for certification, credentialing, employment, contract, or volunteer status, the provider shall further consider such application in accordance with the provisions of Article 23-A of the correction law and section 296 (15) and (16) of the executive law.

- (g) Where the criminal history record of an applicant, potential employee, contractor or volunteer reveals a pending charge for any felony or, any comparable offense in any other jurisdiction, the Office shall hold the application in abeyance until the charge is finally resolved.
- (h) Where the criminal history record of an applicant, potential employee, contractor or volunteer reveals a pending charge for any misdemeanor, or any comparable offense in any other jurisdiction, the Office may hold the application in abeyance until the charge is finally resolved.
- (i) Prior to making a determination to deny a subject individual, the Office shall afford the applicant, prospective employee, contractor or volunteer an opportunity to explain in writing, within fifteen calendar days from the date the notification was mailed, why the application should not be denied. The applicant, prospective employee, contractor or volunteer may request an extension of up to fifteen days. The opportunity for an explanation shall be sent non-electronically, in a manner of mailing that is capable of verifying the date of mailing and shall include a copy of the criminal history information, including all state and federal data, and a copy of Article 23-A of the correction law and information about the subject individual's right to and procedure to seek correction of any incorrect information contained in the history. For prospective operators and new operators of existing providers of service, this opportunity may, at the discretion of the Office, be afforded in the application or certification renewal materials for such operators required to be submitted to the Office.
- (j) Where the Office recommends or directs a provider of services to deny an application of a prospective employee contractor, or volunteer, or to terminate a temporarily approved prospective employee, contractor or volunteer, based on the criminal history record, the provider of services must notify such person, in writing, that such criminal history record is the basis of the denial.

805.8 Documentation and Confidentiality

- (a) Only the authorized person or his or her designee and the relevant subject party shall have access to the summary of the New York State criminal history information received by a provider of services or the Office. However, criminal history information may be disclosed by the authorized person to other parties who are directly participating in any decision with regard to such subject party, to which this information is relevant.
- (b) The authorized person and any other party to whom such criminal history is disclosed shall keep this information strictly confidential.

(c) Any party who willfully permits the release of any confidential criminal history information obtained from a criminal history information check pursuant to this section to parties not authorized to receive same shall be guilty of a misdemeanor.

§ 805.9 Notification of subsequent criminal charges or convictions

(a) The Division shall promptly forward notification that there is a pending criminal action or proceeding, with regard to an employee, volunteer, contractor, operator or credentialed person to the Office only by a method of secure and confidential delivery, addressed to the office. Such information shall be marked “confidential” and shall at all times be maintained by the Office in a secure place.

(b) Upon receiving notification from the Division that there is a pending criminal action or proceeding with regard to an employee, volunteer, or contractor, the Office shall promptly notify the authorized person of a provider of services of the pending criminal action or proceeding.

(c) Upon receiving notification from the Office of the pending criminal action or proceeding, or a conviction, a provider of services shall take any and all appropriate action to ensure that the health, safety, and welfare of its clients are protected and:

(ii) such action or actions shall be documented; and

(iii) in cases involving pending criminal actions or proceedings against employees or volunteers, it shall be the responsibility of the provider of services to inquire as to the outcome of such proceedings if the employee or volunteer remains in service with the provider.

(c) Upon receiving notification from the Division that there is a pending criminal action or proceeding, with regard to an owner or operator of a certified provider of services, or person holding a credential issued by the Office, the Office shall take any and all actions pursuant to regulation to protect the health and safety of persons receiving services.

§ 805.10 Responsibilities of providers of services

(a) Recordkeeping. (1) Each provider of services subject to the provisions of this Part shall establish, maintain, and keep current, a record of:

(i) a current roster of employees and list of staffing assignments;

(ii) a current roster of volunteers;

(iii) names of all persons for whom a request for a criminal history information check was submitted to the Office, identifying whether the person was applying for an employment, contractor or volunteer position;

(iv) for each such name identified, a copy of his or her signed informed consent form required pursuant to section 805.5 of this Part, and the results of the criminal history information check and determination of the Office with regard to the employment, contract or volunteer service of the individual; and

(v) a record identifying whether such individual was hired, contracted with or permitted to engage in volunteer services, what position he or she holds, and any limitations placed on such employment or service.

(2) Such record shall be maintained in a manner that ensures the security of the information contained therein, but which also assures the Office of immediate and unrestricted access to such information upon its request, for the purpose of monitoring compliance with this Part.

(b) Notifications. A provider of services must immediately, but no later than 14 days after the event, inform the Office, and document that such notification occurred, when:

(1) any prospective employee or volunteer who is subject to criminal history information check in accordance with this section has withdrawn the application or is no longer being considered for the position for which the person applied; or

(2) a hiring decision has been made with respect to any prospective employee or volunteer who was subject to, and underwent, a criminal history information check in accordance with this section; and/or

(3) any employee or volunteer who was subject to, and underwent, a criminal history information check in accordance with this section is no longer employed by or volunteering at the program or facility.

(c) Retention and disposal of information.

(1) Each provider of services subject to the provisions of this Part shall maintain information necessary to demonstrate compliance with this Part, as set forth in subdivision (a) of this section, for at least six years after which the person ceases to be a subject individual, as defined in section 805.4 of this Part (i.e., the person is no longer employed in, or volunteers as, a position that involves regular and substantial contact with clients), unless otherwise directed by the Office.

(2) If directed to do so by the Office, a provider of services subject to this Part shall dispose of the summary of the criminal history information and/or any other information related to criminal background checks in accordance with such direction.

(3) Disposal of criminal history information and Office determinations shall be performed in a manner that ensures the confidentiality of the information.

(4) If a subject individual withdraws from the application process, without prejudice, at any time regardless of whether he or she, the Office or the provider has reviewed his or her criminal history information, provided that upon such withdrawal from the application process, any fingerprints and criminal history

information received by the provider shall be destroyed.

(d) Policies and procedures. Each provider of services subject to the provisions of this Part shall have policies and procedures designed to implement the provisions of this Part. Amendment of existing personnel and volunteer policies and procedures to reflect these new requirements may be deemed sufficient compliance with this subdivision.

805.11 Severability

If any provision of this Part or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part that can be given effect without the invalid provision or applications, and to this end the provisions of this Part are declared to be severable.