

A new Part 701 is added to Title 14, NYCRR, to read as follows:

Part 701 JUSTICE CENTER CRIMINAL HISTORY INFORMATION CHECKS

Sec.

701.1 Background and Intent.

701.2 Applicability.

701.3 Legal Base.

701.4 Definitions.

701.5 Requests for criminal history information checks.

701.6 Criminal history review and evaluation.

701.7 Notification of subsequent criminal charges.

701.8 Responsibilities of providers of services.

§ 701.1 Background and Intent.

(a) The Justice Center for the Protection of People with Special Needs was established in response to the recognized need to strengthen and standardize the safety net for vulnerable persons who receive care from New York State's human services agencies.

(b) Prior to the passage of the Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012), human services agencies were authorized, by law, to conduct criminal history information checks of certain individuals. The Protection of People with Special Needs Act seeks to standardize the review process and centralizes, in the Justice Center, the criminal history information check and suitability determination process for facilities or providers under the Justice Center mandate that are overseen by the Office of Mental Health, the Office for People With Developmental Disabilities and the Office of Children and Family Services.

(c) The purpose of this Part is to establish the procedures for conducting these criminal history information checks and resulting suitability determinations.

§ 701.2 Applicability.

(a) This Part shall apply to providers of services that are required to obtain criminal history information checks for specific persons pursuant to sections 16.33 or 31.35 of the Mental Hygiene Law.

(b) The provisions of this Part shall also apply to authorized agencies which operate a residential program for children and the office of children and family services as specified in subdivision (1) of section 378-a of the Social Services Law, excluding foster family homes.

§ 701.3 Legal Base.

(a) Subdivision (5) of section 553 of the Executive Law authorizes the Justice Center to review and evaluate criminal history information in certain situations.

(b) Section 16.33 of the Mental Hygiene Law provides that certain providers of services for persons with developmental disabilities must request a criminal history information check for specified persons.

(c) Section 31.35 of the Mental Hygiene Law provides that certain providers of services for persons with mental illness must request a criminal history record check for specified persons. In accordance with 14 NYCRR section 550.5, the Office of Mental Health has delegated any responsibility it may have for these checks to the Justice Center for review and evaluation of background checks for providers for whom the Justice Center has authority to perform such review and evaluation pursuant to subdivision (5) of section 553 of the Executive Law.

(d) Subdivision (1) of section 378-a of the Social Service Law provides that each authorized agency which operates a residential program for children and the Office of Children and Family Services shall request, through the Justice Center, a criminal history information check for each prospective operator, employee or volunteer of such residential program for children who will have regular and substantial unsupervised or unrestricted physical contact with children in such program.

§ 701.4 Definitions.

Whenever used in this Part:

(a) "Authorized person" means the individual(s) designated by a provider of services who is authorized to request, receive and review a summary of the New York State criminal history information in accordance with this Part.

(b) "Commissioner" means, as the context requires, the Commissioners or their designees of the New York State Office of Mental Health, the New York State Office for People With Developmental Disabilities or the New York State Office of Children and Family Services.

(c) "Criminal history information" means a record of pending criminal charges, criminal convictions which are not vacated or reversed, and certificates filed with the New York State Division of Criminal Justice Services 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" shall also include information from the federal bureau of investigation (FBI) as a result of a national criminal history record check.

(d) "Designated fingerprinting entity" means an entity designated by the Justice Center to fingerprint persons who are required to have criminal history information checks in accordance with this Part.

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

(f) "Executive Director" means the Executive Director of the Justice Center for the Protection of People with Special Needs.

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

(h) "Prospective employee" means a prospective employee as referenced in sections 16.33 or 31.35 of the mental hygiene law or subdivision (1) of section 378-a of the Social Services Law, and any person to be employed or utilized by a provider of services and who will have regular and substantial unsupervised or unrestricted physical contact with individuals receiving services from providers specified in the respective statutes.

(i) "Prospective volunteer" means a person who has applied to participate in activities with or for the benefit of persons of a provider of services, under the supervision of staff or management of such provider, for which he or she receives no salary or remuneration, who will have regular and substantial unsupervised or unrestricted physical contact with individuals receiving services.

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

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

(l) "Provider of services" means a provider of services, as defined in subdivision 4 of section 488 of the Social Services Law, which is required to request a criminal history information check pursuant to section 845-b of the Executive Law, sections 16.33 or 31.35 of the Mental Hygiene Law, subdivision (1) of section 378-a of the Social Services Law, and this Part.

(m) "Register of substantiated category one cases of abuse and neglect" means the register established pursuant to section 495 of the Social Services Law, also known as the staff exclusion list, which is maintained by the Justice Center.

(n) "Subject individual" means a person with regard to whom a provider of services is required to request a criminal history information check pursuant to section 845-b and subdivision (5) of section 553 of the Executive Law, sections 16.33 or 31.35 of the Mental Hygiene Law, subdivision (1) of section 378-a of the Social Services Law, and this Part

§ 701.5 Requests for criminal history information checks.

(a) The Justice Center shall ensure that a New York State and national criminal history information check is conducted on all subject individuals as defined in section 701.4 of this Part.

(b) Any provider of services subject to compliance with this Part that is issued an operating certificate on or after June 30, 2013 shall request a New York State and national criminal history information check of natural persons with an ownership interest in such provider, if the natural person will have regular and substantial unsupervised or unrestricted physical contact with individuals receiving services. Any change in the ownership interest of any provider on or after June 30, 2013, for which a new natural person with the requisite contact becomes an operator shall require a New York State and national criminal history record check of such new operator,

which shall be performed in concert with applicable licensing or approval processes established by the Commissioners of the applicable State agencies.

(c) The Justice Center shall supply every provider of services that is subject to the provisions of this Part with information identifying the designated fingerprinting entities that may be utilized to facilitate compliance with this Part.

(d) Process for requesting criminal history information checks.

(1) Prior to requesting a criminal history information check for any subject individual, a provider of services subject to this Part shall request the Justice Center to check its register of substantiated category one cases of abuse or neglect, also known as the staff exclusion list. If the check of the staff exclusion list does not preclude the provider of services from hiring or utilizing the subject individual pursuant to subdivision (3) of section 495 of the Social Services Law, the provider may proceed with requesting a criminal history information check.

(2) Before a provider of services can request a criminal history information check pursuant to this section, it must designate an authorized person. Such authorized person must complete a sworn statement on a Justice Center form that shall be submitted to and maintained by the Justice Center, which attests that the authorized person:

(i) will request a criminal history information check only on those individuals that the provider of services has determined to be subject individuals;

(ii) will, along with each request, submit a summary of the specific duties of the subject individual that qualify the provider of services to request the criminal history information check;

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

(iv) will ensure that the provider of services, its agents, and employees are aware of and will abide by the confidentiality requirements and all other provisions of section 845-b of the Executive Law.

(3) As part of a provider of services' initial application to the Office of Mental Health, the Office for People with Developmental Disabilities or the Office of Children and Family Services, as applicable, to provide services in accordance with the regulations of the applicable agency, its authorized person(s) shall be responsible for checking that a request for a criminal history information check is submitted to the Justice Center for each subject individual associated with the provider.

(4) As part of a provider of services' renewal of a license to provide services in accordance with the regulations of the state agency with jurisdiction over such services, its authorized person(s) shall be responsible for requesting a criminal history information check of any operator who joined the organization on or after June 30, 2013 who has the requisite contact and who previously did not have a criminal history record check

performed.

(5) The authorized person(s) of every provider of services subject to this Part shall be responsible for requesting the criminal history information check for each subject individual.

(6) For each request for a criminal history information check, the providers' authorized person(s) shall be responsible for obtaining and maintaining documentation demonstrating that:

(i) the provider of services has informed the subject individual, in writing, that such provider is required to request a check of his or her criminal history information and review the results of such check in accordance with section 845-b of the Executive Law;

(ii) the provider of services has informed the subject individual, in writing, that he or she has the right to obtain, review and seek correction of his or her criminal history record in accordance with regulations and procedures of the Division and the FBI;

(iii) the provider of services has obtained the signed, sworn, informed consent of the subject individual on a form supplied by the Justice Center which indicates that such individual:

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

(B) has been informed of the reason for the request for his or her criminal history information;

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

(D) has consented to such request for a report of his or her criminal history information, with respect to New York State and national criminal history information check;

(E) has supplied a current mailing or home address on the form;

(F) has 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; and

(G) has 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.

(e) In certain circumstances, the authorized person may be provided with an additional abuse and neglect notification about a subject individual in accordance with section 562 of the Executive Law.

(f) A licensed or otherwise approved provider of services may temporarily approve a prospective employee or volunteer while the results of the criminal history information check are pending, but shall not allow such person to have unsupervised or unrestricted physical contact with individuals receiving services during such time.

(1) For purposes of this subdivision, unsupervised or unrestricted physical contact shall mean in-person, face to face communication or interaction with individuals receiving services, 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 by 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 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 protect the health, safety and welfare of individuals receiving services, taking into consideration the nature of the environment (e.g., physical plant considerations), staffing patterns, employee responsibilities and the characteristics of individuals receiving services, and must include provisions which:

(i) require 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 employees or volunteers is always present in the same room as such prospective employees or volunteers at all times while such personal care activities are occurring;

(ii) provide that if the provider of services has been previously informed by the subject individual in the application process, or by the Justice Center prior to issuance of its determination, of an existing conviction or pending charge, the provider shall prevent any person with a conviction or pending charge of one or more of the following from being temporarily approved:

(A) a felony sex offense;

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

(C) abandoning a child and/or endangering the welfare of an incompetent, physically disabled or vulnerable elderly person pursuant to sections 260.00, 260.25, 260.32 or 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 pending felony charge other than as specified in subparagraph (ii) of this paragraph, or any 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 individuals receiving services 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 Justice Center prior to issuance of its determination, of such conviction or pending charge.

§ 701.6 Criminal history review and evaluation.

(a) After the Justice Center reviews the criminal history information of a subject individual, the Justice Center and the provider of services shall take the following actions:

(1) If the subject individual is a natural person operator of a new provider of services on or after June 30, 2013; or a new natural person operator of an existing provider on or after June 30, 2013:

(i) When a subject individual under this subdivision has no criminal history, the Justice Center shall promptly advise the Commissioner of the state agency to whom the application for licensing, certification or renewal was submitted to resume its review of the application in accordance with its implementing regulations.

(ii) When the criminal history information of a subject individual under this subdivision reveals a felony conviction at any time for a sex offense, a felony conviction within the past ten years involving violence, or a conviction for abandoning a child and/or endangering the welfare of an incompetent, physically disabled or vulnerable elderly person pursuant to sections 260.00, 260.25, 260.32 or 260.34 of the Penal Law or any comparable offense in any other jurisdiction, the Justice Center shall advise the Commissioner of the state agency to whom the application was submitted that the application must be denied, unless the Commissioner of such agency in consultation with the Justice Center, determines, in his or her discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of individuals receiving services in the facility or program.

(iii) When the criminal history information of a subject individual under this subdivision reveals a conviction for any crime other than one set forth in

paragraph (ii) of this subdivision, the Justice Center may, consistent with article 23-A of the Correction Law, advise the Commissioner of the state agency to whom the application was submitted that the application process shall be denied, unless the Commissioner of such agency in consultation with the Justice Center, determines, in his or her discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of individuals receiving services in the facility or program.

(iv) When the criminal history information of a subject individual under this subdivision reveals a pending charge for any felony or any comparable offense in any other jurisdiction, the Justice Center shall advise the Commissioner of the state agency to whom the application was submitted that the application must be held in abeyance until the charge is finally resolved.

(v) When the criminal history information of a subject individual under this subparagraph reveals a pending charge for any misdemeanor or any comparable offense in any other jurisdiction, the Justice Center may advise the Commissioner of the state agency to whom the application was submitted that the application should be held in abeyance until the charge is finally resolved or give guidance that the provider may act on the application in its own discretion, consistent with applicable laws and regulations..

(2) If the subject individual is a prospective employee or volunteer for a provider of services:

(i) When a subject individual under this paragraph has no criminal history, the Justice Center shall promptly advise the provider of services that it shall not issue a denial for employment or volunteer service and is not directing the provider of services to issue a denial.

(ii) When the criminal history information of such a subject individual reveals a felony conviction at any time for a sex offense, a felony conviction within the past ten years involving violence, a conviction for abandoning a child and/or endangering the welfare of an incompetent, physically disabled or vulnerable elderly person pursuant to sections 260.00, 260.25, 260.32 or 260.34 of the Penal Law or any comparable offense in any other jurisdiction, the Justice Center shall direct the provider to deny employment of or authorization to provide services by such person, unless the Justice Center, determines, in its discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of individuals receiving services in the facility or program.

(iii) When the criminal history record of a subject individual of a provider of services reveals a conviction for any crime other than one set forth in paragraph (ii) of this subdivision, the Justice Center may, consistent with article 23-A of the Correction Law, direct the provider to deny employment or authorization to provide services.

(iv) In cases in which the Justice Center does not issue a denial, or does not direct the provider of services to issue a denial, the provider of services may act on the application in its own discretion, consistent with all applicable laws and regulations.

(v) When the criminal history information of a subject individual of a provider of services reveals a pending charge for any felony or any comparable offense in any other jurisdiction, the Justice Center shall hold the application in abeyance until the charge is finally resolved.

(vi) When the criminal history information of a subject individual of a provider of services reveals a pending charge for any misdemeanor or any comparable offense in any other jurisdiction, the Justice Center may hold the application in abeyance until the charge is finally resolved or give guidance that the provider may act on the application in its own discretion, consistent with applicable laws and regulations.

(b) Prior to making a determination to deny an application pursuant to subdivision (a) of this section, the Justice Center shall afford the subject individual or a new operator of an existing provider of services an opportunity to explain in writing, within twenty calendar days from the date the notification was mailed, why the application should not be denied.

(c) When the Justice Center directs a provider of services to deny an application of a subject individual, or to terminate a temporarily approved prospective employee or volunteer, based on the criminal history information, the provider of services shall notify such person that such criminal history information is the basis of the denial. Such notification shall advise the prospective employee or volunteer that a copy of the summary of the New York criminal history information provided by the Justice Center to the provider of services is available from the provider of services upon written request by the subject individual.

(d) Documentation and confidentiality requirements.

(1) Only the authorized person or his or her designee and the relevant subject individual shall have access to any summary of New York criminal history information that may have been received by a provider of services. However, the summary of New York State criminal history information may be disclosed by the authorized person to other parties who are directly participating in any decision with regard to a subject individual, to which this information is relevant, provided, however, that with respect to information obtained from the FBI as a result of a national criminal history record check, no information shall be transmitted to the provider.

(2) The authorized person and any other party to whom such summary of New York State criminal history information is disclosed shall keep this information strictly confidential.

(3) Any party who willfully permits the release of any summary of New York State criminal history information to parties not authorized to receive same in accordance with section 845-b of the Executive Law or this regulation shall be guilty of a misdemeanor.

§ 701.7 Notification of subsequent criminal charges.

(a) Upon receiving notification from the Division that there is a pending criminal action or proceeding with regard to a subject individual, the Justice Center shall promptly notify the authorized person of a provider of services of the allegation.

(b) Upon receiving notification from the Justice Center of the pending criminal action or proceeding, the provider of services shall take any and all appropriate action to protect the health, safety and welfare of individuals receiving services. Such action or actions shall be documented. In cases involving pending criminal actions or proceedings against subject individuals, it shall be the responsibility of the provider of services to inquire of the subject individual about the outcome of such proceedings if the subject individual remains in service with the provider.

§ 701.8 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 the following records:

(i) names of all subject individuals for whom a request for a criminal history information check was submitted to the Justice Center, identifying whether he or she was applying for employment or a volunteer position;

(ii) for each subject individual identified, a copy of his or her fully executed sworn statement required pursuant to section 845-b of the Executive Law and this section 701.5 of this Part, and the results of the criminal history information check suitability determination of the Justice Center or the provider of services with regard to the employment or volunteer service of the individual.

(2) Such records shall be maintained in a manner that maintains the security of the information contained therein, but which also enables the state agency with licensing and/or monitoring jurisdiction over the provider to obtain immediate and unrestricted access to such information upon its request, for the purpose of monitoring compliance with its regulations.

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

(1) any subject individual who is subject to a criminal history information check in accordance with this Part has withdrawn the application or is no longer being considered for the position for which he or she applied; or

(2) any subject individual who was subject to, and underwent, a criminal history

information check in accordance with this section was not hired or 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 the subject individual is no longer employed or volunteers in a position that involves regular and substantial unsupervised or unrestricted physical contact with clients, unless otherwise directed by the state agency with licensing and/or monitoring authority over the provider.

(2) If directed to do so by the Justice Center, a provider of services subject to this Part shall dispose of the summary of the criminal history information and/or any other information obtained about a subject individual in accordance with such direction.

(3) Disposal of criminal history information and/or any other information obtained about a subject individual and Justice Center determinations shall be performed in a manner that ensures the confidentiality of the information.

(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.