

# ARKANSAS REGISTER

## Transmittal Sheet

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Secretary of State  
Mark Martin  
500 Woodlane, Suite 026  
Little Rock, Arkansas 72201-1094  
(501) 682-5070  
www.sos.arkansas.gov



For Office

Use Only:

Effective Date \_\_\_\_\_ Code Number \_\_\_\_\_

Name of Agency Department of Human Services

Department Division of Developmental Disabilities Services

Contact Elizabeth Pitman E-mail elizabeth.pitman@dhs.arkansas.gov Phone 501-682-4936

Statutory Authority for Promulgating Rules Arkansas Code Annotated 20-48-101

Rule Title: Criminal Records Check (DDS Policy 1087)

Intended Effective Date  
(Check One)

☐ Emergency (ACA 25-15-204)

☐ 10 Days After Filing (ACA 25-15-204)

☒ Other February 1, 2018  
(Must be more than 10 days after filing date.)

Legal Notice Published ..... 11/09/2017

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Reviewed by Legislative Council ..... \_\_\_\_\_

Adopted by State Agency ..... 02/01/2018

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Becky Murphy becky.murphy@dhs.arkansas.gov 1/19/18

Contact Person

E-mail Address

Date

### CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted  
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Signature

(501) 682-8662

melissa.stone@dhs.arkansas.gov

Phone Number

E-mail Address

Director

Title

Date

ARKANSAS DEPARTMENT OF HUMAN SERVICES  
DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES  
DDS DIRECTOR'S OFFICE POLICY MANUAL

Policy Type	Subject of Policy	Policy No.
Administrative	Criminal Records Checks	1087

1. **Purpose**

The purpose of this policy is to delineate the requirements, allowances, exclusions, and general implementation of criminal record checks, in accordance with Ark. Code Ann. § 20-38-101 *et seq.* and Ark. Code Ann. § 20-48-812 (collectively, the “Law”).

2. **Scope**

This policy is applicable to all providers licensed and certified by DHS, excluding facilities licensed by the Office of Long Term Care to provide services for persons with developmental disabilities, any owner of a Provider, all employees of Providers, and all applicants for employment with Providers. This policy does not cover any required adult or child maltreatment registry checks.

3. **Definitions**

“Alternative Living Home” means a residential dwelling owned or operated by an Employee used to provide Direct Care to an Individual with Disabilities.

“Bureau” means the Identification Bureau of the Department of the Arkansas State Police.

“DDS” means the Arkansas Department of Human Services, Division of Developmental Disabilities Services.

“DHS” means the Department of Human Services.

“Determination” means a written conclusion made by the appropriate division of DHS that a person is or is not qualified for employment, licensure, or certification based on the results of an Arkansas State Criminal Record Check or a National Criminal Record Check.

“Direct Care” means providing treatment, services, assistance, education, training, instruction, or supervision to an Individual with Disabilities, or having access to the finances or personal property of an Individual with Disabilities.

“Employee” means a person who:

1. Is employed by a Provider to deliver Direct Care to an Individual with Disabilities; or
2. Provides Direct Care to an Individual with Disabilities on behalf or under the supervision of, or by arrangement with, a Provider (i.e., volunteers, interns, independent contractors, etc.).

An employee does not include a person who is a family member of an Individual with Disabilities, unless the family member is paid by the Provider to provide Direct Care to the Individual.

“Group Home” means a residential dwelling that has been continuously owned or operated by a Provider since prior to July 1, 1995, and has space to provide private sleeping areas for more than four (4), but no more than fourteen (14), unrelated Individuals with Disabilities.

“Individual with Disabilities” means an individual receiving DDS services through a Provider.

“National Criminal Record Check” means a review of national criminal records based on fingerprinting or other identification methods.

“Provider” includes all of the following:

1. A certified Community and Employment Supports (CES) Waiver program service provider;
2. A certified First Connections (Part C of IDEA) program service provider;
3. Any certified adult day program service provider;
4. Any program certified as one of the following: Children’s Health Management Services (CHMS), Developmental Day Treatment Clinic Services (DDTCS), or any successor program to CHMS or DDTCS; and
5. Any other person or entity licensed or certified by DDS or DHS, other than facilities licensed by the Office of Long Term Care, to provide DDS services, including, but not limited to, applied behavior analysts, First Connections service coordinators, and First Connections developmental therapists, occupational therapists, physical therapists, and speech language pathologists.

“State Criminal Record Check” means a review of state criminal records conducted by the Bureau.

“Supported Living Arrangement” means a residential dwelling owned or operated by a Provider which has space to provide private sleeping areas for no more than four (4) Individuals with Disabilities.

4. **Criminal Records Check Requirements**

- A. **State Criminal Record Check**: Except as provided elsewhere in this Section, a Provider (and any applicant to become a Provider) is required to request a State Criminal Record Check on the following persons by submitting a fully executed DDS Form 5088-STATE, or any successor document, completed as per the instructions found therein:
1. Each person applying to be a Provider, or who is an owner of an organization applying to become a Provider;
  2. Each applicant to become an Employee of a Provider; and
  3. Any person over twelve (12) years of age residing in an Alternative Living Home, Group Home, Supported Living Arrangement, or other residential setting in which services are provided to Individuals with Disabilities.
- B. **National Criminal Record Check**: Except as provided elsewhere in this Section, in addition to the State Criminal Record Check, a Provider (and any applicant to become a Provider) is also required to request a National Criminal Record Check, which must include a fingerprint check, on the following persons by submitting a fully executed DDS Form 5088-FBI, or any successor document, completed as per the instructions found therein:
1. Each person that would be an owner of an organization applying to become a Provider; and
  2. Any Employee or applicant for employment that has not been a resident of the State of Arkansas for the entire five (5) preceding years.
- C. **Record Check Retention**: Providers are required to maintain evidence that all required criminal record checks were conducted.
- D. **Excluded Professionals**: The criminal record checks required by this Policy are not required for any person who renders services subject to a professional license that requires the same or similar checks, such as a licensed professional counselor, social worker, nurse, occupational therapist, pharmacist, physical therapist, physician, surgeon, podiatrist, psychologist, psychological examiner, speech-language pathologist, audiologist, nursing home administrator, or behavior analyst.
- E. **Required Renewal**: The criminal record checks required by this Policy must be requested/renewed by a Provider at least once every five (5) years for each person to whom the Policy is applicable.

- F. Subsequent Discovery of a Criminal Record: In the event evidence of a potentially disqualifying conviction is discovered in the five (5) year period between required criminal record checks, the Provider must request a new State Criminal Record Check, and, if applicable, National Criminal Record Check, within five (5) days of discovery. Providers must temporarily disqualify/suspend an Employee's employment upon discovery of a potentially disqualifying conviction, pending a Determination by the appropriate division of DHS.
- G. Qualifying Determinations by other DHS Divisions: A Provider is not required to request a State Criminal Record Check or National Criminal Record Check on an Employee or an applicant to become an Employee if the Division of Child Care and Early Childhood Education, or any other DHS Division, has issued a qualifying Determination for the individual within the past sixty (60) days. The Provider is responsible for retaining and submitting all proper documentation.

## **5. Determinations**

The appropriate division of DHS will make a Determination on each person for whom a State Criminal Record Check and/or National Criminal Record Check is conducted. No Employee or applicant for Employment with a Provider is permitted to perform Direct Care services for a Provider prior to receiving a Determination permitting the person to be employed. Each Determination will be in one of the following categories:

- A. Provisionally Qualified: A determination that a person may be employed as a result of a State Criminal Record Check.
- B. Qualified: A determination that a person may be employed as result of both a State Criminal Record Check and a National Criminal Record Check.
- C. Disqualified: A determination that a person may not be employed as a result of a State Criminal Record Check and/or a National Criminal Record Check.
- D. Tentatively Qualified: A determination that a "Qualified" or "Provisionally Qualified" Determination cannot be issued due to the existence of one or more potentially disqualifying charges that are less than a year old and have not reached disposition in court on a State Criminal Record Check or National Criminal Record Check. In such cases, the Provider may offer employment to the person but must re-submit the required criminal record check(s) every three (3) months until final determination is issued by the appropriate division of DHS.

Notwithstanding the foregoing, any individual that has an Arkansas State Criminal History Report that states "No Criminal History Found for this Subject" automatically receives a "Provisionally Qualified" Determination and will not actually have a Determination Letter issued.

## **6. Disqualifying Offenses.**

A. Permanently Disqualifying Offenses: A person shall be permanently prohibited from being an owner or Employee of a Provider if that person has pled guilty or nolo contendere or been found guilty of any of the following offenses by any court in the State of Arkansas, or any similar offense by a court in another state or a federal court:

1. Abuse of an endangered or impaired person, if felony (§ 5-28-103)
2. Aggravated assault upon a law enforcement officer or an employee of a correctional facility, if a Class Y felony (§ 5-13-211)
3. Arson (§ 5-38-301)
4. Capital Murder (§ 5-10-101)
5. Endangering the Welfare of an Incompetent person—1<sup>st</sup> Degree (§ 5-27-201)
6. Kidnapping (§ 5-11-102)
7. Murder in the First Degree (§ 5-10-102)
8. Murder in the Second Degree (§ 5-10-103)
9. Rape (§ 5-14-103)
10. Sexual Assault in the First Degree (§ 5-14-124)
11. Sexual Assault in the Second Degree (§ 5-14-125)
12. Sexual extortion (§ 5-14-113)

A plea of guilty or nolo contendere or a conviction for any of the above offenses permanently prohibits an individual from being an owner or Employee of a Provider regardless of whether or not the record of the offense is expunged, pardoned, or otherwise sealed.

B. Potentially Disqualifying Offenses: A person who has pled guilty, nolo contendere, or been found guilty of any offense listed in this Section by any court in the State of Arkansas, or of any similar offense by a court in another state or a federal court, is prohibited from being an owner or Employee of a Provider, unless one of the following situations apply:

1. The offense is a misdemeanor, and the date of the conviction or plea of guilty or nolo contendere, is more than five (5) years prior to the date of the State Criminal Record Check or National Criminal Record Check request, and there have been no criminal convictions or pleas of guilty or nolo contendere of any type or nature during that five (5) year period.

OR

2. The offense is a felony, and the date of the conviction or plea of guilty or nolo contendere is more than ten (10) years prior to the date of the State Criminal Record Check or National Criminal Record Check request, and there have been

no other criminal convictions or pleas of guilty or nolo contendere of any type or nature during that ten (10) year period.

The following offenses disqualify an individual who does not meet one of the criteria above from being an Employee or an owner of a Provider, unless the record of the offense has been expunged, pardoned or otherwise sealed:

1. Assault in the First, Second, or Third Degree (§§ 5-13-205—207)
2. Aggravated Assault (§ 5-13-204)
3. Aggravated Assault on a Family or Household Member (§ 5-26-306)
4. Aggravated Assault upon a Law Enforcement Officer or an Employee of a Correctional Facility, if a Class Y felony (§ 5-13-211)
5. Battery in the First, Second, or Third Degree (§§ 5-13-201—203)
6. Breaking or Entering (§ 5-39-202)
7. Burglary (§ 5-39-201)
8. Coercion (§ 5-13-208)
9. Computer Crimes Against Minors (§§ 5-27-601 *et seq.*)
10. Contributing to the Delinquency of a Juvenile (§ 5-27-220)
11. Contributing to the Delinquency of a Minor (§ 5-27-209)
12. Criminal Impersonation (§ 5-3-208)
13. Criminal Use of a Prohibited Weapon (§ 5-73-104)
14. Cruelty to Animals (§ 5-62-103)
15. Aggravated Cruelty to Dog, Cat or Horse (§ 5-62-104)
16. Death Threats Concerning a School Employee or Student (§ 5-17-101)
17. Domestic Battery in the First, Second or Third Degree (§ 5-26-303—305)
18. Employing or Consenting to the Use of a Child in a Sexual Performance (§ 5-27-402)
19. Endangering the Welfare of a Minor in the First or Second Degree (§§ 5-27-205—206)
20. Endangering the Welfare of an Incompetent Person in the Second Degree (§§ 5-27-201—202)
21. Engaging Children in Sexually Explicit Conduct for Use in Visual or Print Media (§ 5-27-303)
22. False Imprisonment in the First or Second Degree (§§ 5-11-103—104)
23. Financial Identity Fraud (§ 5-37-227)
24. Forgery (§ 5-37-201)
25. Incest (§ 5-26-202)
26. Interference with Court Ordered Custody (§ 5-26-502)
27. Felony Interference with a Law Enforcement Officer (§ 5-54-104)
28. Interference with Visitation (§ 5-26-501)
29. Introduction of a Controlled Substance into Body of Another Person (§ 5-13-210)
30. Manslaughter (§ 5-10-104)
31. Negligent Homicide (§ 5-10-105)
32. Obscene Performance at a Live Public Show (§ 5-68-305)
33. Pandering or Possessing Visual or Print Medium Depicting Sexually Explicit Conduct Involving a Child (§ 5-27-304)

34. Patronizing a Prostitute (§ 5-70-103)
35. Permanent Detention or Restraint (§ 5-11-106)
36. Permitting Abuse of a Minor (§ 5-27-221)
37. Producing, Directing, or Promoting a Sexual Performance by a Child (§ 5-27-403)
38. Promoting Obscene Materials (§ 5-68-303)
39. Promoting Obscene Performance (§ 5-68-304)
40. Promoting Prostitution in the First, Second, or Third Degree (§§ 5-70-104—106)
41. Prostitution (§ 5-70-102)
42. Public Display of Obscenity (§ 5-68-205)
43. Resisting Arrest (§ 5-54-103)
44. Robbery (§ 5-12-102)
45. Aggravated Robbery (§ 5-12-103)
46. Any Sexual Offense, including sexual extortion (§§ 5-14-101 *et seq.*)
47. Simultaneous Possession of Drugs and Firearms (§ 5-74-106)
48. Soliciting Money or Property from Incompetents (§ 5-27-229)
49. Stalking (§ 5-71-229)
50. Terroristic Act (§ 5-13-310)
51. Terroristic Threatening (§ 5-13-301)
52. Theft by Receiving (§ 5-36-106)
53. Theft of Property (§ 5-36-103)
54. Theft of Services (§ 5-36-104)
55. Transportation of Minors for Prohibited Sexual Conduct (§ 5-27-305)
56. Unlawful Discharge of a Firearm from a Vehicle (§ 5-74-107)
57. Felony Violation of the Uniform Controlled Substances Act (§§ 5-64-101 *et seq.*)
58. Voyeurism (§ 5-16-102)
59. Criminal attempt (§ 5-3-201), criminal complicity (§ 5-3-202), criminal solicitation (§ 5-3-301), or criminal conspiracy (§ 5-3-401) to commit any of the offenses listed in (A) or (B) above.

## **7. Criminal Record Check Document Retention**

DHS shall maintain all criminal record check documentation required to be retained under restricted access available only to those authorized and trained for its use. All criminal record check documentation shall remain on file for at least five (5) years, and followed by secure destruction.

## **8. Appeals**

Applicants or Employees receiving a Disqualified Determination shall be notified by DHS in writing. A “Disqualified” Determination is the only Determination that may be appealed.

If the Applicant or Employee wishes to appeal, he or she must submit the request for appeal within ten (10) business days of receipt of the written notification. Failure to submit an appeal within this timeframe will result in the appeal being denied. All appeals must be in writing and contain, at a minimum:



- A. The name, address, and telephone number of the person filing the appeal;
- B. The relationship the person filing the appeal has with DDS;
- C. The decision that is being appealed;
- D. The reason(s) the decision is being appealed;
- E. The desired outcome of the appeal;
- F. The law and/or facts being relied upon in filing the appeal;
- G. The person who will present the appeal; and
- H. Whether the person will be represented and if so, the name, address and telephone number of the authorized representative.

Appeals that do not contain ALL of this information will be denied.

The Appeal must be filed with the DHS division that issued the Determination. Within ten (10) business days of receipt of the appeal, the DHS division will schedule and conduct a hearing with all parties. All parties shall be notified of the hearing date, time and location in writing. An extension may be allowed when either party has a valid reason for postponement or both parties agree to the delay.

At the hearing, only issues relevant to the appeal shall be discussed and considered. The DHS Division shall issue a written decision within ten (10) business days of the meeting. The written decision will be submitted to all parties who participated in the hearing. This decision constitutes the final agency action for purposes of the Arkansas Administrative Procedures Act (A.C.A. § 25-15-201 *et seq.*)

## FINANCIAL IMPACT STATEMENT

**PLEASE ANSWER ALL QUESTIONS COMPLETELY**

**DEPARTMENT** Department of Human Services

**DIVISION** Division of Developmental Disabilities Services

**PERSON COMPLETING THIS STATEMENT** Elizabeth Pitman

**TELEPHONE** 501-682-4936 **FAX** 501-682-8380 **EMAIL:** [Elizabeth.pitman@dhs.arkansas.gov](mailto:Elizabeth.pitman@dhs.arkansas.gov)

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

**SHORT TITLE OF THIS RULE** Criminal Records Check (DDS Policy 1087)

- |   |   |  |
|---|---|--|
| 1. Does this proposed, amended, or repealed rule have a financial impact?   | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> |
| 2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            |
| 3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered?  | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            |

If an agency is proposing a more costly rule, please state the following:

(a) How the additional benefits of the more costly rule justify its additional cost;

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(b) The reason for adoption of the more costly rule;

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(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

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(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

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4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

**Current Fiscal Year**

General Revenue	<hr/>
Federal Funds	<hr/>
Cash Funds	<hr/>
Special Revenue	<hr/>
Other (Identify)	<hr/>
 Total	 0

**Next Fiscal Year**

General Revenue	<hr/>
Federal Funds	<hr/>
Cash Funds	<hr/>
Special Revenue	<hr/>
Other (Identify)	<hr/>
 Total	 0

(b) What is the additional cost of the state rule?

**Current Fiscal Year**

General Revenue	_____
Federal Funds	_____
Cash Funds	_____
Special Revenue	_____
Other (Identify)	_____
Total	<u>0</u>

**Next Fiscal Year**

General Revenue	_____
Federal Funds	_____
Cash Funds	_____
Special Revenue	_____
Other (Identify)	_____
Total	<u>0</u>

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

**Current Fiscal Year**

\$ 0

**Next Fiscal Year**

\$ 0

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6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

**Current Fiscal Year**

\$ 0

**Next Fiscal Year**

\$ 0

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7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes ☐ No ☒

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and
  - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
  - (a) the rule is achieving the statutory objectives;
  - (b) the benefits of the rule continue to justify its costs; and
  - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.