

5123:2-3-06

Background investigations for employment with residential facilities.**(A) Purpose**

The purpose of this rule is to establish standards for conducting background investigations on persons applying for employment with a residential facility in a direct services position and on persons placed in a direct services position under a contract with the licensee for the provision of specialized services to individuals residing in a residential facility.

(B) Definitions

The following definitions shall apply to this rule in addition to those terms defined in rule 5123:2-3-01 of the Administrative Code:

- (1) "BCII" means the bureau of criminal identification and investigation.
- (2) "Direct services position" means an employment position in which the employee has physical contact with, the opportunity to be alone with, or exercises supervision or control over one or more individuals.
- (3) "FBI" means the federal bureau of investigation.
- (4) "Minor drug possession offense" means either of the following:
 - (a) A violation of section 2925.11 (drug abuse) of the Revised Code as it existed prior to July 1, 1996;
 - (b) A violation of section 2925.11 (possession of drugs) of the Revised Code as it exists on or after July 1, 1996, that is a misdemeanor or a felony of the fifth degree.
- (5) "MR/DD employee" means any of the following:
 - (a) An employee of the department;
 - (b) An employee of a county board;
 - (c) An "ICF/MR" worker as defined in section 5123.193 of the Revised Code;
 - (d) Someone who is employed in a position that includes providing

specialized services to an individual with mental retardation or a developmental disability.

- (6) "Repeat offender" means a person who has been convicted of or pleaded guilty to the commission of any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule in two or more separate criminal actions. Convictions or guilty pleas resulting from or connected with the same act, or resulting from offenses committed at the same time, shall be counted as one conviction or guilty plea.
- (7) "Sexually oriented offense" means any of the following offenses:
- (a) Regardless of the age of the victim of the offense, a violation of section 2907.02 (rape), 2907.03 (sexual battery), or 2907.05 (gross sexual imposition) of the Revised Code or a violation of former section 2907.12 (felonious sexual penetration) of the Revised Code;
 - (b) A violation of section 2905.01 (kidnapping), 2905.02 (abduction), 2905.05 (child enticement), or 2907.04 (unlawful sexual conduct with a minor, formerly corruption of a minor) of the Revised Code, or a violation of section 2905.04 (child stealing) of the Revised Code as it existed prior to July 1, 1996, or a violation of section 2919.23 (interference with custody) of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation occurred prior to that date, when the victim of the offense is under eighteen years of age;
 - (c) A violation of section 2907.21 (compelling prostitution) of the Revised Code when the person who is compelled, induced, procured, encouraged, solicited, requested, or facilitated to engage in, paid or agreed to be paid for, or allowed to engage in the sexual activity in question is under eighteen years of age;
 - (d) A violation of division (A)(1) or (A)(3) of section 2907.321 (pandering obscenity involving a minor) or 2907.322 (pandering sexually oriented matter involving a minor) of the Revised Code;
 - (e) A violation of division (A)(1) or (A)(2) of section 2907.323 (illegal use of a minor in nudity-oriented material or performance) of the Revised Code;
 - (f) A violation of division (B)(5) of section 2919.22 (endangering children) of

the Revised Code when the child who is involved in the offense is under eighteen years of age;

- (g) Regardless of the age of the victim of the offense, a violation of section 2903.01 (aggravated murder), 2903.02 (murder), 2903.11 (felonious assault), 2905.01 (kidnapping), or division (A) of section 2903.04 (involuntary manslaughter) of the Revised Code that is committed with a purpose to gratify the sexual needs or desires of the offender;
- (h) A sexually violent offense listed or described in paragraph (B)(8) of this rule; or
- (i) Any violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to any of the offenses listed or described in paragraphs (B)(7)(a) to (B)(7)(h) of this rule.

(8) "Sexually violent offense" means any of the following:

- (a) A "violent sex offense," which means a violation of section 2907.02 (rape) or 2907.03 (sexual battery) of the Revised Code, a violation of division (A)(4) of section 2907.05 (gross sexual imposition) of the Revised Code, or a violation of former section 2907.12 (felonious sexual penetration) of the Revised Code, or a felony violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to any of the offenses listed or described in this paragraph; or
- (b) A violation of section 2903.01 (aggravated murder), 2903.02 (murder), 2903.11 (felonious assault) of the Revised Code, or 2905.01 (kidnapping) of the Revised Code or a violation of division (A) of section 2903.04 (involuntary manslaughter) of the Revised Code for which the offender also was convicted of or pleaded guilty to a sexual motivation specification, as described in section 2941.147 of the Revised Code, that charges that a person charged with an offense designated in this paragraph committed the offense with a purpose to gratify the sexual needs or desires of the offender, or a violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to any of the offenses listed or described in this paragraph.

(9) "Specialized services" mean any program or service designed and operated to serve primarily individuals with mental retardation or a developmental

disability, including a program or service provided by an entity licensed or certified by the department. A program or service available to the general public is not a specialized service. If there is a question as to whether a person or entity is providing specialized services, the licensee may request that the director of the department make a determination. The director's determination is final.

(C) The licensee shall ensure that no person is placed in a direct services position under a contract with the licensee for the provision of specialized services to individuals residing in a residential facility, including habilitation staff working through a temporary agency, unless that person has successfully completed a background investigation that meets the requirements of this rule.

(D) The licensee shall conduct background investigations of all persons under final consideration for employment with the residential facility in a direct services position, except that the licensee is not required to request a criminal records check for an employee who is in a direct services position and is being considered for a different direct services position or is returning after a leave of absence or seasonal break in employment, as long as the licensee has no reason to believe that the employee has committed any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule.

(E) When conducting a background investigation, the licensee shall do the following:

(1) Require the person to complete an employment application, conduct a personal interview with the person, and attempt to obtain references from the person's present and former employers. The employment application shall include the names and addresses of the person's present and former employers. The licensee must maintain evidence in writing that reference checks were attempted and/or completed.

(2) Obtain a report from BCII regarding the person's criminal record.

The licensee shall inform each person at the time of initial application that a criminal records check is required to be conducted and satisfactorily completed as a precondition for employment. The licensee shall request the report from BCII in accordance with section 109.572 of the Revised Code.

(3) Request that BCII obtain information regarding the person's criminal record from the FBI if the person who is the subject of the background investigation does not present proof that he/she has been a resident of Ohio for the five-year period immediately prior to the date of the background investigation. If the person presents proof that he/she has been a resident of

Ohio for that five-year period, the licensee may request that BCII include information from the FBI in its report. For purposes of this paragraph, a person may provide proof of Ohio residency by presenting, with a notarized statement asserting that he/she has been a resident of Ohio for that five-year period, a valid driver's license, notification of registration as an elector, a copy of an officially filed federal or state tax form identifying the person's permanent residence, or any other document the licensee considers acceptable.

- (4) Contact the registrar of motor vehicles in order to determine and verify that the person has a valid motor vehicle operator's license and to request a certified abstract regarding the record of convictions for violations of motor vehicle laws, if the duties of the position for which the person has applied require the person to transport individuals or to operate the licensee's vehicles for any other purpose.
 - (5) Contact the department to inquire whether the person is included in the registry established pursuant to section 5123.52 of the Revised Code.
 - (6) Contact the Ohio department of health to inquire whether the nurse aide registry established under section 3721.32 of the Revised Code reveals that its director has made a determination of abuse, neglect, or misappropriation of property of a resident of a long-term care facility or residential care facility by the person.
- (F) Except as otherwise provided in a collective bargaining agreement entered into under Chapter 4117. of the Revised Code that was in effect on November 22, 2000, no licensee may employ as an MR/DD employee a person who is included in the registry established pursuant to section 5123.52 of the Revised Code.
- (G) Except as provided in paragraphs (L) and (M) of this rule, no licensee may place a person in a direct services position if the person has been convicted of or pleaded guilty to any of the following:
- (1) A violation of the following sections of the Revised Code:
 - (a) 2903.01 (aggravated murder),
 - (b) 2903.02 (murder),
 - (c) 2903.03 (voluntary manslaughter),

- (d) 2903.04 (involuntary manslaughter),
- (e) 2903.11 (felonious assault),
- (f) 2903.12 (aggravated assault),
- (g) 2903.13 (assault),
- (h) 2903.16 (failing to provide for a functionally impaired person),
- (i) 2903.21 (aggravated menacing),
- (j) 2903.34 (patient abuse and neglect),
- (k) 2905.01 (kidnapping),
- (l) 2905.02 (abduction),
- (m) 2905.05 (criminal child enticement),
- (n) 2907.02 (rape),
- (o) 2907.03 (sexual battery),
- (p) 2907.04 (unlawful sexual conduct with a minor, formerly corruption of a minor),
- (q) 2907.05 (gross sexual imposition),
- (r) 2907.06 (sexual imposition),
- (s) 2907.07 (importuning),
- (t) 2907.08 (voyeurism),
- (u) 2907.09 (public indecency),
- (v) 2907.21 (compelling prostitution),

- (w) 2907.22 (promoting prostitution),
- (x) 2907.23 (procuring),
- (y) 2907.25 (prostitution),
- (z) 2907.31 (disseminating matter harmful to juveniles),
- (aa) 2907.32 (pandering obscenity),
- (bb) 2907.321 (pandering obscenity involving a minor),
- (cc) 2907.322 (pandering sexually oriented matter involving a minor),
- (dd) 2907.323 (illegal use of minor in nudity-oriented material or performance),
- (ee) 2911.01 (aggravated robbery),
- (ff) 2911.02 (robbery),
- (gg) 2911.11 (aggravated burglary),
- (hh) 2911.12 (burglary),
- (ii) 2919.12 (unlawful abortion),
- (jj) 2919.22 (endangering children),
- (kk) 2919.24 (contributing to unruliness or delinquency of child),
- (ll) 2919.25 (domestic violence),
- (mm) 2923.12 (carrying concealed weapon),
- (nn) 2923.13 (having weapons while under disability),
- (oo) 2923.161 (improperly discharging a firearm at or into a habitation or

school),

(pp) 2925.02 (corrupting another with drugs),

(qq) 2925.03 (trafficking in drugs),

(rr) 2925.04 (illegal manufacture of drugs or cultivation of marihuana),

(ss) 2925.05 (funding of drug or marihuana trafficking),

(tt) 2925.06 (illegal administration or distribution of anabolic steroids),

(uu) 3716.11 (placing harmful objects in food or confection),

(vv) 2905.04 (child stealing) as it existed prior to July 1, 1996,

(ww) 2919.23 (interference with custody) that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation occurred prior to that date,

(xx) 2925.11 (possession of drugs) that is not a minor drug possession offense as defined in this rule,

(yy) Felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

- (2) A felony contained in the Revised Code that is not listed in paragraph (G)(1) of this rule, if the felony bears a direct and substantial relationship to the duties and responsibilities of the position being filled;
- (3) Any offense contained in the Revised Code constituting a misdemeanor of the first degree on the first offense and a felony on a subsequent offense, if the offense bears a direct and substantial relationship to the position being filled and the nature of the services being provided;
- (4) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to any of the offenses listed or described in paragraph (G)(1), (G)(2), or (G)(3) of this rule.

- (H) The offenses listed in paragraph (G)(1) of this rule or a violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to any of the offenses listed or described in paragraph (G)(1) of this rule bear a direct and substantial relationship to the duties and responsibilities of any position with a licensee that involves providing direct services.
- (I) The licensee shall consider the following factors when determining whether an offense listed or described in paragraph (G)(2) or (G)(3) of this rule bears a direct and substantial relationship to the duties and responsibilities of the position being filled:
- (1) The duties and responsibilities of the position;
 - (2) The nature and seriousness of the offense;
 - (3) The circumstances under which the offense was committed;
 - (4) The degree to which the person participated in the offense;
 - (5) The age and ability of the victim, including whether the victim is an individual with physical or mental disabilities;
 - (6) The likelihood that the circumstances leading to the offense will recur;
 - (7) The extent to which the position being filled provides an opportunity for the commission of the same or similar offenses; and
 - (8) The time elapsed since the person was fully discharged from imprisonment, probation, and parole.
- (J) Prior to employing a person in a direct services position, the licensee shall require the person to submit a statement with the person's signature attesting that he/she has not been convicted of or pleaded guilty to any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule. The licensee also shall require the person to sign an agreement under which the person agrees to notify the licensee within fourteen calendar days if, while employed by the licensee, the person is ever formally charged with, convicted of, or pleads guilty to any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule. The agreement shall inform the person that failure to report formal charges, a conviction, or a guilty plea may result in being dismissed from employment.

- (K) A person applying for employment with a licensee shall disclose a conviction for any offense that has been sealed because the information bears a direct and substantial relationship to any direct services position with a licensee.
- (L) The licensee may place a person in a direct services position pending receipt of information concerning the person's background investigation from BCII, the registrar of motor vehicles, or any other state or federal agency if the person submits to the licensee a statement with his/her signature attesting that he/she has not been convicted of or pleaded guilty to any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule. The licensee shall terminate the placement of such person if it is informed that the person has been convicted of or pleaded guilty to any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule.
- (M) The licensee may place a person who has been convicted of or pleaded guilty to any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule in a direct services position only if each of the following standards in regard to rehabilitation are met:
- (1) The offense is not a sexually oriented offense as listed or described in paragraph (B)(7) of this rule;
 - (2) The offense is not a violation of section 2907.06 (sexual imposition), 2907.07 (importuning), 2907.08 (voyeurism), 2907.31 (disseminating matter harmful to juveniles), 2907.32 (pandering obscenity) of the Revised Code or a violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to the offenses listed or described in this paragraph;
 - (3) The offense is not a violation of section 2903.16 (failing to provide for a functionally impaired person) or 2903.34 (patient abuse and neglect) of the Revised Code or a violation of an existing or former municipal ordinance or law of this state, any other state, or the United States, if the offense is substantially equivalent to the offense listed or described in this paragraph;
 - (4) The victim of the offense was not a person for whom the person was responsible for providing care;
 - (5) The person is not a repeat offender as defined in paragraph (B)(6) of this rule;
 - (6) At least five years have elapsed since the person was fully discharged from imprisonment, probation, and parole;

- (7) The person has had the record of his or her conviction sealed pursuant to section 2953.32 of the Revised Code or any substantially equivalent provision under existing or former municipal ordinances or laws of this state, any other state, or the United States; and
 - (8) The person's name does not appear on the registry established under section 5123.52 of the Revised Code.
- (N) If a person meets all the standards listed for rehabilitation in paragraph (M) of this rule with the exception of paragraph (M)(7) of this rule due to the nonexistence of a statute that would allow the person to petition the court to have his/her conviction record sealed, the person may petition the licensee to be considered rehabilitated under the provisions of this rule. The licensee shall not consider for rehabilitation a person for whom a court has denied the person's request to have the record of his/her conviction sealed. The licensee shall consider the following factors in determining if the person has been rehabilitated:
- (1) The duties and responsibilities of the position;
 - (2) The nature and seriousness of the offense;
 - (3) The time elapsed since the applicant was fully discharged from imprisonment, probation or parole;
 - (4) The person's efforts at rehabilitation and the results of those efforts;
 - (5) Whether any criminal proceedings are pending against the person;
 - (6) Any personal references;
 - (7) The person's employment history; and
 - (8) Any other relevant factors.
- (O) It is the duty of a person being considered for placement in a direct services position to provide proof that the standards in regard to rehabilitation specified in paragraph (M) of this rule have been met. If the person fails to provide such proof or if the licensee determines that the proof offered by the person is inconclusive, the person shall not be placed in the position. Any doubt shall be resolved against the person being considered for the placement.

(P) A conviction of or a plea of guilty to an offense listed or described in paragraphs (G)(1) to (G)(4) of this rule shall not prevent a person's placement in a direct services position under the following circumstances:

- (1) The person has been granted an unconditional pardon for the offense pursuant to Chapter 2967. of the Revised Code;
- (2) The person has been granted an unconditional pardon for the offense pursuant to an existing or former law of this state, any other state, or the United States, if the law is substantially equivalent to Chapter 2967. of the Revised Code; or
- (3) The conviction or guilty plea has been set aside pursuant to law.

As used in this rule, "unconditional pardon" includes a conditional pardon with respect to which all conditions have been performed or have transpired.

(Q) Upon request, the licensee shall provide the department with a copy of any report or abstract obtained under this rule.

(R) Upon request, a licensee under contract with a county board shall provide a county board with a copy of any report or abstract obtained under this rule, if the person who is the subject of the report or abstract consents in writing. If the person refuses to consent, the person shall not be placed in a direct services position unless the licensee submits to the county board the following:

- (1) A statement attesting that the person has not been convicted of or pleaded guilty to any of the offenses listed or described in paragraphs (G)(1) to (G)(4) of this rule; or
- (2) If the person has been convicted of or pleaded guilty to an offense listed or described in paragraphs (G)(1) to (G)(4) of this rule, a statement attesting that the standards in regard to rehabilitation in paragraph (M) of this rule have been met.

(S) A person being considered for placement in a direct services position shall cooperate fully with the licensee by providing any information and assistance the licensee needs to comply with this rule. If the person fails to cooperate, the licensee shall not place the person in the position.

(T) For purposes of this rule, reports from BCII or any other state or federal agency regarding a person's criminal record and abstracts supplied by the registrar of motor

vehicles regarding a person's record of convictions for violations of motor vehicle laws are valid for a period of one year from the date of the report or abstract.

(U) The requirements of this rule shall apply only to persons who are hired for or who are placed in a direct services position on or after the effective date of this rule.

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CERTIFIED ELECTRONICALLY

Certification

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