

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: NC Child Care Commission

RULE CITATION: 10A NCAC 09 .2703

DEADLINE FOR RECEIPT: September 7, 2023

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Page 1, Subparagraph (a)(1), Line 7: The contents or substantive requirements of this form do not appear to have been prescribed by rule or statute. Accordingly, they must be set forth here. In the alternative the Commission could de-capitalize "Authority for Release of Information" and strike "form" but then the provider would not have to use the Commission's form. See G.S. 150B-2(8a).

Page 1, Subparagraph (a)(2), Line 8-9: Consider identifying the SBI form which I believe the Commission intends the FD-258. See [NCSBI - Fingerprinting](#)

Page 1, Subparagraph (a)(3), Line 11-14: Consider: "an affidavit attesting that the applicant has requested a background check from each State in which the applicant has resided, at any time and for whatever length of time, within the five years preceding the application."

Page 1, Subparagraph (a)(3), Line 11-14: Is there a particular source from which the out-of-state background check must come? Can it be from Bob's Background Checks & Filling Station of Kenosha, WI?

Page 1, Subparagraph (a)(3), Line 11-14: Is there another rule requiring the applicant to send in the out-of-state background checks or does the applicant merely need to tell the Commission that they have been ordered?

Page 1, Subparagraph (a)(3), Line 13: What does the Commission mean by "resided"? Either define it or add a citation to a statute or rule.

Page 1, Subparagraph (a)(3), Lines 11-14: G.S. 110-90.2(b) requires the Department to ensure that a criminal history (as defined in G.S. 110-90.2(a)(3)) of all childcare providers is checked prior to employment and every five years thereafter. However, this Rule only requires a background check for the five years prior to application. How does

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the Department fulfill its mandate of checking the criminal history prior to the five years of application? G.S. 110-90.2(d1) is not dispositive.

Page 1, Paragraph (b), Lines 17-27: Consider re-writing such that the Subparagraph is a list of the which the Division shall consider and include “(8) any additional information the applicant wishes the Division to consider regarding the applicant’s criminal history.”

Page 1, Paragraph (c), Line 28: By definition a “childcare provider” cannot be a firm, partnership, association, or corporation”. See 10A NCAC 09 .0102(8) and G.S. 110-90.2(a)(2).

Page 2, Paragraph (f), Line 1: Change “may” to “shall”.

Page 2, Paragraph (f), Line 1: Are “owners” licensed?

Page 2, Paragraph (g), Line 4: Is this requirement limited to when the applicant is using the online portal? If not, “through the Division’s online portal” is unnecessary.

Page 2, Paragraph (g), Line 4-6: Does the Division have different forms for each state on the online portal?

Page 2, Paragraph (h), Line 15: How many preceding years?

Page 2, Paragraph (i), Line 20: Cite the qualification rule after “disqualified”. “Pursuant to 10A NCAC 09 _____

Page 2, Paragraph (j), Lines 22-23: If it accomplishes the Commission’s intent, “Child care centers and family child care homes shall terminate the employment of any child care provider upon receipt of a notice of disqualification of the provider from the Division notwithstanding any appeal by provider of the disqualification.” Does the Commission intend to limit this to centers and homes? Or is it applicable to “child care facilities” as defined by 10 NCAC 09 .0102(7)?

Page 2, Paragraph (l), Lines 26 – 29. “or any other administrative action or civil penalty permitted by law or rule” is very broad and the Commission has limited jurisdiction. Cite the rule by which a child care facility can have its license revoked or suspended.

Page 3, Paragraph (o), Line 1: Is there a time when the submission is too early?

Page 3, Paragraph (p), Line 4: What constitutes an “investigation”? Is there a rule which can be cited?

Page 3, Paragraph (q), Lines 6-10: If it accomplishes the Commission’s intent, consider: “Any individual over the age of fifteen who resides in a family child care home or child care center on either a temporary or permanent basis shall comply with the

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requirements of Paragraph (a) of this Rule within five days of either moving into the home or center, or within five days of reaching their sixteenth birthday.”

Page 3, Paragraph (r), Line 11: “Operators” is a defined term. Why is “child care” necessary?

Page 3, Paragraph (r), Line 12: “Home” should be “family child care home” and “center” should be “child care center”. Please use the full defined phrase of any phrase employed the first time it is used in each paragraph. Thereafter, within that paragraph, the shorter “home” or “center” can be employed.

Page 3, Paragraph (r), Line 12: The contents or substantive requirements of this form do not appear to have been prescribed by rule or statute. Accordingly, they must be set forth here. See G.S. 150B-2(8a).

Page 3, Paragraph (s), Lines 13-14: When does an application begin? What is the trigger? Is it 10 NCAC 09 .0302?

Page 3, Paragraph (t), Line 15: “Center” should be “child care center” if that is what the Commission intends. If that is not the Commission’s intention, then “center” needs to be defined.

Page 3, Paragraph (t), Line 15-19: This is the second time in all of Chapter 9 that the Commission has used the word “disqualify.” The only other time is in Paragraph (h) and there it is used in the context of the Division “disqualifying a provisional child care provider” prior to the Commission determining that an applicant was qualified. The intent of this paragraph is unclear. Is this paragraph in the context of pre or post licensure? If pre-licensure, why is the language necessary?

Page 3, Paragraph (t), Line 15-19: Are there only three disqualifying factors?

Page 3, Paragraph (t), Line 15-19: Consider re-writing this paragraph for clarity and breaking down the concepts contained therein.

Page 3, Paragraph (t), Line 15-16: Does “of a family child care home or center” refer to the “household member” or “child care provider” or both?

Page 3, Paragraph (t), Line 16: Is only the failure to comply with Paragraph (g) a disqualifying event? What about the failure to comply with other paragraphs?

Page 3, Paragraph (t), Line 16: Does “located in residence” refer to “family child care home or center” or “child care provider” or “household member” or both “child care provider” or “household member”?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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Date submitted to agency:

1 **10A NCAC 09 .2703 is amended as published in 37:20 NCR 2015-2017 as follows:**

2

3 **10A NCAC 09 .2703 CRIMINAL HISTORY RECORD CHECK REQUIREMENTS FOR CHILD CARE**
4 **PROVIDERS**

5 (a) In addition to the requirements in Rules .0302 and .1702 of this Chapter, a child care provider shall submit the
6 following to the Division prior to the issuance of a license or prior to beginning employment:

- 7 (1) a signed and completed Authority for Release of Information form; and
8 (2) fingerprint impressions submitted on the forms required by the Division and State Bureau of
9 Investigation;
10 (3) ~~if a child care provider is an out-of-state resident, he or she shall also submit a certified local history~~
11 ~~from the Clerk of Superior Court in his or her county of residence. any applicant who has lived~~
12 ~~outside of North Carolina in the previous five years, shall submit an affidavit verifying they have~~
13 ~~completed a request for an out-of-state background check for each state in which they resided in the~~
14 ~~preceding five years.~~

15 All required forms can be found on the Division's website at
16 http://ncchildcare.dhhs.state.nc.us/general/dhhscre_childcare.asp.

17 (b) If the child care provider has a criminal history of convictions, pending indictment of a crime, or pending criminal
18 charges, ~~he or she~~ they may submit to the Division additional information concerning the conviction or charges ~~that~~
19 the Division shall use in making the determination of the child care provider's qualification. The Division shall also
20 consider the following in making its decision:

- 21 (1) the length of time since conviction;
22 (2) whether the child care provider is currently on probation;
23 (3) the nature of the offense;
24 (4) the circumstances surrounding the commission of the offense or offenses;
25 (5) the evidence of rehabilitation;
26 (6) the number and type of prior offenses; and
27 (7) the age of the child care provider at the time of occurrence.

28 (c) If the child care provider is a firm, partnership, association, or corporation, the chief executive officer or other
29 person serving in like capacity or a person designated by the chief executive officer as responsible for the operation
30 of the facility, shall complete the criminal history record check as specified in Paragraph (a) of this Rule.

31 (d) If a Letter of Intent to Operate pursuant to G.S. 110-106 is submitted to the Division, the person signing the Letter
32 of Intent shall submit all forms as required in Paragraph (a) of this Rule.

33 (e) Child care providers shall have a valid qualification letter prior to employment or living in the family child care
34 home, and the qualification letter shall be kept on file at the facility for review by representatives of the Division.

35 (f) Provisional child care providers may be employed at a child care facility or reside in a family child care home,
36 nonlicensed home, or child care center in a residence and shall be counted in staff/child ratio. Provisional child care
37 providers shall be supervised at all times by an individual who received a qualifying result on a criminal background

- 1 check within the past ~~three~~ five years and may not be left alone with children. Owners found to be in violation of this
2 Paragraph may be issued an administrative action up to and including revocation of their child care license or notice
3 of compliance in accordance with Section .2200 of this Chapter.
- 4 (g) ~~Within five days of~~ When applying for provisional status through the Division's online portal, the applicant shall
5 complete and submit any documents specific to their former state(s) of residence that are necessary to complete the
6 out-of-state portion of their background check. ~~The applicant shall also certify in writing within five days to the~~
7 ~~Division that they have made the required requests.~~ When requested by the Division, the applicant shall submit a copy
8 and proof of submission of the documents necessary to complete the out-of-state portion of their background check.
9 The Division shall provide to the applicant the necessary information to make these requests, if applicable.
- 10 (h) ~~After six months,~~ Within 45 days of issuing a provisional status to an applicant, the Division shall issue a
11 qualification letter to a provisional child care provider if ~~the Division does not receive a response to its request~~ no
12 criminal background check results that would disqualify the applicant are returned or if there is no response to the
13 applicant's or the Division's request for the state sex offender registry check, the state abuse and neglect registry, or
14 the state criminal history check from the state or states in which the provisional provider currently resides or has
15 resided at any time during the preceding years. ~~five years prior to submitting documents for a criminal history check.~~
16 ~~However, nothing in this Rule shall prevent the Division from disqualifying a provisional child care provider at a later~~
17 ~~date based upon failure to comply with the requirements of Paragraph (g) of this Rule or if the Division determines~~
18 ~~the applicant has submitted false information to the Division or if information is received from any other state after~~
19 ~~the qualification letter has been issued.~~ six months have elapsed.
- 20 (i) Child care providers found to be disqualified shall not be eligible for employment in child care until a qualification
21 letter has been issued by the Division.
- 22 (j) Child care providers determined by the Division to be disqualified shall ~~be~~ have their employment terminated by
23 the center or family child care home immediately upon receipt of the disqualification notice.
- 24 (k) Disqualification of a child care provider living in a family child care home or a center located in a residence shall
25 be grounds for issuance of a summary suspension of the license in accordance with 10A NCAC 09 .2213.
- 26 (l) Refusal on the part of the employer to dismiss a child care provider who has been found to be disqualified shall be
27 grounds for suspension, denial, or revocation of the license or any other administrative action or civil penalty permitted
28 by law or rule. If an applicant appeals the disqualification, the child care provider shall not be employed during the
29 appeal process.
- 30 (m) Operators, as defined by G.S. 110-86(7), shall include the criminal history mandatory reporting requirement in
31 all new employee orientation information. All child care providers and household members who have incurred any
32 pending charges, indictments, or convictions (other than minor traffic offenses) since the last qualification letter was
33 issued by the Division shall notify the operator of such charges within five business days or before returning to work,
34 whichever comes first. The operator shall notify the Division of any such pending charges, indictments, or convictions
35 within one business day of being notified.
- 36 (n) The qualification letter shall be valid for a maximum of ~~three~~ five years from the date of issuance.

1 (o) Prior to the expiration date of the qualification letter, the child care provider shall complete and submit the forms
2 listed in Paragraph (a) of this Rule.

3 (p) After a child care provider has been qualified, the Division shall complete a new criminal history record check if
4 the Division of Child Development and Early Education conducts an investigation involving alleged criminal activity
5 by the child care provider.

6 (q) ~~Individuals who live in the household~~ use a family child care home or center located in a residence on a permanent
7 or temporary basis as their place of residence, including those who have had their 16th birthday after the initial
8 licensing of a family child care home or center located in a residence, shall complete and submit the forms listed in
9 Paragraph (a) of this Rule to the Division within five business days of using the home as their permanent or temporary
10 residence or their 16th birthday.

11 (r) Child care operators shall notify the Division of all new child care providers who are hired or have moved into the
12 home or center located with a residence within five business days by submitting the form provided by the Division.

13 (s) Any application for a criminal background check that is not complete, including the required components in
14 Paragraph (a) of this Rule, within 30 days of beginning the application, will expire and be withdrawn by the Division.

15 (t) The Division shall disqualify any child care provider or household member of a family child care home or center
16 located in a residence if they fail to comply with the requirements of Paragraph (g) of this Rule or if the Division
17 determines the applicant has submitted false information in connection with their criminal background check or
18 application to the Division or if information that disqualifies the child care provider is received from any state during
19 the qualification time period.

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21 *History Note: Authority G.S. 110-85; 110-86(7); 110-90.2; 110-106; 114-19.5; 143B-168.3;*
22 *Temporary Adoption Eff. January 1, 1996;*
23 *Eff. April 1, 1997;*
24 *Amended Eff. March 1, 2014; November 1, 2007;*
25 *Readopted Eff. January 1, 2019;*
26 *Amended Eff. October 1, 2023; February 1, 2021.*