

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

FILED

2015 JUL 31 A 9:57

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Department of Health and Human Resources TITLE NUMBER: 69

CITE AUTHORITY: W.Va. Code 16-49-9(a)

AMENDMENT TO AN EXISTING RULE: YES NO


IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 10

TITLE OF RULE BEING PROPOSED: West Virginia Clearance for Access: Registry and Employment Screening

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

Agency:	Health and Human Resources, Department of		
CBD Number:	Version:	Bill Number:	Resolution Number:
1483	Introduced	SB88	
CBD Subject:	Health		

FUND(S)
8722

Sources of Revenue

Special Fund

Legislation creates:

A New Fund

Fiscal Note Summary

Effect this measure will have on costs and revenues of state government.

The purpose of this legislation is to require background checks for individuals who have direct access to residents, members or beneficiaries of covered providers participating in the West Virginia Clearance for Access: Registry and Employment Screening (WVCARES) program. The bill requires the Secretary of the Department of Health and Human Resources (DHHR) to develop a plan and a program for conducting background checks. The bill requires a centralized database to maintain criminal history record information and results; it establishes a prescreening process conducted by covered providers and requires applicants to provide fingerprints and undergo a criminal background check. The bill establishes procedures and criteria for obtaining and reviewing criminal history record information. In 2011 DHHR received a grant from the Centers for Medicaid and Medicare Services (CMS) to implement a criminal background check system with a rap-back process. The initial grant covered three years, with an expiration date of 9/30/14. In August 2014, a fourth year no-cost extension was granted by CMS to expire 9/30/15, which will make all SFY2015 and the first quarter of SFY2016 costs fully federally funded. Due to some delays in getting the program initiated, the program intends to request a fifth year no-cost extension from CMS to extend the grant until 9/30/16, which will cover all SFY2016 and the first quarter of SFY2017 costs. To date, the states that have requested the fifth year no-cost extension have been approved. The grant does require a 25% match; however CMS has allowed for background check fees that are paid by providers to be used as the in-kind match, resulting in no state revenue being needed to match the federal funds during the entire grant period. For full implementation of the program after the federal grant has expired, the program will rely upon a funding mechanism generated from the administrative fees assessed for the use of the WV CARES system. Estimated cost of this program for FY15 is \$125,000, FY16 is \$380,205 and on-going is \$441,668. Federal Revenue and State Revenue, which is generated by fees, covers expected expenses. Revenue estimate for FY16 is \$270,000 and \$480,000 for FY17. Please see explanation below.

Fiscal Note Detail

Over-all effect

Effect of Proposal	Fiscal Year		
	2015 Increase/Decrease (use "-")	2016 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	125,000	380,205	441,668
Personal Services	60,776	151,724	242,672
Current Expenses	64,224	228,481	198,996
Repairs and Alterations	0	0	0

Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	270,000	480,000

3. Explanation of above estimates (including long-range effect):

Programs costs of approximately \$125,000 are anticipated for FY2015; which includes salary and benefits for the Program Manager, travel, supplies, office space, and a desktop computer to comply with FBI requirements to access background results. Estimated costs for FY2015 are covered by a federal grant from Centers for Medicaid and Medicare Services (CMS). It is anticipated that the associated startup costs will occur during state fiscal years 2015 and 2016.

In FY2016, at least 25% of the anticipated costs will be covered by the federal grant, which will not expire until September 30, 2015. If the fifth year extension is approved, no state dollars will pay for the program during FY2016; however, revenues will be collected to continue the program upon full implementation. If the extension is not approved, the remaining nine months of expenses for FY2016 will equal 75% of estimated costs or \$249,353 (this excludes costs of \$47,735 to state hospitals, see explanation below). These costs are as follows: Program Manager (salary \$45,696 plus benefits for a total of \$60,776), and 2 Fitness Determination staff (salary of \$34,105 each plus benefits for a total of \$90,948). Current expenses of \$180,746 include \$54,500 for Office of Technology project management services, \$18,946 for travel to national conferences and training through the state, \$96,000 for annual rent costs, \$5,300 for copier lease, \$2,400 for cell phone/iPad usage and \$3,600 for office supplies. The proposed fee is \$20 per applicant; at this stage of implementation, it is anticipated that only long term care providers will participate with approximately 13,500 applications, based upon historical figures. FY2016 revenue is estimated at \$270,000.

For fiscal years beginning in SFY2017, the full estimated cost of \$441,668 per year would be covered by the fees assessed to providers for utilizing the system as required by federal law. These costs are as follows: One FTE program manager (salary \$45,696 plus benefits for a total of \$60,776), and 4 Fitness Determination staff (salary of \$34,105 each plus benefits for a total of \$181,896). Current expenses of \$180,746 include: Office of Technology project management services of \$54,500, travel to national conferences and training through the state at \$18,946; printing, supplies, office rent, and other miscellaneous costs of \$107,300. Costs \$18,250 related to state facilities for the WVCARES system will be absorbed by the Departments current budget (see explanation below). Revenue estimates are based on a current average of 6,000 background checks per quarter according to State Police data, approximately 24,000 background checks annually, assuming all quarters are equal and the statute as passed permits the Secretary to add provider types to the program to create a single point of contact for background checks. FY2017 revenue is estimated at \$480,000 (\$20 x 24,000 applicants).

This legislation will result in additional costs for the state hospitals, which the Department will absorb with its current budget. FY2016 costs are based on all current facility employees obtaining the required FBI background check at \$16.50 per employee; this includes 937 Long Term Care employees and 850 Psychiatric Facility employees. FBI background check costs for existing employees is \$29,485.50. All new hires will require an FBI background check (\$16.50), as well as the projected WVCARES Fee (\$20.00); this is an additional \$36.50 per new employee. There are approximately 500 new hires annually. This legislation will result in an additional \$18,250 for new hires per year (FY2016 and on-going). Total cost for FY2016 is \$47,735 and \$18,250 on-going.

Memorandum

SFY2015 and the first quarter of SFY2016 are entirely supported by a federal grant from CMS. DHHR will apply for the fifth year no cost extension in June 2015 and should receive a response prior to the fourth year extension expiration. If the fifth year extension is approved, all expenses stemming from operations in SFY2016 as well as the first quarter of SFY 2017 will be fully covered by the federal grant. Beginning in the second quarter of state fiscal year 2017, the program will be supported by a \$20 per application administrative fee assessed on the providers requesting this service that has been mandated by federal law. It is anticipated that the fully implemented program will be self sustaining upon expiration of fifth year of the federal grant.

In §16-46-8 of this proposed legislation, it states that the State Police may assess a fee to applicants or covered providers for conducting the criminal background check and for collecting and retaining fingerprints for rap back as authorized under this article; since this process has not been complete, additional fees may be assessed that are not included in the above cost. Person submitting Fiscal Note:

Karen L. Bowling
 Email Address:
 karen.l.bowling@wv.gov

69 CSR 10

Department of Health and Human Resources

Office of Inspector General

WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY AND EMPLOYMENT SCREENING
(WV CARES)

BRIEF SUMMARY

This rule establishes criminal background check requirements for applicants for employment as direct access personnel in long-term care facilities. This rule includes definitions and sets forth disqualifying offenses and disqualification time periods; establishes requirements for prescreening applicants on online registries; requires state and federal fingerprint based criminal history record information searches; provides for conditional employment, variances and appeals.

STATEMENT OF CIRCUMSTANCES

The West Virginia Clearance for Access: Registry and Employment Screening Act was passed by the Legislature in 2015 as W.Va. Code §§ 16-49-1, *et seq.* The Act requires the Secretary for the Department of Health and Human Resources to propose rules for legislative approval to implement the provisions of the Act.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: _____

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Health and Human Resources
Office of Inspector General
Building 6, Room 817-B
Charleston, WV 25305
(304) 558-2278

LEGISLATIVE RULE TITLE: _____
West Virginia Clearance for Access: Registry and Employment Screening

1. Authorizing statute(s) citation W.Va. Code § 16-49-9

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 27, 2015

b. What other notice, including advertising, did you give of the hearing?
n/a

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 27, 2015

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received _____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Kathy Lawson, Inspector General

DHHR Office of Inspector General

Building 6 Room 817B

State Capitol Complex

Charleston, WV 25305

phone (304) 558-2278

fax (304) 558-1992

email Kathy.M.Lawson@wv.gov

g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

n/a

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

n/a

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

n/a

d. Attach findings and determinations and reasons:

Attached n/a

Title 69 Series 10

West Virginia Clearance for Access: Registry and Employment Screening (WV CARES)

Legislative Rule

West Virginia Department of Health and Human Resources

Summary of Public Comments from Tom Susman of TSG Consulting:

Comment #1

Section 2.9 Disqualifying Offense – Suggest removing the phrase “substantiated finding” since it is not defined, can be interpreted by OHFLAC extremely broadly, and can include acts with the potential to harm. Suggest leaving in the term “conviction” in this section only.

Response #1

“Substantiated findings” come from sources such as Child Protective Services, Adult Protective Services, judicial decisions, or are verifiable on published registries such as the Nurse Aide Abuse and Neglect Registry. Trained WV CARES staff will be making the employment eligibility decisions based on each individual’s complete criminal history record information. The department has considered this comment, and has determined that the risk of harm to the vulnerable population this rule is intended to protect outweighs the benefit to the potential employees by removing this term. No change will be made to this section.

Comment #2

Section 2.9 Disqualifying Offense – “Felony crimes against property” preclude someone from working in the industry for five years. This is very broad and unclear what crimes are included.

Response #2

The rule takes a categorical approach, as opposed to trying to document a comprehensive list of all possible disqualifying crimes, as a more practical method for implementation. WV CARES staff, a dedicated unit within the Office of Inspector General, is working in partnership with the WV State Police to determine which defined crimes fall within these categories. Crimes against property include, but are not limited to, theft, identity theft, burglary, arson, fraud, embezzlement, financial misconduct including uttering, forgery, and cruelty to animals. It is important to note that, not only is the actual crime disqualifying, but any conviction of attempt, solicitation, conspiracy, aiding, or abetting, also would be disqualifying. WV CARES staff is trained to interpret the criminal history record information of potential employees and make employment eligibility determinations.

Comment #3

Section 2.10 Disqualifying time periods – Felony drug crimes disqualifies someone for 15 years, but the current manual for I/DD Waiver lists only 10 years. Ten should be sufficient, especially since a felony crime against a care-dependent person is only 10 years.

Response #3

Section 2.10, Disqualifying time periods, has been stricken from the proposed rule in an Emergency Amendment to an Emergency Rule filed with the Secretary of State on July 17, 2015.

Comment #4

Sections 5 through 8 generally – Providers are permitted to employ a person “conditionally” for 60 days pending the Secretary’s decision regarding the person’s fitness for direct access employment. However, nothing within the law requires the Secretary to make a decision within 60 days. Provision should be made for conditional employment “pending the Secretary’s decision,” not simply for a flat 60 days.

Response #4

Section 7.4 has been amended to require the Secretary to mail a written decision to the applicant and potential employer within 60 days, not 90 days, of receipt of a variance request. The entire WV CARES employment eligibility process, including a variance determination, if requested, has been designed to be efficient, effective, and economical. The entire process will be conducted well within the federal prohibition of hiring “conditional” employees “not to exceed 60 days.”

Comment #5

Proposed rule imposes \$5,000 penalty per occurrence if a provider fails to maintain proper documentation. Penalty should be for employing disqualified person, not failure to have paperwork in order.

Response #5

Having documentation of compliance with background check laws and rules in an employee’s personnel file is evidence that is immediately identifiable to any DHHR staff who is doing any licensure, certification, survey, or investigation. Section 9.3 of the rule also states that employing someone who is ineligible to work may subject the employer to the same fine. This comment has been considered, and it has been decided to leave Section 9.3 intact.

Comment #6

Providers are concerned about having the timing for this critical process in the hands of DHHR. Delays could affect the quality of care. The proposed rule could impair providers’ ability to recruit new employees who could more easily find non-health care jobs.

Response #6

WV CARES uses web-based technologies to provide employers with a single portal for checking state and national abuse registries and the national sex offender registry. The web-based system will provide an efficient and effective means for employers to check an applicant's status prior to paying the cost of a fingerprint search. The submitted fingerprints will be matched against comprehensive state and federal criminal history records instead of the previous reliance on name-based searches, thereby limiting the ability of bad actors to hide their criminal or abusive action by crossing state lines. Fingerprinting also ensures that applicants are not misidentified and mistakenly barred from gainful employment. All of this will take place in WV CARES' centralized fitness determination unit allowing for consistent and fair review of applicant criminal histories based on a pre-determined set of disqualifying offenses and a rigorous investigation of missing dispositions. The program includes a robust independent appeals process by which applicants may challenge the accuracy of information obtained in a background check, or request consideration of a variance through an independent rehabilitation review. DHHR has a public interest in keeping criminals from working in direct access jobs while enabling those applicants who are eligible to be employed as quickly as possible.

Summary of Comments from April Robertson, OIG General Counsel

Comment #1

After consultation with General Counsel to the Secretary of State and Staff Counsel to the Senate Health & Human Resources Committee, it was mutually agreed that Section 2.10 setting forth specific disqualification time periods, may not have statutory authority, but that general language regarding the length of time an applicant with a conviction is barred from employment and that the hiring decision is ultimately the prerogative of the employer could be appropriately inserted in Sections 7.3 and 7.4.

Response #1

Section 2.10 has been stricken as described above, and new language has been inserted in Sections 7.3 and 7.4. Also, the time within which the Secretary must mail a written decision regarding an applicant's fitness determination has been reduced from 90 to 60 days to comply with federal law.



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Earl Ray Tomblin
Governor

State Capitol Complex
Building 6, Room 817-B
Charleston, West Virginia 25305
Telephone: (304) 558-2278 Fax: (304) 558-1992

Karen L. Bowling
Cabinet Secretary

July 17, 2015

M. Katherine Lawson, Inspector General
WV Dept. of Health & Human Resources
State Capitol Complex
Building 6, Room 817-B
Charleston, WV 25305

RE: Comments Regarding Proposed 69 CSR 10

Dear Ms. Lawson:

After consultation with General Counsel to the Secretary of State and Staff Counsel to the Senate Health & Human Resources Committee, it was mutually agreed that Section 2.10 setting forth specific disqualification time periods, may not have statutory authority, but that general language regarding the length of time an applicant with a conviction is barred from employment and that the hiring decision is ultimately the prerogative of the employer could be appropriately inserted in Sections 7.3 and 7.4.

Sincerely,

A handwritten signature in black ink that reads "April L. Robertson".

April L. Robertson
General Counsel

TSG CONSULTING

Public Relations • Governmental Affairs • Health Care

July 23, 2015

Office of Inspector General
Department of Health and Human Resources
Building 6, Room 817-B
Capitol Complex
Charleston, WV 25305

Dear Inspector General:

Thank you for the opportunity to comment about proposed Legislative Rule 69CSR10, West Virginia Clearance for Access: Registry & Employment Screening. We have clients who have the following concerns:

- Section 2.9. Disqualifying Offense – First, the proposed rule refers to a “conviction or substantiated finding for any crimes that exclude an applicant from direct access personnel positions in a covered provider,” but there is no definition for “substantiated finding.” We suggest removing it and leaving just “conviction” in that section. We are concerned that OHFLAC’s definition of abuse/neglect has grown extremely broad and includes acts that have the “potential” to harm. OHFLAC defines certain actions as abuse or neglect that should not preclude a person from working in the industry. For example, falling asleep on the night shift is classified as neglect even when no one is hurt as a result. Although it is understandable why that might be considered neglectful, should it preclude the person from working in the industry for 15 years? Could that person instead simply be required to work only on the dayshift or in conjunction with another employee?

Second, the rule would add “2.9.g. Felony crimes against property” as a reason for precluding someone from working in the industry for five years. This is new and seems very broad because it is not clear what “felony crimes against property” would include.

- Section 2.10. Disqualification time periods – This section list the disqualification period for felony drug crimes as 15 years. However, the current manual for the ID/DD Waiver lists only 10 years. Ten years should be sufficient. It would be onerous to extend the period to 15 years, especially considering that a felony against a dependent in someone’s care disqualifies that person only for 10 years.
- Sections 5 through 8 generally – These sections describe a process in which the Secretary would make a determination regarding prospective employees’ “fitness” to provide direct care. Providers are permitted to employ a person “conditionally” for 60 days pending the Secretary’s decision. However, nothing within the law requires the Secretary to make a decision within 60 days. The process could become backlogged very quickly, which would result in having providers either dismiss good employees or

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JUL 24 2015

DIHH
Inspector General

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violate the rule. Provision should be made for conditional employment "pending the Secretary's decision," not simply for a flat 60 days.

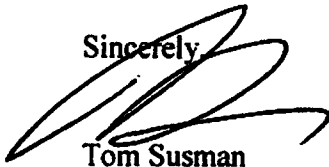
In addition, the proposed rule would impose a \$5,000 penalty per occurrence if a provider would fail to maintain proper documentation. The penalty should be imposed for employing a disqualified person, not for failure to have paperwork in order.

Finally, providers are concerned about having the timing of one of the most critical processes in providing care – hiring good employees – placed in the hands of DHHR because DHHR has many responsibilities that sometimes could hinder the department from acting in a timely manner. Delays on the part of DHHR could affect the quality of care that is delivered. Workforce matters are major issues for providers. The proposed rule could impair providers' ability to recruit new employees, especially considering that they more easily could find permanent employment in non-health care jobs without delay.

I hope you will consider carefully the concerns expressed here before allowing the proposed legislative rule to proceed further toward being implemented. If you would like to discuss this further, please feel free to call me at 304-345-1161.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Susman", written over the word "Sincerely".

Tom Susman

TSG CONSULTING
Public Relations • Governmental Affairs • Health Care
118 Capitol Street
Charleston, WV 25301

Office of Inspector General
Department of Health and Human Resources
Building 6, Room 817-B
Capitol Complex
Charleston, WV 25305

69CSR10

TITLE 69
LEGISLATIVE RULES
WEST VIRGINIA DIVISION OF HEALTH

FILED

2015 JUL 31 A 9:57

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 10

WEST VIRGINIA CLEARANCE FOR ACCESS: REGISTRY & EMPLOYMENT SCREENING

§69-10-1. General Provisions.

1.1. Scope. It is the purpose of this rule to protect West Virginia's vulnerable population by requiring registry prescreening and state and federal criminal background checks for all direct access personnel of covered providers and covered contractors. The short title of this rule shall be known as WV CARES.

1.2. Authority. W. Va. Code §16-49-9.

1.3. Filing Date.

1.4. Effective Date.

1.5. Application. This rule applies to covered providers and covered contractors as defined in this rule and W. Va. Code §16-49-1 et seq.

1.6. Enforcement. This rule is enforced by the secretary of the Department of Health and Human Resources or his or her lawful designee.

§69-10-2. Definitions.

The following definitions are for the purposes of implementing this rule.

2.1. Applicant. The person who is being considered for employment or engagement with a covered provider or covered contractor.

2.2. Background Check. A prescreening of registries on the WV CARES website and a fingerprint-based search of state and federal criminal history record information.

2.3. Conviction. A finding of guilt by a court, a plea of guilty or *nolo contendere* was accepted, or when the individual entered a first offender, deferred adjudication, or arrangement or program where the judgment of conviction is withheld, regardless of whether an appeal is pending.

2.4. Covered Contractor. A licensed, certified, and/or registered health care provider who performs personal services for the covered provider in exchange for monetary compensation, where the covered provider has the right to specify the result to be accomplished by the work, but not the means and methods by which the result is accomplished.

2.5. Covered Provider. The following facilities and providers are required to participate in the WV CARES program: skilled nursing facilities, nursing facilities, home health agencies, providers of hospice care, long-term care hospitals, providers of personal care services, providers of adult day care, residential

care providers that arrange for, or directly provide, long-term care services, including assisted living facilities, and intermediate care facilities for individuals with intellectual disabilities, all as defined in W.Va. Code and W.Va. Code of State Rules.

2.6. Department. West Virginia Department of Health and Human Resources.

2.7. Direct Access. Physical contact with a resident, member, beneficiary, or client of a covered provider or covered contractor, or access to their property, personally identifiable information, protected health information, or financial information.

2.8. Direct Access Personnel. An individual who has direct access by virtue of ownership, employment, engagement, or agreement with a covered provider or covered contractor. Direct access personnel does not include volunteers or students performing irregular or supervised functions, or contractors performing repairs, deliveries, installations or similar services for the facility.

2.9. Disqualifying Offense. A conviction or substantiated finding for any of the crimes that exclude an applicant from direct access personnel positions in a covered provider, including the conviction of attempt, solicitation, conspiracy, aiding, or abetting the underlying crime. Disqualifying convictions include those crimes enumerated in federal or state code and recognized by the West Virginia State Police, and that generally fall within the following categories:

2.9.a. State or federal health and social services program-related crimes;

2.9.b. Patient abuse or neglect;

2.9.c. Health care fraud;

2.9.d. Felony drug crimes;

2.9.e. Crimes against care-dependent or vulnerable individuals;

2.9.f. Felony crimes against the person; and

2.9.g. Felony crimes against property.

2.10. Fitness Determination. A finding by the secretary after review of an applicant's criminal history record information that the applicant is either eligible for employment or not.

2.11. Negative Finding. A finding in the employment prescreening that excludes an applicant from direct access personnel positions.

2.12. Notice of Ineligibility. A notice pursuant to W.Va. Code § 16-49-3 that the secretary's review of the applicant's criminal history record information reveals a disqualifying offense.

2.13. Prescreening. A mandatory search of databases and registries on the WV CARES website for exclusions and licensure status prior to the submission of fingerprints for a criminal history record information check.

2.14. Rap Back. The notification to the department when an individual who has undergone a fingerprint-based state or federal criminal history record information check has a subsequent state or

federal criminal history event.

2.15. Secretary. The secretary of the Department of Health and Human Resources, or his or her designee.

2.16. State Board of Review. A board within the department designated by state law through which an applicant may appeal a negative fitness determination.

§69-10-3. Prescreening.

3.1. A covered provider or covered contractor shall prescreen all direct access personnel applicants considered for hire for negative findings by way of an internet search of registries and licensure databases through the WV CARES website. The secretary may charge a fee for its use.

3.2. A covered provider shall ensure that all independent health contractors who provide direct access personnel prescreen their applicants considered for hire for negative findings by way of an internet search of registries and licensure databases through the WV CARES website. The secretary may charge a fee for its use.

§69-10-4. Fingerprinting.

4.1. If the applicant has a negative finding on any required registry or licensure database, the covered provider or covered contractor shall notify the applicant, in writing, of such finding and shall not employ that applicant.

4.2. If the applicant does not have a negative finding in the prescreening process, and the covered provider or covered contractor, if applicable, is considering the applicant for employment, the applicant shall submit to fingerprinting for a state and federal criminal history record information check, and may be employed as a conditional employee subject to the provisions of this rule.

4.3. Applicants considered for hire shall be notified by the hiring entity that their fingerprints will be retained by the State Police Criminal Identification Bureau and the Federal Bureau of Investigation to allow for updates of criminal record information according to applicable standards, rules, regulations or laws.

4.4. An applicant who has gone through the criminal background check process described by the provisions of this rule, but has not been employed by a covered provider for five years, must submit new fingerprints and obtain a new employment fitness determination from the secretary.

§69-10-5. Employment Fitness Determination.

5.1. After an applicant's fingerprints have been compared with the state and federal criminal history information, the State Police shall notify the secretary of the results for the purpose of making an employment fitness determination.

5.2. If the secretary's review of the criminal history record information reveals the applicant does not

have a disqualifying offense, the applicant may be employed.

5.3. If the secretary's review of the criminal history record information reveals a conviction of a disqualifying offense, the applicant may not be employed, unless a variance has been requested or granted.

5.4. The secretary shall provide written notice of the employment fitness determination to the covered provider or covered contractor, if applicable, but shall not disseminate the criminal history record information.

5.5. The covered provider or covered contractor, if applicable, shall maintain a copy of the written notice of the eligible fitness determination in the applicant's personnel file.

§69-10-6. Conditional Employees.

6.1. Conditional basis employment for no more than 60 days may occur when:

6.1.a. An applicant does not have a negative finding on a required registry or licensure database, and the employment fitness determination is pending the criminal history record information; or

6.1.b. An applicant has requested a variance of the employment fitness determination and that decision is pending.

6.2. All conditional employees shall receive direct on-site supervision by the covered provider until an eligible fitness determination is received.

6.3. The conditional employee, pending the employment fitness determination, must affirm, in a signed statement, that he or she has not committed a disqualifying offense, and acknowledge that a disqualifying offense shall constitute good cause for termination. Conditional employees who have requested a variance shall not be required to sign such a statement.

§69-10-7. Variance.

7.1. The applicant, or the covered provider or covered contractor, if applicable, on the applicant's behalf, may file a written request for a variance of the fitness determination with the secretary.

7.2. The secretary may grant a variance if mitigating circumstances surrounding the negative finding or disqualifying offense is provided, and the secretary finds that the individual will not pose a danger or threat to residents or their property, or both.

7.3. Mitigating circumstances may include:

7.3.a. The passage of time. The length of time an applicant is barred from employment in direct access care starts from the date of conviction or the date of release from imprisonment, whichever is later.

7.3.b. Extenuating circumstances such as the applicant's age at the time of conviction, substance abuse, or mental health issues.

7.3.c. A demonstration of rehabilitation such as character references, employment history, education, and training.

7.3.d. The relevancy of the particular disqualifying information with respect to the type of employment sought.

7.4. The secretary shall mail to the applicant and the covered provider or covered contractor, if applicable, a written decision within 60 days of receipt of the request indicating whether a variance has been granted or denied. The individual hiring decision is ultimately the prerogative of each covered provider or covered contractor.

§69-10-8. Appeals.

8.1. If the applicant believes that his or her criminal history record information within the state of West Virginia is incorrect or incomplete, he or she may challenge the accuracy of such information by writing to the State Police for a personal review.

8.2. If the applicant believes that his or her criminal history record information from outside the state of West Virginia is incorrect or incomplete, he or she may appeal the accuracy of such information by contacting the Federal Bureau of Investigation for instructions.

8.3. If the purported discrepancies are at the charge or final disposition level, the applicant must address this with the court or arresting agency that submitted the record to the State Police.

8.4. The applicant shall not be employed during the appeal process.

§69-10-9. Responsibility of the Covered Provider or Covered Contractor.

9.1. Record Retention. A covered provider shall maintain the following documents related to the background checks for all direct access personnel for the duration of their employment, including:

9.1.a. Documents establishing that an applicant has no negative findings on registries and licensure databases.

9.1.b. The secretary's eligible employment fitness determination;

9.1.c. Any variance granted by the secretary, if applicable; and

9.1.d. For conditional employees, the covered provider shall maintain documentation that establishes that the individual meets the qualifications for conditional employment.

9.2. Except as otherwise permitted by this rule, the covered provider may not employ an applicant,

or engage an independent health contractor, prior to completing the background check process.

9.3. Failure of the covered provider to maintain background check documentation that all direct access personnel are eligible to work or employing an applicant or engaging an independent contractor who is ineligible to work may subject the covered provider to civil money penalties in an amount not to exceed \$5,000 per occurrence.

§69-10-10. Change in Employment.

10.1. If an individual applies for employment at a subsequent covered provider or covered contractor, the applicant is not required to submit to fingerprinting and a criminal background check if:

10.1.a. The individual previously submitted to fingerprinting and a full criminal background check as required by this rule;

10.1.b. The prior criminal background check confirmed that the individual did not have a disqualifying offense;

10.1.c. The individual received prior approval from the secretary to work for or with the covered provider or independent health contractor, if applicable; and

10.1.d. No new criminal activity that constitutes a disqualifying offense has been reported.

10.2. The secretary shall provide a copy of the employment fitness determination upon request by a subsequent covered provider or covered contractor.