

DEPARTMENT OF HEALTH

Adoption of Chapter 11-106,
Hawaii Administrative Rules

February 3, 2019

SUMMARY

Chapter 11-106, Hawaii Administrative Rules,
entitled "Background Checks", is adopted.

§11-106-1

HAWAII ADMINISTRATIVE RULES

TITLE 11

DEPARTMENT OF HEALTH

CHAPTER 106

BACKGROUND CHECKS

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§11-106-1 Purpose. The purpose of this chapter is to specify how the department or its designee shall conduct background checks to ensure the reputable and responsible character of all prospective applicants, operators, direct patient access employees, and adult volunteers of a healthcare facility that is licensed and certified, or licensed or certified by the department, and, in the case of any healthcare facility operated in a private residence, all adults living in the home other than the clients, and a person or entity seeking part-time or full-time employment or contract or sub-contract with the department. [Eff **FEB 03 2019**] (Auth: HRS §321-11; 321-15.2; 321-171.5; 846-2.7) (Imp: HRS §321-15.2; 846-2.7)

§11-106-2 Definitions. As used in this chapter: "Abuse" means any improper action or activity or any omission of proper action or activity that results

in physical, emotional, financial or psychological injury or harm.

"Adult day health care" means an organized day program of therapeutic, social, and health services provided to adults with physical or mental impairments or both, who require nursing oversight or care, for the purpose of restoring or maintaining, to the fullest extent possible, their capacity for remaining in the community.

"Adult day health center" means a facility that provides adult day health care.

"Adult residential care home" means any facility providing twenty four hour living accommodations, for a fee, to adults unrelated to the family, who require at least minimal assistance in the activities of daily living, personal care services, protection, and healthcare services, but who do not need the professional health services provided in an intermediate, skilled nursing or acute care facility.

"Adults" means individuals aged eighteen years or older.

"Applicant" means a person or entity seeking licensure or certification to operate a healthcare facility, or a person or entity seeking part-time or full-time employment or contract or sub-contract with the department. If the applicant is an entity, the term "applicant" shall also include its principals, directors, partners, managers, agents, and representatives to the extent that any of these individuals will have access to or contact with clients, their finances, assets, personal property, medical records, or individually identifiable information.

"Assisted living facility" means a combination of housing, healthcare services, and personalized supportive services designed to respond to individual needs, to promote choice, responsibility, independence, privacy, dignity, and individuality.

"Background check" means a review of records stored in state or national record repositories for history of abuse, neglect, threatened harm, or other maltreatment against children or adults, and for any

criminal history, including:

- (1) Adult abuse perpetrator records by means of a search of the individual's name and birth date in the state adult protective services central registry of reported cases established in section 346-224;
- (2) Child abuse and neglect records by means of:
 - (A) An initial name inquiry in the state child welfare records files;
 - (B) A subsequent child abuse confirmation history check for new hires and rehires; and
 - (C) An annual name inquiry into state child welfare record files;
- (3) Criminal history records in accordance with section 831-3.1 and section 846-2.7;
- (4) Sex offender registry records;
- (5) Certified nurse aide registry for information or findings pursuant to section 457A-3; and
- (6) Adult abuse perpetrator records, child abuse and neglect records, criminal history records, sex offender registry records, and certified nurse aide registry records of another state where a prospective employee or adult volunteer previously resided.

"Client" or "patient" or "resident" means an individual that is receiving care or services from a healthcare facility, or an individual that is receiving care or services from a healthcare provider.

"Community care foster family home" means a home as defined in section 321-481, Hawaii Revised Statutes (HRS).

"Conviction for a relevant crime" means any federal or state conviction for any relevant crime as defined in this section.

"Criminal history record information" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, and other formal criminal charges, and any disposition arising therefrom, sentencing, formal correctional

supervisory action, and release; but does not include intelligence or investigative information, identification information to the extent that such information does not indicate involvement of the individual in the criminal justice system, and information derived from offender-based transaction statistics systems which do not reveal the identity of individuals.

"Criminal history record information system" or "system" means a system, including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation, or dissemination of intrastate, interstate, and national criminal justice data.

"Criminal history record name inquiry" means a search by name and other identifying information using the state computerized criminal history record information system.

"Department" means the State department of health or its designee.

"Designee" means an agent or organization acting on behalf of the department.

"Developmental disabilities domiciliary home" has the same meaning as defined in section 321-15.9, HRS.

"Direct patient access employee" means any individual, including a volunteer, who has direct access to a patient or resident of a healthcare facility (or direct access to a patient's belongings) including but not limited to physicians, nurses, nursing assistants, home health aides, therapists, activities personnel, and support staff (i.e. housekeeping, dietary, etc.).

"Director" means the director of the State department of health.

"Disqualifying information" means a conviction for a relevant crime or a finding of patient or resident abuse.

"Expanded adult residential care home" means any facility providing twenty-four hour living accommodations, for a fee, to adults unrelated to the family, who require at least minimal assistance in the activities of daily living, personal care services,

protection, and healthcare services, and who may need the professional health services provided in an intermediate care or skilled nursing facility.

"Finding of patient or resident abuse" means a confirmation that an allegation of patient or resident abuse has been substantiated.

"Healthcare facility" has the same meaning as defined in section 321-15.2, HRS.

"Healthcare provider" means any healthcare professional or healthcare agency, clinic, facility, operator or organization licensed, certified, or contracted by the department.

"Home and community-based case management agency" has the same meaning as defined in section 321-482, HRS.

"Home care agency" has the same meaning as defined in section 321-14.8, HRS.

"Hospice service" has the same meaning as defined in section 321-15.63, HRS.

"Hospital" or "broad service hospital" or "acute care hospital" means a facility that is licensed under HAR chapter 11-93 or its successor chapter, and staffed and equipped to provide inpatient medical or surgical care, or both, for acute and chronic illness, injury, or obstetrics.

"Intermediate care facility" means a facility that provides appropriate care to persons referred by a physician, who:

- (1) Need twenty-four hours per day assistance with the normal activities of daily living;
- (2) Need care provided by licensed nursing personnel and paramedical personnel on a regular, long term basis, and;
- (3) Do not need skilled nursing or paramedical care twenty-four hours per day.

"Intermediate care facility for individuals with intellectual disabilities" means a facility that provides health, social, and rehabilitative services to individuals with intellectual disabilities through an individually designed active treatment program in accordance with Hawaii Administrative Rules (HAR) section 11-99.

"Licensee" means any person awarded a state license or state certificate to operate a healthcare facility.

"Name inquiry" means a criminal history record check conducted by using the name and other identifying information of the individual, in lieu of a fingerprint check.

"Operator" means an individual or entity that is licensed or certified or is seeking licensure or certification to operate a healthcare facility and is responsible for the management and overall operations of that healthcare facility.

"Rap back program" means the fingerprint program administered by the Hawaii Criminal Justice Data Center in accordance with section 846-2.7(a), HRS.

"Rehabilitation agency" means a clinic or facility established and operated exclusively for the purpose of providing diagnostic, therapeutic, and restorative services to outpatients for the rehabilitation of injured, disabled, or sick persons, at a single fixed location, by or under the supervision of a physician

"Relevant crime" means:

- (1) Any offense described in 42 United States Code section 1320a-7 (section 1128(a) of the Social Security Act), which includes:
 - (A) A crime related to the delivery of an item or service under this chapter;
 - (B) A crime relating to neglect or abuse of patients in connection with the delivery of a healthcare item or service;
 - (C) A crime consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; or
 - (D) A crime consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; or
- (2) A crime of such a serious nature or

circumstance that the perpetrator poses a risk to the health, safety, or well-being of a patient or resident. This includes but is not limited to murder, manslaughter, assault, sex offense, domestic violence, theft, forgery, arson, kidnapping, or possession, use, sale, manufacture, or distribution of dangerous drugs or controlled substances.

"Reputable and responsible character" means an individual:

- (1) Has not been convicted of a relevant crime; or
- (2) Does not have a finding of patient or resident abuse as defined by this chapter.

"Rural health center" means a clinic or primary health center in a designated rural area that provides rural health services pursuant to the federal Rural Health Clinic Services Act of 1977 (Public Law 95-210, 12 C.F.R. §491) primarily to make available outpatient or ambulatory care services of the nature typically provided in a physician's office or outpatient clinic. The services must be made available by the clinic, including specified types of diagnostic examination, laboratory services, and emergency treatments.

"Skilled nursing facility" means a health facility that provides skilled nursing and related services to patients whose primary need is for twenty-four hours of skilled nursing care on an extended basis and regular rehabilitation services.

"Special treatment facility" means a facility that provides a therapeutic residential program for care, diagnosis, treatment, or rehabilitation services for socially or emotionally distressed persons, mentally ill persons, persons suffering from substance abuse, and developmentally disabled persons. Special treatment facilities shall include short term crisis residential programs and long term residential treatment programs.

"Therapeutic living program" means a supervised living arrangement that provides mental health, substance abuse services, or supportive services for

individuals or families who do not need the structure of a special treatment facility and are transitioning to independent living. The program aids residents in meeting basic needs and provides supportive services through a required service plan. [Eff FEB 03 2019]
 (Auth: HRS §321-15.1; 321-15.2; 321-15.6; 321-15.61; 321-15.62; 321-15.63; 321-15.9; 321-16.5; 321-16.6; 333F; 831-3.1; 846-2.7) (Imp: HRS §321-15.2)

§11-106-3 Background checks. (a) All applicants and operators shall:

- (1) Be subject to background checks; and
- (2) Provide consent to the department or its designee to conduct background checks.

(b) All prospective direct patient access employees and adult volunteers of healthcare facilities and, in the case of any healthcare facility operated in a private residence, all adults living in the home other than the clients shall:

- (1) Be subject to background checks in accordance with this chapter; and
- (2) Provide consent to the department or its designee to conduct background checks.

(c) The department or its designee shall obtain background check information from an applicant or operator, on the applicant or operator, and on any prospective employees of the applicant or operator including any new employee retained which shall include an annual name inquiry into state criminal history record files.

(d) The department or its designee shall:

- (1) Provide an applicant with the results of his or her background check; and
- (2) Inform an applicant whether an individual described in subsections (a) and (b) is suitable for employment, to be an operator, volunteering, or residing in the home.

(e) The applicant or the individual who is the subject of the background check shall be responsible for all fees, whether paid for by the employer or by the applicant or individual, related to processing background checks, including subscribing to the rap back program.

[Eff **FEB 03 2019**] (Auth: HRS §321-15.2; 378-2.5; 846-2.7) (Imp: HRS §321-11.5; 321-15.2; 378-2.5; 846-2.7)

§11-106-4 Enforcement. (a) The department may revoke or suspend a current license or certificate, impose penalties or fines, deny an application for a license or certificate or a license or certificate renewal, if the applicant, operator, employee, or adult volunteer at the healthcare facility, or, in the case of any healthcare facility operated in a private residence, any adult living in the home other than the client:

- (1) Refuses to authorize the department or its designee to conduct a background check, refuses to authorize the department or its designee to obtain background check record information for verification, or refuses consent to be fingerprinted;
- (2) Refuses or fails to submit to the department or its designee information required to perform a background check;
- (3) Has any disqualifying information; or
- (4) Has any background check information that the department or its designee finds may pose a risk to the health, safety, or welfare of the residents or patients of the healthcare facility.

(b) The department may withdraw an offer of employment or contract, or revoke or suspend a current license or certificate with a healthcare facility or healthcare provider if the prospective direct patient access employees and adult volunteers refuse to meet the requirements contained in this chapter.

(c) The department's determination under subsections (a) and (b) shall be based upon consideration of the background check information and may take into consideration:

- (1) The nature of the incidents reported in the information;
- (2) The relevance of the information to the qualifications, functions, and duties of the position the individual seeks to occupy;
- (3) The amount of time that has passed since the incidents contained in the information;
- (4) Evidence of rehabilitation submitted by the individual, which may include but is not limited to character references or reports from professionals who have the knowledge and ability to evaluate the individual;
- (5) Whether the background check is completed timely; or
- (6) Additional information the department may request from the individual.

(d) In making a determination of suitability for employment, the department may require an in-person interview of the individual subject to background checks in this chapter to help in the department's final decision-making.

(e) The department or its designee shall obtain background check information on any new employee of licensed or certified facilities retained after the applicant is issued a license or certificate under this section, which shall include an annual name inquiry into state criminal history records. [Eff. FEB 03 2019]
] (Auth: HRS §321-1.4; 321-15.2; 321-20; 378-2.5)
(Imp: HRS §321-15.2)

11-106-5 Frequency of background checks. (a)

Operators, employees or contractors subject to the requirements of this chapter shall obtain a background check within five working days of operation or hire for the purposes of complying with the requirements of this chapter.

(b) Healthcare providers shall make a name inquiry into the state's criminal history records on employees or contractors for each of the first two years of employment or contract and biennially thereafter to ensure continued compliance with background check standards.

(c) The department may waive the requirements of paragraph (b) of this section for employees, contractors, or healthcare providers or operators enrolled in the state's rap back program. [Eff

FEB 03 2019

] (Auth: HRS §321-1.4; 321-15.2) (Imp: HRS §321-15.2)

11-106-6 Exemption from disqualifying

information. (a) An applicant, prospective operator, direct patient access employee or adult volunteer, and all adults, other than the clients, living in a healthcare facility operated in a private residence, requesting an exemption from the background check results established by this chapter shall follow procedures specified by the department.

(b) Requests for exemptions shall be made in writing within thirty calendar days of applicant's receipt of background check results.

(c) The department or its designee shall not accept future background check applications for one calendar year from any applicant, prospective operator, direct patient access employee or adult volunteer, and all adults, other than the clients, living in a healthcare facility operated in a private residence, who is determined to have disqualifying information, fails to submit a request for exemption from disqualifying information within thirty calendar days of the receipt of background checks results.

(d) The department or its designee may accept future background check applications within one calendar year from any applicant, prospective operator, direct patient access employee or adult volunteer, and all adults, other than the clients, living in a healthcare facility operated in a private residence, who is determined to have disqualifying information, if the disqualifying information is not relevant to the job description or scope of employment. [Eff **FEB 03 2019**] Auth: HRS §321-1.4; 321-15.2) (Imp: HRS §321-15.2)

11-106-7 Decision. (a) The department shall provide written notice by certified mail of an order to revoke or suspend a current license or certificate, impose penalties or fines, or deny an application for a license or certificate based on this chapter, which shall include the reason for the department's decision and the right to an administrative appeal pursuant to chapter 91, HRS and chapter 11-1, HAR.

(b) The right to an administrative appeal of the department's or its designee's decision shall be as set forth in the rules for the program under which the applicant is seeking licensure.

(c) When an administrative appeal is requested to contest a decision to deny, revoke, or suspend a license or certificate pursuant to this chapter, a healthcare facility shall not operate, or an employee or prospective employee shall not work at the healthcare facility, pending the completion of the appeal.

(d) A hearing under this section shall be conducted as a contested case hearing under chapter 91, HRS, and in accordance with chapter 11-1, HAR." [Eff **FEB 03 2019**] (Auth: HRS §321-15.2; 321-20; 378-2.5, HAR §11-1) (Imp: HRS §321-15.2; 321-20; 378-2.5)

Chapter 11-106, Hawaii Administrative Rules, on the Summary Page dated February 3, 2019, was adopted following a public hearing held on September 10, 2018, after public notice was given in the Honolulu Star-Advertiser, West Hawaii Today, Hawaii Tribune Herald, Maui News, and The Garden Isle on August 9, 2018.

The adoption of chapter 11-106 shall take effect ten days after filing with the Office of the Lieutenant Governor.



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Director
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APPROVED:



DAVID Y. IGE
Governor
State of Hawaii

Dated: 01-23-2019

APPROVED AS TO FORM:



Deputy Attorney General

Filed

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