

D.C. OFFICE OF PERSONNEL**NOTICE OF EMERGENCY RULEMAKING**

The Interim Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000 and Mayor's Order 2004-166, dated September 30, 2004; and in accordance with Title II of D.C. Law 15-117, the Child and Youth, Safety and Health Omnibus Temporary Act of 2004 (Act), effective March 30, 2004 (D.C. Act 15-304; 51 DCR 1359, February 6, 2004), and any similar subsequent legislation, hereby gives notice of the adoption of the following emergency rules. The Act requires that criminal background checks be obtained for: (1) certain persons being considered for employment or voluntary services in District government agencies that provide direct services to children and youth; (2) all persons being considered for employment or voluntary services in the Child Support Enforcement Division of the Office of the Attorney General for the District of Columbia; (3) all employees and volunteers in the Child Support Enforcement Division of the Office of the Attorney General for the District of Columbia; and (4) certain employees and volunteers in District government agencies that provide direct services to children and youth. The Act also requires that traffic record checks be conducted for certain persons; and that rules be issued to implement the provisions of the title. Therefore, to ensure the preservation of the welfare of the public in general, and to ensure the preservation of the welfare of children and youth in particular, action was taken on October 1, 2004 to adopt the following emergency rules, to add a new section 412 to Chapter 4 of the *D.C. Personnel Regulations*, Organization for Personnel Management, implementing the provisions of the Act. These rules will remain in effect for up to one hundred twenty (120) days from October 1, 2004, unless earlier superseded by another rulemaking notice.

CHAPTER 4**ORGANIZATION FOR PERSONNEL MANAGEMENT**

A new § 412 is added to read as follows:

412 CRIMINAL BACKGROUND CHECKS IN DISTRICT GOVERNMENT AGENCIES THAT PROVIDE DIRECT SERVICES TO CHILDREN AND YOUTH

412.1 Pursuant to Title II of D.C. Law 15-117, the Child and Youth, Safety and Health Omnibus Temporary Act of 2004 (Act), effective March 30, 2004 (D.C. Act 15-304; 51 DCR 1359, February 6, 2004), and as specified in this section, the Mayor and other personnel authorities shall be required to conduct criminal background checks and traffic record checks to investigate certain employees, volunteers, and persons being considered for employment in District government agencies that provide direct services to children and youth. Implementation of Title II of the Act shall commence on October 1, 2004.

- 412.2 Each employee or volunteer occupying a covered position shall be required to submit to periodic criminal background checks while employed by, or volunteering at, an "agency that provides direct services to children and youth," as that term is defined in section 202 (1) of the Act and section 499 of this chapter. The provisions for periodic criminal background checks are specified in sections 412.30 through 412.32 of this section.
- 412.3 The following subordinate agencies shall be subject to the criminal background check and traffic record check provisions of the Act, on the basis that each one of these agencies, as a whole or certain components thereof, meet the definition of "agency that provides direct services to children and youth" in section 202 (1) of the Act and section 499 of this chapter:
- (a) Department of Human Services;
 - (b) Department of Health;
 - (c) Department of Parks and Recreation;
 - (d) Fire and Emergency Medical Services Department;
 - (e) Metropolitan Police Department;
 - (f) Child Support Enforcement Division (CSED) of the Office of the Attorney General for the District of Columbia;
 - (g) State Education Office of the Executive Office of the Mayor;
 - (h) Department of Mental Health; and
 - (i) Child and Family Services Agency.
- 412.4 Pursuant to section 204 (b) and (d) of the Act, traffic record checks shall be conducted on employees and volunteers of agencies that provide direct services to children and youth who are, or on appointees who would be, required to drive motor vehicles to transport children and youth in the course of performing their duties. Traffic record checks shall be obtained from the traffic records maintained by the D.C. Department of Motor Vehicles.
- 412.5 Notwithstanding the provisions of sections 203 (3) and (4), and 204 (d) of the Act, and any provisions of this section, applicants under consideration for employment and employees of the CSED shall not be subject to the criminal background check and traffic record check provisions of the Act until March 1, 2005.

- 412.6 A criminal background check pursuant to the Act shall be conducted by means of fingerprint and National Criminal Information Center checks conducted by the Metropolitan Police Department and the Federal Bureau of Investigations (FBI).
- 412.7 The Mayor, for agencies subordinate to the Mayor that are subject to the Act, and independent District government agencies that are subject to the Act, shall cover their own respective costs for criminal background checks and traffic record checks required under the Act.
- 412.8 The Chief, Metropolitan Police Department (or his or her designee), shall be responsible for conducting criminal background checks under the Act, including fingerprinting and traffic record checks for agencies subordinate to the Mayor that are subject to the Act. In order to fulfill these functions, staff of the Metropolitan Police Department shall include at least one (1) person approved by the Federal Bureau of Investigations (FBI) to fingerprint, and at least one (1) person to provide clerical services.
- 412.9 The Chief, Metropolitan Police Department (or his or her designee), for agencies subordinate to the Mayor that are subject to the Act, and independent District government agencies that are subject to the Act, shall develop internal operating procedures for conducting the criminal background checks and a sliding fee schedule for the payment of the costs of criminal background checks and traffic record checks.
- 412.10 Criminal background checks pursuant to this section shall be required for the following persons:
- (a) Each person being considered for employment in a District government agency that provides direct services to children and youth, in a position with duties and responsibilities as described in section 412.11 of this section or similar duties and responsibilities;
 - (b) Each person who has made an affirmative effort through a written application or resume to become a volunteer in a District government agency that provides direct services to children and youth, in a voluntary position with duties and responsibilities as described in section 412.11 of this section or similar duties and responsibilities; and
 - (c) Each employee and volunteer in a District government agency that provides direct services to children and youth, who occupies a position with duties and responsibilities as described in section 412.11 of this section or similar duties and responsibilities.
- 412.11 Upon consulting with the head of a District government agency that provides direct services to children and youth, the appropriate personnel authority shall

identify and determine which positions in the agency shall be covered under the Act. In identifying the covered positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of direct services that affect the health, safety, and welfare of children and youth or services for the benefit of children and youth, including but not limited to, at least one (1) of the following duties and responsibilities:

- (a) Childcare duties;
- (b) Recreational activities;
- (c) Delinquency prevention and control services, including custody, security, supervision, and residential and community support services for committed and detained juvenile offenders;
- (d) Educational activities;
- (e) Individual counseling;
- (f) Group counseling;
- (g) Assessment, case management and support services;
- (h) Psychiatric and psychological assessment services;
- (i) Developmental, speech, and language evaluation services;
- (j) Diagnostic evaluation and treatment services;
- (k) Childhood development services;
- (l) Medical or clinical services;
- (m) Therapeutic services, including individual and group therapy, and play therapy;
- (n) Prevention and intervention services;
- (o) Mentoring services;
- (p) Youth care services;
- (q) Healthcare services, including medical, behavioral, mental health, dental, vision, nutrition, or developmental services;
- (r) Cultural enrichment services;

- (s) Public safety services, including counseling or education intervention services about safety, crime prevention, fire safety, youth problem-solving;
- (t) Driving a motor vehicle to transport children and youth; and
- (u) Child support enforcement services provided by the CSED.

412.12 The following standards shall be applied in identifying positions, compensated or not, which shall be subject to the criminal background check requirement or the traffic record check requirement under the Act:

- (a) The underlying guiding standard to be applied in identifying positions that shall be subject to the criminal background check requirement and traffic record check requirement shall be one of reasonableness, coupled with the standards outlined in section 412.12 (b) through (l) of this section, as applicable.
- (b) A determination that a position is covered under the Act and subject to the criminal background check requirement shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities listed in section 412.11 of this section or similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.
- (c) The single fact that a position is located in a District government agency that provides direct services to children and youth does not automatically make the position or its incumbent subject to the criminal background check requirement or the traffic record check requirement of the Act.
- (d) Strictly tangential, casual, or occasional contact with children and youth does not automatically make an employee or volunteer subject to the criminal background check requirement or traffic record check requirement of the Act.
- (e) Administrative, clerical, or technical support positions within the immediate office of the head of a District government agency that provides direct services to children and youth as well as within other components, units, or divisions of the agency that provide non-operational support services shall not be subject to the criminal background check requirement unless the position descriptions or statements of duties, as applicable, contain at least one (1) of the duties and responsibilities listed in section 412.11 of this section or similar duties and responsibilities, related to the direct provision of services to children and youth as

described in section 202 (1) of the Act and section 499 of this chapter, and a determination is made that any incumbents of the positions will perform the duties and responsibilities personally and routinely. Such positions may include, but are not limited to the head of the agency, special assistants, administrative officers, staff assistants, and secretaries.

- (f) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a covered position shall be subject to an initial criminal background check upon the personnel action being effected and to periodic criminal background checks while detailed, temporarily promoted, or temporarily reassigned.
- (g) A volunteer whose assignment changes from non-covered duties and responsibilities to covered duties and responsibilities shall be subject to an initial criminal background check upon being moved to the covered assignment and to periodic criminal background checks while in the covered assignment.
- (h) A determination that a position is subject to the traffic record check requirement under the Act shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties requires that any incumbent of the position drive a motor vehicle to transport children and youth in the course of performing his or her duties.
- (i) An employee who is detailed, temporarily promoted, or temporarily reassigned from a non-covered position to a position that will require him or her to drive a motor vehicle to transport children and youth in the course of performing the duties of the detail, temporary promotion, or temporary reassignment shall be subject to an initial traffic record check upon the personnel action being effected.
- (j) A volunteer whose assignment changes from non-covered duties and responsibilities to duties and responsibilities that will require him or her to drive a motor vehicle to transport children and youth in the course of performing the duties of the voluntary assignment shall be subject to an initial traffic record check requirement upon being moved to the covered assignment.
- (k) Any position subject to the traffic record check requirement shall also be subject to the criminal background check requirement.
- (l) Notwithstanding the standards outlined in section 412.12 (a) through (k) of this section; and as specified in section 412.5 of this section, all appointees and employees, whether compensated or not, in the CSED shall

be designated as covered under the Act and shall be subject to the criminal background check requirement and traffic record check requirement under the Act, including periodic criminal background checks for current employees and volunteers in the CSED.

- 412.13 Agencies that provide direct services to children and youth may submit information and documentation to the appropriate personnel authority to challenge the designation of a position as subject to a criminal background check or traffic record check. The personnel authority shall evaluate any information and documentation submitted by an agency, and promptly determine whether the original designation shall stand or be changed.
- 412.14 Vacancy announcements for positions identified and designated as requiring a traffic record check or criminal background check, or both, shall include statements informing each applicant that:
- (a) The position for which he or she is applying has been identified and designated as requiring a criminal background check or traffic record check, or both; and
 - (b) If tentatively selected for the position, a criminal background check or traffic record check, or both, as appropriate, will be conducted. The vacancy announcement shall also state that a final job offer and appointment to the position will be contingent upon the appointee satisfying the requirements of the traffic record check or criminal background check, or both.
- 412.15 In the case of non-competitive recruitment for a position requiring a criminal background check or traffic record check, or both, the appropriate personnel authority shall inform the person being considered for employment, in writing, of the requirements specified in section 412.14 of this section.
- 412.16 The Director, D.C. Office of Personnel (or his or her designee), shall publish the list of positions in agencies under the personnel authority of the Mayor that are subject to a criminal background check or traffic record check, or both, in the District Personnel Manual (or any other procedural manual developed). The list shall be published on an annual basis.
- 412.17 A final offer of appointment to a compensated or volunteer position for which a criminal background check or criminal background check is required shall not be made until after the criminal background check or traffic record check, or both, have been conducted on the appointee and a determination made that the appointee meets the requirements of the Act.
- 412.18 Prior to a criminal background check being conducted, the appropriate personnel authority shall inform each appointee, employee, or volunteer subject

to the check where and when to report for fingerprinting, and provide each appointee, employee, or volunteer with a form or forms to be utilized for the following purposes:

- (a) To authorize the Metropolitan Police Department or other entity, as appropriate, to conduct the criminal background check and confirm that the appointee, employee, or volunteer has been informed that the employing agency is authorized to conduct a criminal background check;
- (b) To affirm that the appointee, employee, or volunteer has not been convicted of a crime in the District of Columbia or any other State or territory, for any of the following offenses or their equivalent in another State or territory:
 - (1) Murder, attempted murder, manslaughter or arson;
 - (2) Assault, battery, assault and battery, assault with a dangerous weapon, mayhem, or threats to do bodily harm;
 - (3) Burglary;
 - (4) Robbery;
 - (5) Kidnapping;
 - (6) Theft, fraud, forgery, extortion, or blackmail;
 - (7) Illegal use or possession of a firearm;
 - (8) Trespass or injury to property;
 - (9) Rape, sexual assault, sexual battery, or sexual abuse;
 - (10) Child abuse or cruelty to children; or
 - (11) Unlawful distribution or possession of, or possession with intent to distribute, a controlled substance;
- (c) To acknowledge that the appointee, employee, or volunteer has been notified of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report;
- (d) To acknowledge that the employing agency may choose to deny the appointee employment or a volunteer position based on the outcome of the criminal background check;

- (e) To provide any additional information that is required, such as name, social security number, date of birth, and gender; and
 - (f) To inform the appointee or employee that a false statement on the form or forms may subject them to criminal penalties.
- 412.19 Upon receiving and completing the form or forms specified in section 412.18 of this section, the appointee or employee shall report to the designated location to be fingerprinted.
- 412.20 Upon completing each criminal background check, the designated Metropolitan Police Department representative, or the representative for any other entity conducting the check, shall forward the check to the appropriate employing agency.
- 412.21 Agencies shall consider a variety of factors in determining an appointee's suitability for employment based on a criminal background check conducted pursuant to this section, but shall not consider arrest records and juvenile records. Possession of one (1) or more of the following criminal background characteristics may make the appointee ineligible for employment or voluntary service:
- (a) A felony conviction; or
 - (b) A serious misdemeanor conviction.
- 412.22 Except as provided in section 412.23 of this section, the following variables shall be closely considered and evaluated on a case-by-case basis to determine if an appointee subject to a criminal background check shall be ineligible for employment or voluntary service:
- (a) The recency of any conviction;
 - (b) The age of the appointee at the time of any conviction;
 - (c) Any false statements made by the appointee concerning the form or forms described in § 412.18 of this section, or the uncovering of any intentional false statements of material fact or deception or fraud in applying for employment, compensated or not, that would provide a basis for disqualification; and
 - (d) The absence or presence of rehabilitation or efforts toward rehabilitation.
- 412.23 Notwithstanding the factors and variables specified in sections 412.21 and 412.22 of this section, a criminal background check reflecting a conviction or

convictions for crimes against children or youth shall result in the disqualification of the appointee subject to the check.

- 412.24 Records of traffic infractions shall be judged on an individual basis for appointees whose duties would include driving a motor vehicle to transport children or youth as described in the Act. A pattern of disregard for existing traffic regulations, particularly where there has been a conviction for driving under the influence of intoxicants or drugs, may make the appointee ineligible for employment or voluntary service, if the appointee could be required to drive a motor vehicle to transport children and youth in the course of performing his or her duties.
- 412.25 Based on the outcome of the criminal background check, each employing agency shall determine whether a final offer of appointment should be made or denied.
- 412.26 If the determination is to deny the final offer of appointment, the employing agency shall do all of the following:
- (a) Send the appointee a written notification of the determination. The written notification shall inform the appointee of his or her right to obtain a copy of the criminal background check report and to challenge the accuracy and completeness of the report, in writing, within ten (10) days of receiving the written notification; and
 - (b) Send the personnel authority a copy of the written notification.
- 412.27 In challenging the results of a criminal background check report, the appointee may present information and documentation to clarify any errors in the report resulting from mistakes in identity, and any mitigating circumstances that may exist concerning the report.
- 412.28 Upon receiving a challenge to a criminal background check report, the appropriate employing agency shall promptly make a determination on the case and inform the appointee of the decision, in writing, with a copy to the personnel authority.
- 412.29 If the determination is that a final offer of appointment should be made to an appointee, the employing agency shall promptly notify the personnel authority.
- 412.30 Upon receiving the employing agency's determination that a final offer of appointment should be made to an appointee, the appropriate personnel authority shall promptly issue a final offer letter to the appointee.
- 412.31 An appointee under this section who provides false information in the course of applying for a position shall be subject to prosecution pursuant to section 404

of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Official Code § 22-2405) (2001).

- 412.32 Periodic criminal background checks for current employees and volunteers shall be conducted when:
- (a) Derogatory information about the employee or volunteer, of a nature that will impact the employee's or volunteer's suitability to continue performing the duties of the covered position, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority; or
 - (b) Information about a criminal offense committed by the employee or volunteer, such as the criminal offenses listed in section 412.18 of this section, is disclosed to the employing agency or personnel authority by a credible source or sources, or is independently discovered by the employing agency or personnel authority.
- 412.33 An employee who fails a periodic criminal background check may be subject to administrative action up to and including removal. In determining the type of administrative action to be taken, the employing agency shall consider the factors and variables in sections 412.21 and 412.22 of this section as well as any other similar factors and variables, except that a criminal background check reflecting a conviction or convictions for crimes against children or youth shall result in removal. In addition to, or in the place of administrative action, and at the employing agency's discretion, an employee who fails a periodic check may be reassigned to a non-covered position, except that this option shall not be available for an employee whose criminal background check reflects a conviction or convictions for crimes against children or youth.
- 412.34 A volunteer who fails a periodic criminal background check may be terminated or moved to another volunteer assignment that does not include the provision of direct services to children and youth. In determining the type of action to be taken, the employing agency shall consider the factors and variables in sections 412.21 and 412.22 of this section as well as any other similar factors and variables, except that a criminal background check reflecting a conviction or convictions for crimes against children or youth shall result in the termination of the voluntary services.
- 412.35 Criminal background check records obtained under this section shall be confidential and for the exclusive purpose of making employment-related determinations under this section. The records shall not be released or otherwise disclosed to any person, except when:

- (a) Required as one component of an application for employment with a District government agency that provides direct services to children and youth;
- (b) Requested by the personnel authority during an official inspection or investigation;
- (c) Ordered by a court;
- (d) Authorized by the written consent of the person being investigated; or
- (e) Utilized for an administrative action in a personnel proceeding, including but not limited to, disciplinary actions under Chapter 16 of these regulations.

412.36 An individual who discloses confidential information in violation of any of the provisions in section 412.35 of this section shall be guilty of a criminal offense and, upon conviction, shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one hundred eighty (180) days, or both.

412.37 Each personnel authority with agencies that provide direct services to children and youth shall prepare compliance reports every six (6) months beginning on the date that these regulations are effective. Each report shall be submitted to the Mayor and shall include:

- (a) The number of criminal background checks and traffic record checks conducted for appointees, the number of appointees who were hired upon completion of the check, and the number rejected; and
- (c) The number of periodic criminal background checks conducted for employees and volunteers, and any administrative action initiated or taken upon completion of the periodic checks.

Section 499 is amended to add the following definitions:

499 DEFINITIONS

499.1 When used in this chapter, the following terms have the meaning ascribed:

Agency that provides direct services to children and youth – for the purposes of section 412 of this chapter, any District government agency, or a component of a District government agency such as an office, unit or division, including the agencies listed in section 412.3 of this chapter, that provides services that affect the health, safety, and welfare of children and youth, including individual and group counseling, therapy, case management, supervision, or mentoring. These services are provided either directly or for the benefit of children and youth.

Applicant – for the purposes of section 412 of this chapter, a person who has filed a written application for employment or resume with a District government agency that provides direct services to children and youth; or a person who has made an affirmative effort through written application, resume or a verbal request, to serve as a volunteer with a District government that provides direct services to children and youth; or a person who has filed a written application for employment or resume for a position in the Child Support Enforcement Division of the Office of the Attorney General for the District of Columbia.

Appointee – for the purposes of section 412 of this chapter, a person who has been made a tentative job offer to a covered position, compensated or voluntary, subject to the satisfactory completion of a criminal background check or traffic record check, or both; or a person who has been made a tentative job offer to a position in the Child Support Enforcement Division of the Office of the Attorney General for the District of Columbia, compensated or voluntary, subject to the satisfactory completion of a criminal background check or a traffic record check, or both.

Children – for the purposes of section 412 of this chapter, persons twelve (12) years of age or under.

Covered assignment – for the purposes of section 412 of this chapter, tasks of a volunteer in a District government agency that provides direct services to children and youth, which require the volunteer to provide direct services that affect the health, safety, and welfare of children and youth, including but not limited to the duties and responsibilities listed in section 412.11 (a) through (u) of this chapter.

Covered duties and responsibilities – for the purposes of section 412 of this chapter, duties and responsibilities of a volunteer in a District government agency that provides direct services to children and youth, that require the volunteer to provide direct services that affect the health, safety, and welfare of children and youth or services for the benefit of children and youth, including but not limited to the duties and responsibilities listed in section 412.11 of this chapter.

Covered position – for the purposes of section 412 of this chapter, a position, compensated or voluntary, in a District government agency that provides direct services to children and youth, with duties and responsibilities that would require the employee or volunteer to provide direct services that affect the health, safety, and welfare of children and youth or services for the benefit of children and youth, including but not limited to the duties and responsibilities listed in section 412.11 of this chapter.

Criminal background check – the investigation of a person's criminal history through the record systems of the U.S. Federal Bureau of Investigation or D.C. Metropolitan Police Department.

Independent agency – any board or commission of the District of Columbia government not subject to the administrative control of the Mayor.

Material – a statement that is capable of influencing, or has a natural tendency to affect, an official decision.

Non-covered duties and responsibilities – for the purposes of section 412 of this chapter, duties and responsibilities of a volunteer in a District government agency that provides direct services to children and youth, of such a nature that would not require that the volunteer be subjected to the criminal background check and traffic records check requirements of the Act.

Non-covered position – for the purposes of section 412 of this chapter, a position, compensated or voluntary, in a District government agency that provides direct services to children and youth, with duties and responsibilities of such a nature that would not require that the employee or volunteer be subjected to the criminal background check and traffic records check requirements of the Act.

Person being considered for employment – for the purposes of section 412 of this chapter, a person who has been made a tentative offer of employment, compensated or voluntary, to a covered position, subject to the satisfactory completion of a criminal background check or a traffic record check, or both; or a person who has been made a tentative job offer to a position in the Child Support Enforcement Division of the Office of the Attorney General for the District of Columbia, compensated or voluntary, subject to the satisfactory completion of a criminal background check or a traffic record check, or both.

Volunteer – for the purposes of section 412 of this chapter, any person who works without monetary or any other financial compensation, in a covered position, for a District government agency that provides direct services to children and youth.

Youth – for the purposes of section 412 of this chapter, persons between thirteen (13) and seventeen (17) years of age, inclusive.