



## **Old Dominion Association of Church Schools**

Date: June 21, 2019

To: Tara Ragland  
Deborah Eves

Re: Questions Regarding June 4 Memo to Child Day Centers

ODACS appreciates the helpful information that our ministries have been receiving from VDSS throughout the month of June. We have been asked for clarification about the June 4 memo regarding background checks. I have read the memo carefully, as well as the *Procedures for Conducting Background Investigations*. In order to be better able to advise our ODACS ministries, I need your help with several questions. I appreciate any answers you can provide.

- 1. When a “not eligible” letter is mailed to the individual who submitted fingerprints, how is the provider to know?**

I was not able to find the answer to this question in the *Procedures* document. We can foresee this change causing a number of significant challenges for providers.

- 2. If a provider receives an “unable to determine letter,” and if the individual subsequently certifies that there is no barrier crime, can the provider still be held liable in a case in which the individual has misrepresented the facts?**

If the answer to this question is yes, then the “unable to determine letter” could possibly become a determination of ineligibility by default, and eligible individuals could possibly be denied employment through no fault of their own. Regardless of the answer, receipt of such a letter seems to automatically place a provider in a very uncomfortable position.

It appears to us that VDSS has no option but to walk a legal tight rope on this issue. However, while fingerprint background checks have been sold by proponents as the final word in background check safety, these new instructions seem to us to have muddied the water considerably. We appreciate your helping us to understand the new instructions more clearly.

Sincerely,

Dan Zacharias  
Executive Director of ODACS



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF SOCIAL SERVICES

**DATE:** June 28, 2019

**TO:** Dan Zacharias, ODACS

**FROM:** Tara Ragland, Director  
Division of Licensing Programs

**SUBJECT:** Clarification on background checks

This memo is in response to the request for clarification sent June 21, 2019. The "Child Day Care Programs Procedures for Conducting Background Investigation" can be found here:

[https://www.dss.virginia.gov/files/division/licensing/background\\_index\\_childrens\\_facilities/fingerprint\\_based\\_background\\_checks/child\\_day\\_care/background\\_investigation\\_procedures\\_child\\_day\\_care\\_programs.pdf](https://www.dss.virginia.gov/files/division/licensing/background_index_childrens_facilities/fingerprint_based_background_checks/child_day_care/background_investigation_procedures_child_day_care_programs.pdf)

**1. When a "not eligible" letter is mailed to the individual who submitted fingerprints, how is the provider to know?**

The change to the process highlighted in the June 4, 2019 memo is only in regards to who receives the Virginia criminal history record. Providers will no longer receive the Virginia criminal history record but will continue to receive the "not eligible" letter. Page six of the "Child Day Care Programs Procedures for Conducting Background Investigation" includes a section on determination letters.

"OBI will email a determination letter to the provider for the individual who submitted fingerprints to let them know if the individual is eligible or not eligible to work with children."

**2. If a provider receives an "unable to determine letter," and if the individual subsequently certifies that there is no barrier crime, can the provider still be held liable in a case in which the individual has misrepresented the facts?**

Section 63.2-1720.1 F of the Code of Virginia says "A person who complies in good faith with the provisions of this section shall not be liable for any civil damages for any act or omission in the

performance of duties under this section unless the act or omission was the result of gross negligence or willful misconduct.”

Individuals are required in 63.2-1720.1 I to report barrier crimes convictions or child abuse and neglect findings to the program.

“1. Any individual required to undergo a background check pursuant to subsection A who is (i) convicted of any barrier crime as defined in § 19.2-392.02 or (ii) found to be the subject of a founded complaint of child abuse or neglect within or outside of the Commonwealth shall notify the child day center, family day home, or family day system described in subsection A of such conviction or finding.”

Page seven of the “Child Day Care Programs Procedures for Conducting Background Investigation” includes information on how an agency should respond when an “unable to determine” letter is received.

“The decision to hire an individual with an “unable to determine/adequate information is not available letter” is up to the provider. It is recommend the provider take a statement from the individual about any arrests, charges, or convictions that may be on the criminal history record and document all information provided based on what the individual discloses. If at any point, a barrier conviction is disclosed, the facility must treat the case as “not eligible”. It is recommended that the individual sign the statement, the statement should be attached to OBI’s determination letter, and both documents be placed in the individual’s file.”

If a provider has followed the instructions in the procedures document about getting a statement from the individual about what happened, and no barrier crimes convictions have been disclosed, the provider can hire the individual. Any additional questions about program liability should be addressed to the program’s legal counsel.

We hope this information clarifies your questions. Thanks for reaching out, and please let us know if we can provide further assistance.