

Health and Human Services  
Developmental Disabilities

Third Revised PI-10-03

**To:** Regional Developmental Disabilities Program Administrators  
Developmental Disabilities Licensed Provider Agencies

**From:** Tina Bay, Director, Developmental Disabilities

**Re:** Background Check requirements for Developmental Disabilities (DD)  
licensed provider agencies licensed in accordance with NDAC 75-04-01.

**Effective Date:** September 1, 2022

\*This policy replaces former Policy PI-10-03, effective July 1, 2020

**Purpose**

The purpose of this policy is to ensure that background checks are conducted on all applicants, employees, contractors, and volunteers of DD licensed provider agencies who have regular, unsupervised direct contact with, direct responsibility for, or access to people receiving services, their personal property, financial resources or personal information and are licensed according to NDAC 75-04-01.

It only addresses the background checks for services that are provided by a DD licensed provider agency. The services of Adult Foster Care, Adult Foster Care Respite, Homemaker, Extended Home Health Care, and Personal Care under the Medicaid State Plan must follow the requirements of the regulating or licensing agency.

Performing background checks on individuals who may have contact with vulnerable people is a component of preventing abuse, neglect, and exploitation. This provides a framework for background checks and describes when a background check is required, the components of a background check, and what is done if a background check reveals a potential problem.

Background checks supplement but do not replace reference checks or substitute for proof of education, specific training, certification, or professional licenses required for a position or job functions.

## **Authority**

North Dakota Century Code (NDCC) 25-1; North Dakota Administrative Code (NDAC) 74-04-01

North Dakota Century Code (NDCC) Chapter 25-16 requires the Health and Human Services (HHS) to license entities which provide services to clients with intellectual and related developmental disabilities. (<http://www.legis.nd.gov/cencode/t25c16.pdf>)

North Dakota Administrative Code (NDAC) 75-04-01 establishes the rules of licensure. Those rules (75-04-01-06 and 75-04-01-06.1) require disclosure of criminal records of employees and officers of a licensee to (DHS). (<http://www.legis.nd.gov/information/acdata/pdf/75-04-01.pdf>)

ICF Regulation §483.420(d)(1)(iii) The facility must prohibit the employment of individuals with a conviction or prior employment history of child or client abuse, neglect or mistreatment. <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R94SOMA.pdf>

## **Definitions**

1. "Applicant" means an entity which has requested licensure from the North Dakota Health and Human Services pursuant to NDCC chapter 25-16.
2. "Background check" means the process of researching and compiling information regarding criminal and other appropriate records.
3. "Bureau of Criminal Investigation" BCI is the state's central repository for criminal history information, a system that compiles records of arrests and prosecutions of individual offenders for use by law enforcement, the courts and the public. The criminal history information is submitted by local law enforcement agencies, state's attorneys, the courts, parole and probation, etc., to the BCI. A ND BCI check only provides information on ND records.
4. "Client" means an individual found eligible as determined through the application of NDAC chapter 75-04-06 for services coordinated through intellectual disabilities-developmental disabilities program management, on whose behalf services are provided or purchased.
5. "Contractor" means a person or company that is not an employee of the licensee but performs work on a contract basis with a licensee including but not limited to consulting nurses, or therapists. It does not include contractors performing repairs, deliveries, installations, or similar services for the licensee.

6. “Criminal Conviction Offense Statement” is a form in the license application that lists all current employees, authorized representatives/governing body, volunteers, contractors, interns of the agency who have a criminal history. The form is submitted each year with the license application. Anyone currently employed or engaged with the agency that has a criminal history will be listed on the Criminal Conviction Offense Statement including those with a previous documented history, new hires, and those who committed an offense within the past licensing period. A person remains on the list for as long as they are with the agency.
7. “DD licensed provider agency” means an organization that operates programs/services licensed by the North Dakota Health and Human Services (HHS) Developmental Disabilities to provide the following:
  - Day Habilitation
  - Family Care Option (including all adults, over the age of 18, living in the home)
  - Independent Habilitation
  - Individual Employment Support
  - Infant Development
  - In Home Supports (provider managed)
  - Parenting Supports
  - Prevocational Services
  - Residential Habilitation
  - Small Group Employment Supports
  - Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID)
  - Section 11 residential or vocational
8. “Department” means the North Dakota Health and Human Services (HHS).
9. “Developmental Disabilities” (DD) means the section within the North Dakota Health and Human Services (HHS) responsible for licensing of services pursuant to NDCC chapter 25-16 and NDAC 75-04-01.
10. “Direct bearing offense” includes an offense described in NDCC chapters as follows:
  - Section A.
    - 12.1-6 homicide
    - 12.1-17-01 simple assault
    - 12.1-17-01.1 assault
    - 12.1-17-01.2 Domestic violence

- 12.1-17-02 aggravated assault
  - 12.1-17-03 reckless endangerment
  - 12.1-17-04 terrorizing
  - 12.1-17-06 criminal coercion
  - 12.1-17-07.1 stalking
  - 12.1-17-12 assault or homicide while fleeing a police officer
  - 12.1-18 kidnapping
  - 12.1-20-03 gross sexual imposition
  - 12.1-20-03.1 continuous sexual abuse of a child,
  - 12.1-20-04 sexual imposition
  - 12.1-20-05 corruption or solicitation of minors
  - 12.1-20-05.1 luring minors by computer or other electronic means
  - 12.1-20-06 sexual abuse of wards
  - 12.1-20-07 sexual assault
  - 12.1-21-01 arson
  - 12.1-22-01 robbery
  - 12.1-22-02 burglary if a class B felony under subdivision b of subsection 2 of that section
  - 12.1-27.2 sexual performances by children
  - 12.1-29-01 promoting prostitution
  - 12.1-29-02 facilitating prostitution
  - 12.1.-31-05 child procurement
  - 12.1-41 Uniform Act on Prevention of a Remedies for Human Trafficking
  - 14-09-22 abuse of child
  - 14-09-22.1 neglect of child
  - An offense under the laws of another jurisdiction which requires proof of substantially similar elements required for conviction under any of the enumerated North Dakota statutes listed above, or
- Section B.
- An offense other than an offense identified above, if HHS determines the person has not been sufficiently rehabilitated.

**11. “Employee”** means an individual who is employed by a licensed agency and has direct contact with or unsupervised access to clients receiving services, their personal property, personal information, or personal resources. This includes, but not limited to, direct support professionals who provide hands-on care and support to clients, supervisors, billing and clerical staff, case records, senior staff, president/CEO, executive director, and mid management staff such as Qualified Developmental Disabilities Professionals (QDDPs), and others who meet the definition of employee.

**12. “Governing body”** means the individual or individuals designated in the articles of incorporation of a corporation or constitution of a legal entity as being authorized to act on behalf of the entity. Also referred to as officers.

13. "License" means the authorization by the department to provide a service to individuals pursuant to NDCC chapter 25-16 and NDAC 75-04-01.
14. "Volunteer" means an individual who has unsupervised interaction with a client or access to their personal information, property, or financial resources, as a result of an agreement with an agency/licensee but who is not paid. May also mean a person who works as an apprentice or trainee in an occupation or profession to gain practical experience, satisfy legal or other requirements for being licensed or accepted professionally. It does not include volunteers or students performing irregular or supervised functions.

**Background checks are required for:**

1. **New DD Licensed Provider applicant**

A background check is required as part of the application process for entities requesting an initial (first time) license under NDAC 75-04-01. A satisfactory background check is required prior to the approval of any license and services may not be provided until a license is issued.

2. **Existing DD Licensed Providers**

DD licensed provider agencies must conduct an initial background check for all prospective employees and at least every five (5) years thereafter for current employees. Background checks must be completed regardless of the employee's age. If the agency requires more frequent background checks, this can be reflected in the agency policies and procedures.

If a prospective or current employee has had a background check completed within the past 12 months by another DD licensed provider agency, the hiring DD licensed provider agency may choose to accept this background check. A copy must be obtained and placed in the employee personnel file. If the background check has any crimes or negative actions that required review by the Department, supporting correspondence from the Department showing a hiring decision must also be included in the personnel file.

If an employee is rehired and there is less than a one-year lapse in employment, a new background check is not required if the most recent background check has been completed within the required 5 years.

3. **Contractors or Subcontractors of DD Licensed Provider Agencies**

If the applicant or DD licensed provider agency is contracting or subcontracting with other entities, there must be an agreement ensuring federal and state

background checks have been completed on all persons employed who work with clients, including volunteers. Each DD licensed provider agency must maintain a current copy of the background check. **If there is no agreement ensuring a federal and state background check has been completed, the provider must conduct the background check.**

### **Offer/Start date of employment or engagement with the agency**

Individuals who have been offered a position with a DD licensed provider agency may be employed or engaged with the agency on a **conditional** basis pending the outcome of the required background check. The temporary or conditional approval in any case may not exceed 45 calendar days.

In order to protect the health, safety, and welfare of people receiving services, conditional hires shall not be permitted to have unsupervised or unrestricted physical contact with people receiving services during such time of temporary approval.

### **A complete Background Check consists of the following:**

**1. For prospective employees who are a ND Resident all of the following sources must be included in the check regardless of the position the person is being considered for. The DD licensed provider may complete the checks, or they may choose a reputable entity to complete the checks.**

**a. Criminal history background check.**

In North Dakota **the criminal check must be completed through** the Bureau of Criminal Investigation (BCI). The requirements for requesting ND Criminal History Records can be found at the following link:

<https://attorneygeneral.nd.gov/public-safety/criminal-history-records/requesting-criminal-history-record-check>

**b. Certified Nurse Aide registry**

North Dakota:

[https://www.ndhealth.gov/hf/North\\_Dakota\\_certified\\_nurse\\_aide.htm](https://www.ndhealth.gov/hf/North_Dakota_certified_nurse_aide.htm)

**c. Child Abuse and Neglect Central Registry**

North Dakota: <https://www.nd.gov/eforms/Doc/sfn00433.pdf>

**d. Sex offender registry**

North Dakota: <http://www.sexoffender.nd.gov/OffenderWeb/search/basic>

**e. State and Federal exclusions databases Office of Inspector General (OIG)**

North Dakota: <https://www.nd.gov/dhs/services/medicalserv/medicaid/docs/prov-exclusion-list.pdf>

National database: <https://exclusions.oig.hhs.gov/>

**f. State Board of Nursing**

There are two verifications that need to be completed for The North Dakota Board of Nursing site.

- ND Board of Nursing License/Permit Verification and North Dakota Board of Nursing
- UAP/Technician/MAIII Registration Verification

[https://www.ndbon.org/verify\\_renew/verify\\_nurse.asp](https://www.ndbon.org/verify_renew/verify_nurse.asp)

**g. Court system**

Search needs to be completed under Criminal/Traffic data base:

<http://www.ndcourts.gov/publicsearch/default.html?aspxerrorpath=/publicsearch/contactsearch.aspx>

- 2. In addition to the items identified in number one (1) above, the following need to be completed for those state(s) of residency for the past 5 years. All of the following sources must be included in the check regardless of the position the person is being considered for. The DD licensed provider may complete the checks, or they may choose a reputable entity to complete the checks.**

**a. Criminal history background check**

The ND Bureau of Criminal Investigation maintains a list of some agency contacts in other states that will be provided upon request.

**b. Child Abuse and Neglect Central Registry**

National resource:

<http://centerforchildwelfare.fmhi.usf.edu/ChildProtective/AdamWalsh.pdf>

**c. Sex offender registry**

National resource: <https://www.nsopw.gov/>

**d. State Board of Nursing**

National resource: <https://www.ncsbn.org/contact-bon.htm>

**e. Certified Nurse Aide registry**

National resources: <https://www.ncsbn.org/725.htm> or <https://www.cnalicense.org/nar/>

\*\*Only if a state law **prohibits** disclosure of records or the prospective employee has lived out of the country with in the past 5 years, the provider can have staff complete the Self-Disclosure of Previous Criminal History Form/Child Abuse Registry ([SFN 1792](#)).

The department will not hear challenges to the accuracy of background checks. If a licensee or employee wishes to challenge the accuracy of any report, it must be done in the jurisdiction involved with the charge or conviction.

**Disposition of Background Check Results**

Upon receiving the results of the background check from **all** sources, DD licensed provider agency will **determine if further review is required** by Developmental Disabilities **based on the information below**.

**1. No Additional Review Required by DD**

- a. No record** means that all sources indicate no crimes or negative actions for the individual were found.
- b. Infractions only** means that the only crimes or negative actions found were those classified as infractions.

*North Dakota categorizes some crimes as infractions. Infractions are violations of law, regulation, or ordinances. An infraction is less serious than a misdemeanor. Most infractions are settled administratively. Defendants do not have a right to a jury trial and although an individual charged with an infraction can hire an attorney the government doesn't have a constitutional duty to provide one. A person who commits an infraction will usually get a ticket or citation and pay a fine. Penalties: Up to \$1,000 in fines. Infractions are considered the least serious type of crime and have no incarceration penalties associated with them, unless a person convicted of an infraction has a previous conviction for the same crime within the prior year. In such circumstances, prosecutors charge the infraction as a Class B misdemeanor up to 30 days' imprisonment and a maximum of \$1,500 in fines. Some*



*examples of Infractions include but are not limited to: Sale of tobacco to minors; Gambling on private premises where the total amount involved exceeds \$2,500 per person; Speeding; Parking fines; Littering; Noise disturbances; Violations of building codes, etc.*

Infractions do not need to be reported to the department, but the licensed agency must determine whether the infraction is substantially related to or has a direct impact on the ability of the individual to perform the job functions for which they are being considered. Consider whether there are patterns of infractions, the time that has elapsed since the infraction, and age of the individual at the time of the infraction. For example, the provider may consider that recent and multiple speeding tickets may have an impact as to whether the person should be employed in a position that transports clients.

### **c. Direct bearing**

If the records indicate the potential employee has been found guilty of, pled guilty to, or pled no contest to a direct bearing offense(s) the DD licensed provider agency may **not** employ that person.

An individual is known to have been found guilty of, pled guilty to, or pled no contest to an offense when it is:

- a. Common knowledge in the community; or
- b. Acknowledged by the individual; or
- c. Reported to the facility as the result of an employee background check.

### **d. Registry Checks (for potential employee in an ICF)**

If the records indicate the potential employee is listed on the Child Abuse/Neglect Information Index, CNA Registry, or Board of Nursing Registry for child or client abuse, neglect or mistreatment, employment or engagement with individuals residing in an **Intermediate Care Facility (ICF)** is **prohibited** per §483.420(d)(1)(iii).

## **2. Further Review Required by DD (submitted by DD Licensed Provider)**

- a. Non-direct bearing offenses are crimes or negative actions that do not automatically disqualify the individual. However, the decision on offering employment or engagement with the DD licensed provider agency is pending until it has been determined by the Department:

- i. If the nature of the offense or underlying conduct is substantially related to the service(s) provided to the client and has direct relevance to the job or position the person is seeking.
  - ii. If the person has been sufficiently rehabilitated under section 12.1-33-02.1.
- b. Per NDAC 75-04-01-06.1(4), in the case of a misdemeanor offense described in North Dakota Century Code sections 12.1-17-01, simple assault; 12.1-17-03, reckless endangerment; 12.1-17-06, criminal coercion; 12.1-17-07.1, stalking; or equivalent conduct in another jurisdiction which requires proof of substantially similar elements as required for conviction, the department may determine the individual has been sufficiently rehabilitated, if five years have elapsed after final discharge or release from any term of probation, parole, or other form of community corrections or imprisonment, without subsequent conviction.

**c. Registry Checks (for potential employee in Waiver Services)**

If the records indicate the potential employee is listed on the Child Abuse/Neglect Information Index, CNA Registry, or Board of Nursing Registry, the provider may furnish information satisfactory to the department, from which the department can determine the potential employee's ability to provide care that is free of abuse and neglect.

**Records required for determination**

- The following records must be submitted with the background check to DD for review:
  1. The nature of the conviction
  2. Jurisdiction of the court of records
  3. When it occurred
  4. Sentencing or disposition
  5. Rehabilitation participation, if any
  6. Identity of the person's probation/parole officer (if applicable),
  7. Job description
  8. Supervision arrangements
  9. Access to client medications or client funds
  10. Explanation from the subject regarding the circumstances of the conviction, why the nature of the offense should not apply to the job functions, etc., if this is applicable.
  11. Description of safeguards that the provider will take to ensure the health and safety of clients if person is hired (if applicable).

- If the records submitted do not include the above information DD will be unable to make a determination and the request will be returned.

### **DD Notification**

Once DD receives all applicable records, a review and determination will be completed within 10 business days. DD will notify the DD licensed provider agency of the determination in writing.

### **Additional Requirements**

If a DD licensed provider agency becomes aware that an existing employee or volunteer of the agency is convicted of an offense subject to the review of the department, they must immediately report the offense to DD for further review to determine if continued employment or engagement with the agency is appropriate.

Any employee or volunteer that is hired or engaged with the provider with a criminal conviction and determined to be sufficiently rehabilitated must be placed on the Criminal Conviction Offense Statement and will remain on the list for as long as the person is with the licensed agency. At the time of the annual license renewal, the DD licensed provider agency shall complete and sign the Criminal Offense Conviction Statement ([SFN 235](#)) verifying full compliance regarding background checks.

Every DD licensed provider agency shall retain the most recent two (2) completed background checks in the employee personnel file and shall be available for review by department staff to assure compliance with this procedure. **Documentation for each check listed above must include the date the check was completed, a printout or screenshot of the findings, and initials of who completed the check.**

**DD licensed agency must look at any additional names the potential or existing employee may have had in the last 5 years.**

### **Noncompliance**

If the DD licensed provider agency elects to employ or continue to employ a person found to have a 'direct bearing' offense or to be insufficiently rehabilitated, the licensee will be in violation of the provisions of NDAC 75-04-01 (<http://www.legis.nd.gov/information/acdata/pdf/75-04-01.pdf>) and be subject to licensure denial, suspension, or revocation. If the licensee disagrees with the determination, they may appeal per NDAC 75-04-01-05. The department will not hear appeals from employees of the licensee.

NDAC 75-04-05-25. Indemnification. Provider agencies may be required to indemnify and reimburse the department for any federal funds, the expenditure of which is disallowed as a consequence of the provider agency's failure to establish and maintain adequate records or the provider agency's failure to otherwise comply with written

standards, rules and regulations, or statutes.

<https://www.legis.nd.gov/information/acdata/pdf/75-04-01.pdf>

NDAC 75-04-01-40(6) The department maintains the right to withhold a payment for services or suspend or terminate Medicaid enrollment if the licensee has failed to abide by terms of the Medicaid contract, federal and state laws, regulations, and policies regarding documentation or data reporting.

<https://www.legis.nd.gov/information/acdata/pdf/75-04-01.pdf>