

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**COLORADO IMPLEMENTED MANY
NEW CRIMINAL BACKGROUND
CHECK REQUIREMENTS FOR
CHILDCARE PROVIDERS, BUT
CHALLENGES REMAIN FOR
UNIMPLEMENTED REQUIREMENTS**

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Office of Inspector General

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Report in Brief

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U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL



Why OIG Did This Review

The Child Care and Development Block Grant Act of 2014 (CCDBG Act) added new requirements for States receiving Child Care and Development Fund (CCDF) funds to conduct comprehensive criminal background checks on staff members and prospective staff members of childcare providers prior to employment and every 5 years thereafter. States must have requirements, policies, and procedures in place to conduct criminal background checks for staff members of childcare providers (other than relatives) that are licensed, regulated, or registered under State law or receive CCDF funds. Background check requirements apply to any staff member who is employed by a childcare provider for compensation or whose activities involve the care or supervision of children or unsupervised access to children.

Our objective was to determine Colorado's progress toward implementing new criminal background check requirements established under the CCDBG Act.

How OIG Did This Review

Our review covered Colorado's implementation of the new criminal background check requirements that were in place as of March 1, 2018. In addition, we examined Colorado's plans to address the new criminal background check requirements that were not implemented by the end of our fieldwork, June 20, 2018. We also identified challenges that Colorado experienced. Our review did not address childcare providers' compliance with the new requirements.

Colorado Implemented Many New Criminal Background Check Requirements for Childcare Providers, but Challenges Remain for Unimplemented Requirements

What OIG Found

Colorado implemented many of the new criminal background check requirements established under the CCDBG Act. However, certain criminal background check requirements for childcare providers remained unimplemented as of March 1, 2018, and significant challenges may delay full implementation until 2019 or 2020. Specifically, these challenges include, on Colorado's part, unavailable finances and staff to process the background checks, data system limitations, and required changes to State laws or policies and procedures. Colorado currently has until September 30, 2018, to implement the new criminal background check requirements. The outstanding challenges may lead Colorado to request an additional 1-year waiver from the Administration for Children and Families to address the challenges and comply with the new requirements.

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INTRODUCTION

WHY WE DID THIS REVIEW

The Child Care and Development Block Grant Act of 2014 (CCDBG Act) added new requirements for States receiving Child Care and Development Fund (CCDF) funds to conduct comprehensive criminal background checks on staff members and prospective staff members of childcare providers every 5 years (P.L. No. 113-186 § 658H (Nov. 2014)). In Colorado, the designated CCDF lead agency is the Colorado Department of Human Services (State agency).

States must have requirements, policies, and procedures in place to conduct criminal background checks for staff members of childcare providers (other than relatives) that are licensed, regulated, or registered under State law or receive CCDF funds. Background check requirements apply to any staff member who is employed by a childcare provider for compensation or whose activities involve the care or supervision of children or unsupervised access to children. This includes not only caregivers, teachers, and directors, but also janitors, cooks, and other employees of a childcare provider who may not regularly engage with children, but whose presence at the facility gives them the opportunity for unsupervised access. For family childcare homes, this includes the caregiver requesting a check of himself or herself, as well as other adults in the household who may have unsupervised access to children.

As part of its oversight activities, the Office of Inspector General is conducting a series of reviews to improve the program integrity of childcare and development grant programs. This review focuses on the State agency's implementation of the criminal background checks. For this review, we define implementation as the actions taken to establish the requirements, policies, and procedures that will be used to carry out the provisions of the CCDBG Act. Future childcare provider audits will test how the States and childcare providers have implemented these criminal background check requirements in their day-to-day operations.

OBJECTIVE

Our objective was to determine the State agency's progress toward implementing new criminal background check requirements established under the CCDBG Act.

BACKGROUND

Reauthorized in the CCDBG Act, CCDF is the primary Federal funding source devoted to subsidizing the childcare expenditures of low-income families. Administered by the Administration for Children and Families (ACF), CCDF provides eligible low-income families with help paying for childcare at a provider of their choice while they work or participate in training or education, or both. In fiscal year (FY) 2016, ACF provided \$5.7 billion to States, territories, and tribes to fund CCDF programs. Each month, CCDF serves approximately 1.4 million children under the age of 13 from 850,000 low-income working families.

New Criminal Background Check Requirements

The U.S. Department of Health and Human Services (HHS) implemented the CCDBG Act's new criminal background check requirements for States, territories, and tribes in a Final Rule issued in September 2016 (45 CFR part 98). According to Federal regulations, States must have requirements, policies, and procedures in place to conduct comprehensive criminal background checks. States are required to conduct criminal background checks for childcare staff members and prospective staff members that include checks of two national registries, three in-State registries, and checks of three registries in other States as necessary (we refer to those checks as "inter-State checks") (45 CFR § 98.43(b)).

The national background registry checks are:

- a Federal Bureau of Investigation (FBI) criminal history fingerprint check and
- a search of the National Crime Information Center's (NCIC's) National Sex Offender Registry.

In-State background registry checks (applicable to the State in which the childcare staff member resides) are:

- a search of the State criminal registry using fingerprints,
- a search of the State sex offender registry, and
- a search of the State-based child abuse and neglect registry.

Inter-State background registry checks (applicable to each State in which the childcare staff member resided during the preceding 5 years) are:

- a search of each State's criminal registry (fingerprints optional),
- a search of each State's sex offender registry, and
- a search of each State-based child abuse and neglect registry.

In addition to requiring registry checks, States must comply with several other requirements laid out in Federal regulations. The requirements are described below. In parentheses, we add a descriptor of the requirement that we will use in later discussions in the report:

- Federal regulations require criminal background checks for staff members and prospective staff members of childcare providers (other than relatives) that are licensed, regulated, or registered under State law or receive CCDF funds. This includes

any staff member who is employed by a childcare provider for compensation or whose activities involve the care or supervision of children or unsupervised access to children. Throughout the report, these individuals will be referred to as “childcare staff members” (45 CFR § 98.43(a)). (“Applicable to all childcare staff members”)

- Federal regulations require States to include in their requirements, policies, and procedures specific factors that would cause a childcare staff member to be ineligible for employment by childcare providers (45 CFR § 98.43(c)). (“Disqualification factors”)
- Federal regulations require criminal background checks prior to employment and at least every 5 years following employment (45 CFR § 98.43(d)(2)). (“Five-year timeframe”)
- States must have requirements, policies, and procedures that a childcare staff member may not start work until the FBI or in-State criminal registry fingerprint check is returned as satisfactory, and that a staff member be continually supervised until a determination is made on all checks (45 CFR § 98.43(d)(4)). (“Condition of employment”)
- States are required to provide the results of criminal background checks within 45 days after the date on which the childcare provider submitted the checks (45 CFR § 98.43(e)(1)). (“Results within 45 days”)
- States are required to provide a process for childcare staff members to appeal the results of criminal background checks (45 CFR § 98.43(e)(3)). (“Appeals process”)
- States may charge for the costs (not to exceed actual costs) of processing applications and administering criminal background checks (45 CFR § 98.43(f)). (“Appropriate fees”)
- States must ensure that their policies and procedures for criminal background checks are published on their websites (45 CFR § 98.43(g)). (“Transparency of State policies and procedures”)

Extension and Waiver Deadlines for Implementation

The CCDBG Act required that all States have requirements, policies, and procedures in place that meet the criminal background check requirements not later than September 30, 2017. The CCDBG Act allowed for the Secretary of HHS to grant a 1-year extension to States as long as they demonstrate a good-faith effort to implement the requirements. In recognition of significant challenges to implementing the new background requirements, all States, including Colorado, applied for and received extensions through September 30, 2018. In addition, ACF has the authority to grant States a waiver of a statutory provision, including one or more criminal background check requirements, and may extend the period of implementation for the waived requirements for up to 2 additional years, until September 30, 2020, assuming that the

requirements for applying for the waiver are fulfilled. In its State plan preprint,¹ ACF has indicated that if a State implements the FBI criminal history check and the three in-State background checks for prospective staff by September 30, 2018, the State may receive a time-limited waiver (1 year, with an additional year renewal, subject to conditions being met) to perform the following actions:

- conduct FBI checks and in-State registry checks on current childcare staff, and
- establish procedures and conduct checks of the NCIC's National Sex Offender Registry and inter-State registries for current and prospective staff, as necessary.

Colorado's Coordination Efforts for Conducting Criminal Background Checks

The State agency said that it worked with the Colorado Bureau of Investigation (CBI) to conduct criminal background checks for childcare staff members. Specifically, the CBI is involved in the collection of fingerprint checks for the national FBI criminal history fingerprint check. State agency officials added that CBI will also be involved in collecting the fingerprint checks for the National Sex Offender Registry check (discussed later in this report).

HOW WE CONDUCTED THIS REVIEW

Our review covered the State agency's implementation of the new criminal background check requirements that were in place as of March 1, 2018. In addition, we examined the State agency's plans to address the new criminal background check requirements that were not implemented by the end of our fieldwork, June 20, 2018. We also identified challenges that the State agency experienced. Our review did not address childcare providers' compliance with the new requirements.

We did not review the State agency's overall internal control structure. Rather, we limited our review to determining whether the State agency implemented the new criminal background check requirements.

The Appendix contains the details of our audit scope and methodology.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

¹ The State plan is the primary mechanism that ACF uses to determine State and territory compliance with the requirements of the CCDBG Act. The State plan preprint provides a tool for States and territories to describe to ACF their progress on eight key functions of an integrated system of childcare as described in the preprint (https://www.acf.hhs.gov/sites/default/files/occ/fy_2019_2021ccdf_plan_preprint_11_30_17.pdf).

RESULTS OF REVIEW

The State agency implemented many of the new criminal background check requirements established under the CCDBG Act. However, certain criminal background check requirements for childcare providers remained unimplemented as of March 1, 2018, and significant challenges may delay full implementation until 2019 or 2020. Specifically, these challenges include unavailable finances and staff to process the background checks, data system limitations, and required changes to State laws or policies and procedures. The State agency currently has until September 30, 2018, to implement the new criminal background check requirements. The outstanding challenges may lead the State agency to request an additional 1-year waiver from ACF to address the challenges and comply with the new requirements.

Table 1 provides a summary of the State agency’s implementation status for the national, in-State, and inter-State background registry checks.

Table 1: The State Agency’s Implementation Status of Background Registry Checks

Background Registry Checks	Implementation Status as of 3/1/2018	Potential Implementation Status as of 10/1/2018 ²	Potential Implementation Status as of 10/1/2019 ³
FBI criminal history fingerprint check	Implemented		
NCIC's National Sex Offender Registry	Not Implemented		
In-State criminal registry	Implemented		
In-State sex offender registry	Implemented		
In-State child abuse and neglect registry	Implemented		
Inter-State criminal registry	Not Implemented		
Inter-State sex offender registry	Not Implemented		
Inter-State child abuse and neglect registry	Not Implemented		

² We based Colorado’s potential implementation status on discussions we had with State agency officials, and the categories are subject to change. A “green” status indicates that the State agency had fully implemented or planned to fully implement the background registry check by the corresponding date. A “red” status indicates that the State agency did not plan to implement the background registry check by the corresponding date.

³ *Id.*

THE STATE AGENCY DID NOT FULLY IMPLEMENT ALL NATIONAL BACKGROUND REGISTRY CHECKS

The National FBI Criminal History Fingerprint Check Was Implemented

According to Federal regulations, States are required to conduct an FBI criminal history fingerprint check using Next Generation Identification⁴ for childcare staff members or prospective staff members (45 CFR § 98.43(b)(1)).

As of March 1, 2018, the State agency had implemented the FBI criminal history background check.

The National Crime Information Center's National Sex Offender Registry Check Was Not Implemented

Federal regulations require States to conduct a search of the NCIC's National Sex Offender Registry for childcare staff members or prospective staff members (45 CFR § 98.43(b)(2)).

As of March 1, 2018, the State agency had not implemented the NCIC's National Sex Offender Registry check. According to State agency officials, neither the State agency nor CBI currently has the staff to implement this registry check; both agencies are working to determine how to fulfill this requirement. CBI officials also stated that CBI has requested that the FBI's Criminal Justice Information Services Advisory Board discuss whether the sex offender registry check could be triggered at the Federal level. CBI believes that the FBI should have the ability to check both the fingerprint criminal history and national sex offender registry using the same information submitted with the fingerprints.

THE STATE AGENCY IMPLEMENTED ALL IN-STATE BACKGROUND REGISTRY CHECKS

According to Federal regulations, States are required to conduct a search of the (1) State criminal registry (using fingerprints), (2) State sex offender registry, and (3) State-based child abuse and neglect registry in the State in which the childcare staff member or prospective staff member resides (45 CFR § 98.43(b)(3)).

As of March 1, 2018, the State agency had implemented the three in-State criminal background registry checks.

⁴ The FBI fingerprint check, Next Generation Identification (formerly the Integrated Automated Fingerprint Identification System), provides the criminal justice community with the world's largest and most efficient electronic repository of biometric and criminal history information.

THE STATE AGENCY DID NOT IMPLEMENT ALL INTER-STATE BACKGROUND REGISTRY CHECKS

Inter-State Criminal History Registry Check, Sex Offender Registry Check, and Child Abuse and Neglect Registry Check Were Not Implemented

According to Federal regulations, States are required to conduct a search of the criminal registry, State's sex offender registry, and child abuse and neglect registry in each State (fingerprints optional) in which the childcare staff member or prospective staff member resided during the preceding 5 years (45 CFR § 98.43(b)(3)).

As of March 1, 2018, the State agency had not implemented the inter-State criminal history registry check because of challenges it experienced. Specifically, the State agency indicated that the resources needed to implement this requirement had not been identified. The State agency estimated that it would need additional staff members to complete this requirement. State agency officials stated that the resulting financial impact was being discussed, but added that neither the specific number of staff members nor the financial impact could be determined until a process to conduct checks of these registries was in place. In addition, the State agency anticipates that systems and administrative rule changes are required to be in compliance with relevant Federal regulations. Further, the Colorado Division of Early Care and Learnings, Background Investigation Unit (BIU), recently received clarifying information from the State agency that it does not have authority to complete the background inquiry checks for abuse and neglect for individuals working in childcare outside of Colorado.

The Colorado Office of Early Childhood anticipates requesting a statutory change to gain authority to complete inter-state background inquiry checks for abuse and neglect during Colorado's next State legislative session starting in January of 2019. Until BIU is given the regulatory authority to complete inter-state abuse and neglect checks, Colorado will be unable to respond to inter-state abuse and neglect background check requests.

THE STATE AGENCY DID NOT FULLY IMPLEMENT ALL BACKGROUND CHECK REQUIREMENTS

In addition to accessing national, in-State, and inter-State registries, States are required to implement criminal background check requirements that address other Federal requirements. As of March 1, 2018, the State agency implemented six of the eight background check requirements.

Table 2 on the following page provides a summary of the State agency's implementation status for these background check requirements.

Table 2: The State Agency’s Implementation Status of Background Check Requirements

Background Check Requirements	Implementation Status as of 3/1/2018	Potential Implementation Status as of 10/1/2018⁵	Potential Implementation Status as of 10/1/2019⁶
Applicable to all childcare staff members	Implemented		
Disqualification factors	Implemented		
Five-year timeframe	Not Implemented		
Condition of employment	Not Implemented		
Results within 45 days	Implemented		
Appeals process	Implemented		
Appropriate fees	Implemented		
Transparency of State policies and procedures	Implemented		

Two Background Check Requirements Were Not Implemented

Five-Year Timeframe

Federal regulations require States to have requirements, policies, and procedures in place to conduct criminal background checks for childcare staff members and prospective staff members prior to employment and at least once every 5 years (45 CFR § 98.43(d)(2)).

This Federal regulation requires that FBI fingerprint checks be conducted for any new owner, new applicant, newly hired employee, new licensee, or individual who began employment (or residence for homes) in a licensed childcare facility on or after August 11, 2011. Individuals employed prior to August 10, 2011, who had not been previously required to complete an FBI background check, were excluded from the requirement for FBI fingerprint checks.

⁵ We based Colorado’s potential implementation status on discussions we had with State agency officials, and the categories are subject to change. A “green” status indicates that the State agency had fully implemented or planned to fully implement the background check requirement by the corresponding date. A “yellow” status indicates that the State agency planned to partially implement the background check requirement by the corresponding date.

⁶ *Id.*

Colorado is currently promulgating State-level requirements mandating that FBI checks be conducted every 5 years for all individuals who are working with children in licensed or qualified exempt facilities. State agency officials told us that they believe that these requirements will be effective by September 30, 2018.

Condition of Employment

Federal regulations state that a prospective staff member may begin work for a childcare provider after completing either the FBI criminal history fingerprint check or the in-State criminal history check. Until all background check components have been completed, the staff member must be supervised at all times by an individual who has received a qualifying result on a background check within the past 5 years (45 CFR § 98.43(d)(4)).

Currently, Colorado requires that all criminal background checks (FBI and CBI) be submitted within 5 days of employment, and staff members do not have to be supervised while these background checks are being processed. Colorado is currently promulgating rules to ensure that prospective staff members cannot begin work until either the FBI or CBI criminal check has been completed and that staff members must be supervised at all times by an individual who has received a qualifying result on a background check within the past 5 years. State agency officials told us that they believe that this requirement will be effective by September 30, 2018.

Six Background Check Requirements Were Implemented

Applicable to All Childcare Staff Members

Federal regulations require States to have requirements, policies, and procedures in place to conduct criminal background checks for staff members of childcare providers (other than relatives) that are licensed, regulated, or registered under State law or receive CCDF funds. Background check requirements apply to any staff member who is employed by a childcare provider for compensation or whose activities involve the care or supervision of children or unsupervised access to children (45 CFR § 98.43(a)).

As of March 1, 2018, the State agency had implemented this criminal background check requirement.

Disqualification Factors

Federal regulations list disqualification factors for childcare staff members employed by providers receiving CCDF assistance. The factors include refusing a background check or knowingly providing a materially false statement in connection with a background check; being registered, or being required to be registered, on the State or National Sex Offender Registry; having been convicted of a felony consisting of murder, child abuse or neglect, a crime against children, spousal abuse, a crime involving rape or sexual assault, kidnapping, arson, physical assault, or a drug-related offense committed during the preceding 5 years; and having been

convicted of a violent misdemeanor committed as an adult against a child (e.g., child abuse, child endangerment, sexual assault, child pornography) (45 CFR § 98.43(c)(1)).

As of March 1, 2018, the State agency had implemented this criminal background check requirement.

Results Within 45 Days

Federal regulations require States to carry out the request of childcare providers for a criminal background check as expeditiously as possible and within 45 days after the date on which the provider submitted the request. Also, States must provide the results of the criminal background check to the provider and to the current or prospective staff member (45 CFR § 98.43(e)(1)).

As of March 1, 2018, the State agency had implemented this criminal background check requirement.

Appeals Process

Federal regulations require States to provide a process for childcare staff members and prospective staff members to appeal the results of criminal background checks and to challenge the accuracy or completeness of the information contained in the member's criminal background report (45 CFR § 98.43(e)(3)).

As of March 1, 2018, the State agency had implemented this criminal background check requirement.

Appropriate Fees

Federal regulations allow States to charge up to the actual costs of processing applications and administering the criminal background checks (45 CFR § 98.43(f)).

As of March 1, 2018, the State agency had implemented this criminal background check requirement.

Transparency of State Policies and Procedures

Federal regulations require States to ensure that their policies and procedures for criminal background checks are published on the State and local lead agency websites (45 CFR § 98.43(g)).

As of March 1, 2018, the State agency had implemented this criminal background check requirement.

CONCLUSION

As of March 1, 2018, the State agency had implemented many of the new criminal background check requirements established under the CCDBG Act. Specifically, the State agency implemented one national background registry check, three in-State background registry checks, and six other background check requirements. However, significant challenges remain for the three unimplemented inter-state background check requirements, and these challenges may delay full implementation until 2019. The State agency plans to continue to work with State partner agencies, State administrators, and ACF to ensure that all remaining background check requirements are implemented in a timely manner. We will continue to monitor the State agency's actions and progress toward implementation of the new criminal background check requirements.

APPENDIX: AUDIT SCOPE AND METHODOLOGY

SCOPE

Our review covered the State agency's implementation of the new criminal background check requirements that were in place as of March 1, 2018. In addition, we examined the State agency's plans to address the new criminal background check requirements that were not implemented by the end of our fieldwork, June 20, 2018. We also identified challenges that the State agency experienced in implementing the new requirements. Our review did not address childcare providers' compliance with the new requirements.

We did not review the State agency's overall internal control structure. Rather, we limited our review to determining whether the State agency implemented the new criminal background check requirements.

We conducted our audit, which included fieldwork at the State agency office in Denver, Colorado, from November 2017 to June 2018.

METHODOLOGY

To accomplish our objective, we:

- reviewed applicable Federal regulations and ACF guidance;
- reviewed applicable State laws, regulations, policies, and procedures;
- identified the new criminal background check requirements that were implemented by the State agency as of March 1, 2018;
- identified the new criminal background check requirements that were not implemented by the State agency as of March 1, 2018;
- interviewed State agency officials to gain an understanding of the challenges that the State agency experienced and the State agency's plans to address unimplemented criminal background check requirements;
- interviewed CBI officials to gain an understanding of their role in assisting the State agency in complying with the new regulatory requirements for criminal background checks;
- interviewed ACF officials to discuss the State agency's progress toward implementing the new criminal background check requirements; and

- discussed the results of our review with the State agency on August 3, 2018.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.