

DRAFT for informal comments from providers and other stakeholders (second posting 6-11-18)
Text in *italics* to be deleted; text in **bold** to be added

9 CSR 10-5.190 Background Screening for Employees and Volunteers

PURPOSE: This amendment clarifies the application of the rule and updates the rule to ensure it is consistent with section 630.170, RSMo, and makes necessary modifications to implement the changes impacting section 630.170, RSMo, that were effective January 1, 2017.

PURPOSE: This rule establishes standards for obtaining background screening for: [certain]

1. Staff; [and]

2. Volunteers; and

3. Certain members of a provider's household

in any public or private facilities, community residential facilities, day programs or specialized service operated, licensed, certified, accredited, in possession of deemed status, or funded by the Department of Mental Health.

(1) For the purposes of this rule, **public or private facilities, community** residential facilities, day programs and specialized services (**agency(ies)**) are divided into two (2) categories, as follows:

(A) Category I. [*Those*]**Agencies** that are certified or licensed exclusively by the Department of Mental Health (DMH) or, although not certified or licensed, are funded by [*the department*]**DMH**. Specifically this category includes:

1. [*Agencies certified by DMH as community psychiatric rehabilitation programs (CPRP), comprehensive substance abuse and treatment and rehabilitation programs (CSTAR), residential and/or outpatient programs;*]**All agencies certified by DMH;**

[*2. Agencies certified by DMH in the community-based waiver certification program;*

[*3. Agencies certified by the Division of Alcohol and Drug Abuse;*

4. *Facilities*]**2. Agencies** that have contractual arrangements with [*the department*]**DMH** but are exempt from [*the department's*]**DMH's** licensing and certification [*rules*]**process** due to accreditation or other reason; and

COMMENT: (2) Accredited providers are not exempt from licensing and certification rules; it exempts them from going through the survey and having to be licensed or certified, but they are still responsible to follow the rules.

DMH RESPONSE: Changed as indicated.

[*5. Facilities and day programs which*]**3. Agencies that** are licensed by [*the department*]**DMH** and do not have a license from another state agency.[*;* and]

(B) Category II. [*Those*]**Agencies** that[, *in addition to a license or certificate from DMH,*] have a license or [*certification*]**certificate** from another state agency. Specifically, this category includes [*facilities*]**agencies** licensed by the Children's Division or the Department of Health and Senior Services; also included are intermediate care facilities/[*mental retardation*]**for individuals with intellectual disabilities** (ICF/[*MR*]**IDD**). [*Facilities and a*]**Agencies** included in Category II are subject to rules regarding criminal record review as promulgated by the state agency [*which*]**that** licenses or certifies them and are not subject to sections [(2)]**(3)** through (6) of this rule, **however, all other sections of this rule apply.** [*However such agencies are subject to sections (7), (8), (9) and (10).*]

(2) This rule applies to—

(A)**Paid and unpaid [S]staff and volunteers of the agency, including student workers; and**

DRAFT for informal comments from providers and other stakeholders (second posting 6-11-18)
Text in *italics* to be deleted; text in **bold** to be added

[(B) Volunteers who are recruited as part of an agency's formal volunteer program but does not apply to volunteers who assist individuals as a friend would by providing assistance with shopping, transportation, recreation, etc.; and]

*[(C)](B) For residential services, [M]members of the provider's [H]household, except **minor children under the age of 18**, who have contact with [residents or clients, except for minor children]individuals served.*

COMMENT: (B) Consider using a specific age of children that would be exempt for the background checks such as, "except for children under the age of 18."

DMH RESPONSE: Changed as indicated.

COMMENT: (B) CSR requires significant background checks of employees and volunteers. Should this CSR also require agencies to access the exclusion list maintained by the U.S. Department of Health and Human Services – the Medicaid Exclusions Database?

DMH RESPONSE: DMH requires background checks for abuse/neglect purposes; this database includes other areas not required by DMH and will not be added to the rule.

COMMENT: This rule (2) applies to paid and unpaid staff and volunteers, including student workers. We have a church group that comes out with holiday gifts that are not screened because we don't always know who is coming in advance and we never leave them alone with the children. Instituting background checks would eliminate anyone from wanting to do this. Also, we have high school students who "job shadow" for a couple of hours. We do not do background screenings on them because they are never left alone with clients in our facilities.

DMH RESPONSE: Individuals who are part of a church or other similar group participating in this type of activity are considered visitors and a background screening is not required.

Students who job shadow are not employees or workers, therefore a background screening is not required for this type of activity.

(3) Each *[residential facility, day program or specialized service]***agency** defined under Category I above shall make the following inquiries for all new *[employees] staff, [and] volunteers, and certain members of the provider's household, where applicable:*

(A) An inquiry with the Department of Health and Senior Services to determine whether the *[new employee or volunteer]***person** having contact with *[residents or clients]***individuals served** is listed on the employee disqualification list of the Department of Social Services or the Department of Health and Senior Services;

(B) An inquiry with *[the Department of Mental Health]***DMH** to determine whether the *[new employee or volunteer]***person** is on the DMH disqualification registry; and

(C) A criminal background check with the **Missouri** State Highway Patrol. The request for the background check *[shall]***does** not require fingerprints and shall be in accordance with requirements of the **Missouri** State Highway Patrol under Chapter 43, RSMo. The *[facility, program or service]* **agency** may use a private investigatory agency to conduct this review.

COMMENT: Does the draft CSR mean if an agency has a public event at which both persons served and employees and their families are invited (such as fund raising, picnic, banquet, party) at which "certain members" of employees' households may have contact with persons served, the household members must have a prior background check?

DRAFT for informal comments from providers and other stakeholders (second posting 6-11-18)
Text in *italics* to be deleted; text in **bold** to be added

DMH RESPONSE: In these instances, the family members or others in attendance are considered visitors and a background screening is not required. The background screening is required for individuals residing in the provider's household, except children under the age of 18.

COMMENT: Is the background screening a one-time screening for the residential service employee's certain household members or is the agency expected to keep up with changes for household members on an annual basis or at some other level of frequency?

DMH RESPONSE: It is a one-time screening.

(4) The criminal background check and inquiries required under section (3) of this rule shall be initiated prior to the [employee]staff, [or] volunteer, **or certain members of the provider's household, where applicable**, having contact with [residents, clients or patients]individuals served.

COMMENT: Suggest adding language from RSMo 630.170.7 where it states, "not later than two working days after hiring any person for a full-time, part-time, or temporary position." This would link both requirements we have—for the background check to be initiated before contact and within two working days. Many times we have questions asking us where the authority is for our stand and we do not have a single authority that states both requirements.

DMH RESPONSE: RSMo 630.170.7 includes more than those "hired". The proposed rule is actually less restrictive and will remain as written.

(5) Each [residential facility, day program and specialized service]agency included under Category I **above** shall require all new applicants for employment, [or] volunteer positions, **and certain members of the provider's household, where applicable**, [involving]who will have contact with [residents or clients]individuals served to—

(A) Sign a consent form authorizing a criminal record review with the highway patrol, either directly through the patrol or through a private investigatory agency;

(B) Disclose his/her criminal history, including any conviction or a plea of guilty to a misdemeanor or felony charge and any suspended imposition of sentence, any suspended execution of sentence or any period of probation or parole; and

(C) Disclose if s/he is listed on the employee disqualification list of the Department of Social Services or the Department of Health and Senior Services, or the DMH disqualification registry.

COMMENT: Consider adding in section (5) a requirement to disclose if they are listed on the Medicaid Exclusion Database.

DMH RESPONSE: DMH requires background screening for abuse/neglect purposes, therefore this database will not be added to the rule.

(6) Each agency shall develop policies and procedures regarding the implementation of this rule and the disposition of information provided by the criminal record review. At a minimum the [guidelines shall address]policies and procedures include—

(A) Procedures for obtaining the criminal record review;

(B) Procedures for confidentiality of records; and

(C) Guidelines for evaluating information received through the criminal record review which establish a clear boundary between *[those]* convictions *[which]***that**, by statute~~*[, must]*~~ exclude an individual from service, and *[those]* convictions *[which]***that** would not automatically exclude an individual.

(7) Offenses *[which]***that** under section 630.170, RSMo, disqualify a person from service are as follows:

(A) A person *[shall be]***is** disqualified from holding any position in the agency if that person—

1. Has been *[convicted of,]* found *[quilty]***guilty** of~~*[,]*~~ **or** *[pled]***pleaded** guilty to or *nolo contendere*, **including having received a suspended imposition of sentence or suspended execution of sentence**, to any of the following crimes~~*[.]*~~:

A. *[Physical abuse or Class I Neglect of a patient, resident or client]***Abuse or neglect of an individual served as defined in section 630.155, RSMo;** or

B. Furnishing unfit food to *[patients, residents or clients]***an individual served as defined in section 630.160, RSMo[.]**; or

C. **Vulnerable person abuse, as defined in sections 565.210 to 565.214, RSMo.**

2. Is listed on the DMH disqualification registry; or

3. Is listed on the employee disqualification list of the Department of Health and Senior Services or Department of Social Services.

(B) A person who has been *[convicted of,]* found guilty *[to,]* **of or** *[pled]***pleaded** guilty to or *nolo contendere*, **including having received a suspended imposition of sentence or suspended execution of sentence**, to any of the *[following]* crimes **specified in section 630.170.2, RSMo**, *[shall be]* **is** disqualified from holding any position having contact with *[patients, residents or clients]***individuals served** in the agency. **For reference purposes, DMH maintains an updated list of disqualifying crimes under section 630.170, RSMo, at <http://dmh.mo.gov/about/employeeedisqualification/>.** *[The crimes listed below are not disqualifying unless they are felonies, except for failure to report abuse and neglect to the Department of Health and Senior Services, which is a Class A misdemeanor. The disqualifying crimes are:*

1. *First or second degree murder;*
2. *Voluntary manslaughter (includes assistance in self-murder);*
3. *Involuntary manslaughter;*
4. *First or second degree assault;*
5. *Assault while on school property;*
6. *Unlawful endangerment of another;*
7. *First or second degree assault of a law enforcement officer;*
8. *Tampering with a judicial officer;*
9. *Kidnapping;*
10. *Felonious restraint;*
11. *False imprisonment;*
12. *Interference with custody;*
13. *Parental kidnapping;*
14. *Child abduction;*
15. *Elder abuse in the first degree or the second degree;*
16. *Harassment;*

DRAFT for informal comments from providers and other stakeholders (second posting 6-11-18)
Text in *italics* to be deleted; text in **bold** to be added

17. *Stalking;*
18. *Forcible rape;*
19. *First or second degree statutory rape;*
20. *Sexual assault;*
21. *Forcible sodomy;*
22. *First or second degree statutory sodomy;*
23. *First or second degree child molestation;*
24. *Deviate sexual assault;*
25. *First degree sexual misconduct;*
26. *Sexual abuse;*
27. *Endangering the welfare of a child;*
28. *Abuse of a child;*
29. *Robbery in the first degree or second degree;*
30. *Arson in the first or second degree;*
31. *First or second degree pharmacy robbery;*
32. *Incest;*
33. *Causing catastrophe;*
34. *First degree burglary;*
35. *Felony count of invasion of privacy;*
36. *Failure to report abuse and neglect to the Department of Social Services as required under subsection 3 of section 198.070, RSMo; or*
37. *Any equivalent felony offense.]*

1. A person who has been found guilty of or pleaded guilty or nolo contendere, including having received a suspended imposition of sentence or suspended execution of sentence, to a violation of section 577.010, RSMo, or section 577.012, RSMo, and who is alleged and found by the court to be an aggravated or chronic offender under section 577.023, RSMo, is disqualified from holding any position having contact with individuals served in the agency if the person is hired by the agency after January 1, 2014.

COMMENT: *Can you please list the violations for these RSMo sections.*

DMH RESPONSE: DMH maintains a list of violations on its website which will be published in the proposed amendment (8)(A). Violations will not be added to the rule. Future statute changes would make the rule outdated and result in numerous amendments.

(8) Any person disqualified from employment under this rule may request an exception from the DMH Exceptions Committee in accordance with 9 CSR 10-5.210 Exceptions Committee Procedures.

(A) The right to request an exception under this subsection *[shall]* **does** not apply to persons who are disqualified due to being listed on the employee disqualification registry of the Department of Social Services or Department of Health and Senior Services, nor does it apply **under section 630.170.4, RSMo**, to persons who are disqualified due to any *[of the following]* crime*[s:]* pursuant to the provisions of chapter 566 or sections 565.020, 565.021, 568.020, 568.060, 569.025, or 569.070, RSMo. For reference purposes, DMH maintains an updated list of disqualifying crimes not eligible for exception under section 630.170.4, RSMo, at <http://dmh.mo.gov/about/employeeedisqualification/>.

[1. First or second degree murder;

2. *First or second degree statutory rape;*
3. *Sexual assault;*
4. *Forcible sodomy;*
5. *First or second degree statutory sodomy;*
6. *First or second degree child molestation;*
7. *Deviate sexual assault;*
8. *Sexual misconduct involving a child;*
9. *First degree sexual misconduct;*
10. *Sexual abuse;*
11. *Incest;*
12. *Causing catastrophe;*
13. *Abuse of a child;*
14. *First degree pharmacy robbery; or*
15. *Forcible rape.]*

(9) For the purposes of this rule, a verdict of not guilty by reason of insanity (NGRI) is not per se disqualifying. A suspended imposition of sentence (SIS) or suspended execution of sentence (SES) is disqualifying.

(10) *[A provider shall not hire a]***Any** person who has committed a disqualifying crime as identified in section (7) of this rule, unless the person has received an exception from *[the department]***DMH, is not eligible for hire by an agency.** However, the *[provider]***agency** retains the discretionary authority to deny employment to persons who—

- (A) Have committed crimes not identified as disqualifying;
- (B) Have received an exception from the Exceptions Committee; or
- (C) Have received a verdict of Not Guilty by Reason of Insanity.

AUTHORITY: sections 630.170 and 660.317, RSMo Supp. 2003 and 630.655 and 630.710, RSMo 2000. Emergency rule filed Aug. 15, 1997, effective Aug. 28, 1997, expired Feb. 26, 1998. Original rule filed Aug. 15, 1997, effective March 30, 1998. Amended: Filed Oct. 29, 1998, effective May 30, 1999. Amended: Filed Nov. 3, 2003, effective April 30, 2004. Amended: Filed March 29, 2004, effective Sept. 30, 2004. Amended:*

Original authority: 630.170, RSMo 1980, amended 1982, 1996, 1998, 2001, 2003, **2008, 2012, 2013; 630.655, RSMo 1980; 630.710, RSMo 1980, amended 1996, 1998, and 660.317, RSMo 1996, amended 1997, 1998, 2003, 2003.*

*NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or opposition to this proposed rule by writing to Gail Vasterling, General Counsel, Department of Mental Health, P.O. Box 687, 1706 E. Elm Street, Jefferson City, MO 65102. To be considered, comments must be delivered by regular mail, express or overnight mail, in person, or by courier within thirty (30) days after publication in the **Missouri Register**. If to be hand-delivered, comments must be brought to the Department of Mental Health at 1706 E. Elm Street, Jefferson City, Missouri. No public hearing is scheduled.*