



ALAN WILSON
ATTORNEY GENERAL

December 21, 2023

Constance Holloway
Director
South Carolina Department of Disabilities and Special Needs
3440 Harden Street Extension
Columbia, South Carolina 29203

Dear Ms. Holloway:

We received your request for an opinion on behalf of the South Carolina Department of Disabilities and Special Needs (“DDSN”) concerning employee background checks required pursuant to section 44-7-2910 of the South Carolina Code. Specifically, you ask: “first, whether certain DDSN services are subject to the governing statute, and second, under what circumstances are fingerprint-based background checks required.”

Law/Analysis

- A. Are Regional Centers, Adult Activity Centers, Community Training Homes (“CTHs”), Supervised Living Programs-II (“SLP-IIs”), and Intermediate Care Facilities (“ICFs”) direct care entities under section 44-7-2910 of the South Carolina Code and if so, must DDSN therefore require its contracted providers to have their employees undergo criminal background checks?

Section 44-7-2910 of the South Carolina Code (2018) requires criminal record checks for direct caregivers and states as follows:

(A)(1) A direct care entity employing or contracting with a direct caregiver shall conduct a criminal record check as provided in this section prior to employing or contracting with the direct caregiver. A direct care entity may consider all information revealed by a criminal record check as a factor in evaluating a direct caregiver’s application to be employed by or contract with the entity.

(2) An employment agency may not furnish employees to a direct care entity without conducting a criminal record check on each employee. An employee who works in multiple direct care settings must have a criminal record check on file at the location of the employment agency,

the home office of his employer, or at the individual's primary place of employment.

S.C. Code Ann. § 44-7-2910(A). Section 44-7-2910(B)(1) defines “direct care entity” as:

- (a) a nursing home, as defined in Section 44-7-130;
- (b) a daycare facility for adults, as defined in Section 44-7-130;
- (c) a home health agency, as defined in Section 44-69-20;
- (d) a community residential care facility, as defined in Section 44-7-130;
- (e) a residential program operated or contracted for operation by the Department of Mental Health or the Department of Disabilities and Special Needs;
- (f) residential treatment facilities for children and adolescents;
- (g) hospice programs.
- (h) an in-home care provider, as defined in Section 44-70-20(3).

Initially, we note the Legislature does not explicitly exempt DDSN entities from this provision. To the contrary, the Legislature references DDSN operated facilities in section 44-7-2910(B)(1). Therefore, we presume section 44-7-2910 is applicable to DDSN entities assuming they are “direct care entities.” In your letter, you ask whether Regional Centers, Adult Activity Centers, CTHs, SLP-IIs, SLP-Is, and Intermediate Care Facilities fall within the definition of “direct care entities” for purposes of section 44-7-2910. Whether or not these particular entities are direct care entities pursuant to this definition involves questions of fact. As we stated in numerous prior opinions, this Office does not have the jurisdiction of a court to determine questions of fact. Op. Att’y Gen., 2023 WL 6550940 (S.C.A.G. Oct. 3, 2023). Nonetheless, we will try to provide guidance based on the information you provided to us.

First, in regard to Regional Centers, it is our understanding that DDSN operates four Regional Centers. S.C. Code Ann. § 44-20-360 (2018). According to DDSN’s website, individuals with disabilities live at these centers and are cared for by DDSN staff. (DDSN website, *available at* <https://ddsn.sc.gov/ddsn-divisions>). Section 44-7-2910(B)(e) includes residential programs operated by DDSN as “direct care entities.” Therefore, we believe these regional centers are likely direct care entities for purposes of this statute.

Next, you inquire about Adult Activity Centers, which you describe as “goal-oriented programs of ‘developmental, prevocational services designed to develop, maintain, increase or maximize an individual’s functioning in activities of daily living, physical growth, emotional stability, socialization, communication and vocational skills.’” (citing S.C. Code Reg. § 88-405(A)). Looking at the types of entities included as direct care entities under section 44-7-2910(B), we note this list includes day care facilities as defined in section 44-7-130 of the South Carolina Code (Supp. 2022). Section 44-7-130(9) defines “daycare facility for adults” as

a facility for adults eighteen years or older that:

(a) offers in a group setting a program of individual and group activities and therapies;

(b) is directed toward providing community-based care for those in need of a supportive setting for less than twenty-four hours a day, in order to prevent unnecessary institutionalization; and

(c) provides a minimum of four and a maximum of fourteen hours of operation a day.

We do not have all the facts to determine if an Adult Activity Center meets this definition. However, as you describe them, Adult Activity Centers offer individual and group activities and therapies. But you would need to consider whether these facilities provide community-based care for less than twenty-four hours a day to prevent unnecessary institutionalization and whether they operate between four and fourteen hours a day to determine if they are an adult daycare facility pursuant to section 44-7-2910(B)(1)(b) making them a direct care entity for purposes of section 44-7-2910(A)(1).

As for CTHs, you described them as allowing individuals “to ‘live in a homelike environment under the supervision of [a] qualified and trained staff’ of caregivers comprised either of ‘trained private citizens who provide care in their own homes’ or ‘service provider employees caring for individuals in a home operated by the provider agency.’” (quoting the DDSN webpage, *available at <https://ddsn.sc.gov/services/overview-ddsn-services>*). Section 44-7-2910(B)(1)(c) includes “a home health agency, as defined in Section 44-69-20” as a “direct care entity.” Section 44-69-20(4) of the South Carolina Code (2018) defines “home health agency” as a “public, nonprofit, or proprietary organization, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services.” Home health services are defined by section 44-66-20(5) of the South Carolina Code (Supp. 2022) as follows:

(5) “Home health services” shall mean those items and services furnished to an individual by a home health agency, or by others under arrangement with the home health agency, on a visiting basis, and except for subsection “e” below, in a place of temporary or permanent residence used as the individual’s home as follows:

(a) Part-time or intermittent skilled nursing care as ordered by a physician, an APRN pursuant to Section 40-33-34(D)(2)(h), or a PA pursuant to Section 40-47-935(B)(8) and as provided by or under the supervision of a registered nurse and at least one other service listed below;

(b) Physical, occupational or speech therapy;

(c) Medical social services, home health aide services and other therapeutic services;

(d) Medical supplies and the use of medical appliances;

(e) Any of the foregoing items and services which are provided on an outpatient basis under arrangements made by the home health agency with a hospital, nursing care facility, or rehabilitation center and the furnishing of which involves the use of equipment of such a nature that the items and services cannot be readily made available to the individual in his home, or which are furnished at such facility while the patient is there to receive such items or service, but not including transportation of the individual in connection with any such items or services.

We are not aware of exactly what types of services either the private citizens or the service provider employees are offering but should these services amount to home health services as defined under section 44-66-20(5), CTHs may be considered “home health agencies” under section 44-69-20(4) and therefore direct care entities under section 44-7-2910. In addition, section 44-7-2910(B)(1)(e) includes “a residential program operated or contracted for operation by the Department of Mental Health of the Department of Disabilities and Special Needs” in the definition of a “direct care entity.” Therefore, a court could find the care received by individuals from services provided by employees in a home operated a provider agency fall within the section 44-7-2910(B)(1)(e) definition of a “direct care entity.”

In regard to SLP-IIs, you state they “are typically offered in an apartment setting that has staff available on-site or in a location from which they may get to the site within fifteen minutes of being called, twenty-four hours daily.” You informed us that SLP-Is “are offered an apartment or house setting and staff is available twenty-four hours daily.” You describe ICFs as “residences for individuals ‘needing maximum support for their high levels of need,’ and these facilities include ‘24-hour care, supervision, training, recreation, and other activities’ in a structured environment.” (quoting the DDSN webpage, *available at* <https://ddsn.sc.gov/ddsn-divisions/intellectual-disability-and-related-disabilities/residential-habilitation-services>). Again, SLP-IIs, SLP-Is, and ICFs may fall under section 44-7-2910(B)(1)(e)’s definition of a direct care entity because they appear to be a residential program operated by DDSN, but a court must consider all of the facts before making such a determination.

In addition to inquiring as to the status of these entities as direct care entities, you also ask if they are direct care entities, whether DDSN must require the employees of its contract providers to undergo background checks. Section 44-7-2910(A)(1), as cited above, specifically requires direct care entities employing or contracting with a direct caregiver to conduct criminal records checks prior to employing the employee or contractor. Therefore, if a court were to find any of these entities are direct care entities, we believe section 44-7-2910(A)(1) requires that entity to

conduct a criminal record check for any direct caregivers (as defined in section 44-7-2910(B)(2)) it employs or contracts with.

B. Are fingerprint-based background checks required for both state background checks and federal background checks or is a name-based search for state background checks sufficient to meet the state requirements?

Section 44-7-2910(A)(1) requires a “criminal background check” of direct caregivers employed by or contracting with a direct care entity. Section 44-7-2910(C)(1) requires the direct care entity to conduct a state criminal record check if the direct care entity can verify the applicant has resided in South Carolina during the twelve months preceding the date of the employment application. If residency cannot be verified, the direct care entity is required to “conduct a state criminal record check on the applicant prior to employment and shall commence a federal criminal record check after employment” or if the direct care entity can verify residency in another state for the preceding twelve months, it can conduct “only a state criminal record check in the applicant’s resident state or jurisdiction where the applicant previously resided.” S.C. Code Ann. § 44-7-2910(C)(2). Section 44-7-2910 does not express what is involved in conducting a criminal record check at either the state or federal level and whether it must include a fingerprint-based background check or if a name-based search is sufficient. However, section 44-7-2920 of the South Carolina Code (2018), contained in the same article as section 44-7-2910, states:

Criminal record checks required pursuant to this article must be conducted by the State Law Enforcement Division or by a private business, organization, or association which conducts background checks if that entity utilizes current criminal records obtained from the State Law Enforcement Division or the Federal Bureau of Investigation to determine any criminal record. An applicant shall submit with the application one complete set of the applicant’s fingerprints on forms specified or furnished by the State Law Enforcement Division. Fingerprint cards submitted to the State Law Enforcement Division pursuant to this section must be used to facilitate a national criminal records check, as required by this section. The criminal record check is not required to be repeated as long as the person remains employed by or continues to contract with a direct care entity; however, if a person is not employed by or is not under contract for one year or longer with a direct care entity, the criminal record check must be repeated before resuming employment or contracting with a direct care entity. The fee charged by the Federal Bureau of Investigation, if any, for the fingerprint review must be paid by the individual direct caregiver or the direct care entity.

S.C. Code Ann. § 44-7-2920 (emphasis added). According to this provision, direct caregivers employed by or contracted with direct care entities are required to submit a set of fingerprints and the direct care entity is required to submit those fingerprints to the State Law Enforcement Division or another authorized entity to facilitate a national criminal records check. As such, we believe a

fingerprint-based background check is required to meet the statutory requirements for background checks pursuant to section 44-7-2910.

Conclusion

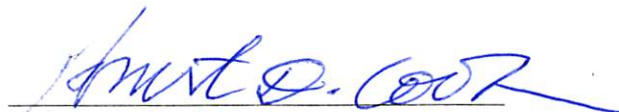
Section 44-7-2910 of the South Carolina Code requires direct care entities to conduct criminal record checks of direct caregivers prior to employing or contracting with them. We do not find evidence of the Legislature's intent to exclude DDSN entities from this provision and therefore we believe it could apply to DDSN entities. However, whether certain DDSN entities including Regional Centers, Adult Activity Centers, CTHs, SLP-IIs, SLP-Is, and ICFs qualify as direct care entities for purposes of this provision is a factual question that ultimately must be determined by a court. Nevertheless, we believe each of these entities has some characteristics that may qualify them as direct care entities under the definition provided in section 44-7-2910(B)(1). Furthermore, if a court were to determine these entities are direct care entities under section 44-7-2910, then we believe DDSN contracted providers must conduct background checks of employees who are considered direct caregivers under this provision. Section 44-7-2920 of the South Carolina Code requires SLED or a qualified private business conduct the criminal record check and mandates the applicant submit a complete set of their fingerprints "to facilitate a national criminal records check" As such, we believe a fingerprint-based background check is required for direct caregivers identified under section 44-7-2910.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General