



Office of Children and Family Services

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Local Commissioners Memorandum

Transmittal:	21-OCFS-LCM-13
To:	Local Departments of Social Services Commissioners, Attorneys, and Legal Staff
Issuing Division/Office:	Division of Child Welfare and Community Services Division of Legal Affairs
Date:	June 4, 2021
Subject:	Relevant and Reasonably Related to Employment Determinations at Administrative Hearings Conducted Under §424-a of the Social Services Law
Contact Person(s):	Chief Administrative Law Judge Steven Connolly, Bureau of Special Hearings, Division of Legal Affairs – steve.connolly@ocfs.ny.gov Senior Director Cassandra Kelleher-Donnaruma, Office of Implementation, Community Affairs and Protective Practices, Division of Child Welfare and Community Service – cassandra.kelleher@ocfs.ny.gov

I. Purpose

This Local Commissioners Memorandum (LCM) provides an update regarding

- a. changes to the New York State Office of Children and Family Services’ (OCFS) process for conducting *administrative hearings* (also known as fair hearings) regarding indicated reports of child abuse or maltreatment (indicated reports) following a database check by the New York Statewide Central Register of Child Abuse and Maltreatment (SCR) pursuant to Social Services Law (SSL) §424-a (SCR database check); and
- b. greater clarification about the opportunity for local departments of social services (LDSSs) to submit additional evidence for consideration at *administrative hearings* (also known as fair hearings) conducted pursuant to SSL §424-a regarding whether an indicated report is “relevant and reasonably related” (R&R)

to the subject of the report's (subject's) prospective or continued licensure or employment working with children or vulnerable individuals.

A review to determine whether an indicated report is "relevant and reasonably related to employment" (*R&R review*) is conducted during an administrative appeal. The term "administrative appeal" refers to the process whereby a subject of a report may challenge the determination by the LDSS that they committed child abuse or maltreatment. An administrative appeal will consist of an *administrative review* and, if applicable, an *administrative hearing*. An *R&R review* will determine, as part of the administrative appeals process, whether the existence of an indicated report may be disclosed as part of an SCR database check.

OCFS will begin conducting *R&R reviews* at *administrative hearings* held pursuant to SSL §424-a in instances where the indicated report is determined to be R&R at the *administrative review* and where the referral to the OCFS Bureau of Special Hearings (BSH) for the *administrative hearing* is made on or after June 1, 2021.

II. Background

SCR Database Checks, R&R Reviews, and Potential Impact on Employment or Licensure

SSL §424-a authorizes specified licensing or provider agencies to request that the SCR conduct a database check to determine whether an indicated report exists for a current or prospective employee or licensee. The existence of an indicated report may impact a decision of an employer or licensing agency to retain or offer employment or licensure to a subject.

Pursuant to SSL §§422 and 424-a, the existence of indicated reports that are deemed "not relevant and reasonably related to employment" (*not R&R*) cannot be disclosed to a licensing or provider agency in an SCR database check. However, reports that are deemed *not R&R* are not automatically expunged and continue to be classified as indicated reports by the SCR.

Administrative Appeals

SSL §§422 and 424-a contain different provisions affording subjects the right to request an administrative appeal to OCFS to challenge a determination by the LDSS that they committed child abuse or maltreatment.

1. Appeals Pursuant to SSL §422

Pursuant to SSL §422, the subject has the right to request an administrative appeal within 90 days of the indication of the report. A subject may also request an appeal pursuant to SSL §422 outside the 90-day time frame, upon asserting, in writing, that they had not received the "notice of indication" letter from the LDSS.

2. Appeals Pursuant to SSL §424-a

A subject may have a right to an administrative appeal to challenge an indicated report, if the existence of such report could be disclosed to a licensing or provider

agency as part of an SCR database check and an administrative appeal pursuant to SSL §422 was not previously completed for the same report.

3. Concurrent Requests Pursuant to Both SSL §422 and 424-a

In some instances, a request for an appeal pursuant to both SSL §§422 and 424-a may occur concurrently, resulting in one appeal pursuant to both statutory provisions.

Two Steps in the Administrative Appeals Process

The administrative appeals process consists of two distinct steps, which are both conducted by OCFS staff:

- an *administrative review* and
- an *administrative hearing*

Administrative Review

An *administrative review* is an analysis of the evidence submitted by the LDSS and the subject, to determine whether the LDSS met its burden of a fair preponderance of the evidence to support the determination to indicate the report of alleged child abuse or maltreatment. An *administrative review* is determined solely on the records received. There is no testimony by the parties.

If at *administrative review* it is determined that the LDSS did *not* have a fair preponderance of the evidence to establish that the alleged abuse or maltreatment occurred, then the allegations will be unsubstantiated, and the report will be unfounded. The existence of unfounded reports cannot be disclosed in a SCR database clearance.

If at *administrative review* it is determined that the LDSS *did* have a fair preponderance of the evidence to establish that the alleged child abuse or maltreatment occurred, then the allegations are substantiated, and the report is retained. Retained reports remain indicated. If the report is retained, an *R&R review* is also conducted during the *administrative review* to determine whether the existence of the indicated report may be disclosed as part of a SCR database check.

Administrative Hearing

An *administrative hearing* is a proceeding before an administrative law judge, whereby records and testimony entered into evidence by the LDSS or the subject may be considered to determine whether the LDSS had a fair preponderance of the evidence to support the decision to indicate the report of alleged child abuse or maltreatment. The LDSS has the burden of proof for establishing this at the *administrative hearing*.

Historically, SSL §§ 422 and 424-a have contained different requirements for conducting *R&R reviews* at *administrative hearings*. As a result *R&R reviews* were *not* held during *administrative hearings* conducted *exclusively* pursuant to SSL § 424-a, but were conducted in all other *administrative* hearings challenging indicated reports of child abuse or maltreatment where the report was retained and determined to be R&R at *administrative review*.

SCR Reform Legislation

Effective January 1, 2022, Part R of Chapter 56 of the Laws of 2021 (“SCR reform legislation”), will, among other things, make important changes regarding which indicated reports of child abuse or maltreatment are deemed to be *not* R&R. The existence of indicated reports that have been deemed *not* R&R cannot be disclosed during an SCR database check. However, all indicated reports deemed *not* R&R will remain indicated, unless they are overturned or expunged through some other manner authorized by law.

SCR reform legislation will require *R&R reviews* to be conducted during ***all administrative hearings*** challenging indicated reports of child abuse or maltreatment determined to be R&R during *administrative review* commenced pursuant SSL §§422 and 424-a.

III. Program Implications

OCFS will begin conducting *R&R reviews* at *administrative hearings* under SSL §424-a where the report was retained and determined to be R&R at *administrative review* and where the referral to the BSH for the *administrative hearing* is made on or after June 1, 2021.

The factors OCFS utilizes at an R&R review to determine whether a subject’s conduct is relevant and reasonably related to employment, are as follows:

- Extent or nature of the injury to the child
- Harmful effect on the child
- Events or circumstances surrounding what the subject did or did not do
- Subject’s and child’s age when the incident happened
- How much time has passed since the subject’s last CPS report
- Number of indicated reports the subject has
- If the allegations are related to a very serious injury or sexual abuse
- The act only occurred once
- Subject would respond differently if the same incident happened again
- Subject successfully participated in counseling, treatment, or a self-help group
- Since the report was indicated, the subject demonstrated success working in childcare

As the *R&R review* may impact a decision regarding continued or potential employment or licensure in fields working with children or vulnerable individuals, OCFS continues to

strongly encourage LDSSs and appellants to submit any pertinent information regarding the factors listed above for consideration in all administrative appeals.

IV. Subsequent Guidance

Relevant to but distinct from the topic covered by this guidance document, effective January 1, 2022, SCR reform legislation will also do the following:

1. Change the standard of evidence that child protective services (CPS) must utilize in determining whether to indicate a report of suspected child abuse or maltreatment from “some credible evidence” to “a fair preponderance of the evidence.”
 - This change does not impact the standard of evidence utilized in administrative appeals, which is “a fair preponderance of the evidence.”
2. Automatically deem indicated reports of child *maltreatment not* R&R eight years following the date the report was indicated.
 - This change *does not apply to reports indicated for abuse.*
3. Create new procedures for administrative appeals where there has been a petition filed under Article 10 of the Family Court Act for the same allegations contained in the indicated report that is being administratively appealed.

Separate guidance from OCFS on these three components of SCR reform legislation will be released prior to their effective date.

If you have any questions concerning this guidance, please contact Senior Director Cassandra Kelleher-Donnaruma, Office of Implementation, Community Affairs and Protective Practices at Cassandra.kelleher@ocfs.ny.gov or email AdministrativeAppealsQuestions@ocfs.ny.gov, or contact your appropriate OCFS regional office.

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