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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 86

[Docket ID: DOD-2014-OS-0009]

RIN 0790-AJ19

Background Checks on Individuals in DoD Child Care Services Programs

AGENCY: Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule.

SUMMARY: This rule establishes and updates policy, assigns responsibilities, and provides procedures to conduct criminal history checks on individuals involved in the provision of child care services for children under the age of 18 in DoD programs. The Crime Control Act of 1990 (Act) requires all individuals involved with the provision of child care services to children under the age of 18 undergo a criminal background check. “Child care services” include, but are not limited to, social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), and rehabilitative programs. Any conviction for a sex crime, an offense involving a child victim, or a drug felony, may be grounds for denying employment or for dismissal of an employee providing any of the services discussed above.

DATES: This rule is effective [insert date 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Karen Morgan, 571-372-0859.

SUPPLEMENTARY INFORMATION:

EXECUTIVE SUMMARY

The purpose of this regulatory action is to describe requirements for criminal history background checks, including reinvestigation, and self-reporting, for individuals involved with the provision of child care services.

The legal authorities for this rule include: 5 U.S.C. 2105, 10 U.S.C. chapter 47, 42 U.S.C. 13041.

The major provisions of this regulatory action include providing procedures for requirements for criminal history background checks listing the types of background checks, and descriptions of reinvestigation and self-reporting.

This rule is intended to support the workforce mission of the DoD and implement current law that covers individuals expected to have regular contact with children in the performance of child care services on a DoD installation or DoD-sanctioned program. The estimated costs of the rule are \$10 million annually. This cost includes administration costs; required FBI fingerprint Investigations Child Care National Agency Check and Inquiries checks (\$125/NACI); State Criminal History Repository checks (\$25/each state the individual resided in); and periodic reinvestigations. We do not believe that this rule will impose substantial direct costs on state and local governments.

This rule is part of DoD's retrospective plan, completed in August 2011, under Executive Order 13563, "Improving Regulation and Regulatory Review." DoD's full plan and updates can be accessed at:

<http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+O+SR;rpp=10;po=0;D=DOD-2011-OS-0036>.

PUBLIC COMMENTS

The Department of Defense published a proposed rule in the Federal Register on October 1, 2014 (79 FR 59168-59173) for a 60-day public comment period. We received 22 comments. Five comments expressed support for the rule and no response is required. One comment was withdrawn. The remaining comments are listed below.

Comment ID DOD-2014-OS-0009-0003:

- The law still states that any conviction for a sex crime, an offense involving a child victim, or a drug felony, may be grounds for denying employment or for dismissal of an employee. Public Law 101-647. The word may give too much flexibility in the decision making process to hiring agents in determining what to do with results of the background check. The review board may either bar employment based on the offenses listed out in the statute or excuse the background check results. Agency processes should spell out more specifically which offenses are bars and which are not.

Response: The commenter has referenced the summary paragraph at the beginning of the rule, which is not the rule itself. Please see §86.6(c) for specific criteria for automatic and presumptive disqualifiers, which does not use the term, “may.”

- It is imperative that a thorough review, investigation and study of different systems for background checks is completed on each organization interacting with children.

Response: This rule/policy was developed in collaboration with the Military Services, which are responsible for providing detailed procedures that meet the overall DoD requirements in this rule to ensure the rule/policy is implemented correctly.

Comment ID DOD-2014-OS-0009-0004:

- This rule includes all current employees, contractors and specific volunteers, in addition to future applicants, which is bound to create a backlog for which no solution is presented, at least in the current rule.

Response: This rule does not create a new system. It updates existing policy for background checks.

- This rule addresses foreign nationals in a way that could be ambiguous in its application. The definition describes a foreign national as not a citizen of the United States. This encompasses a fair amount of specific volunteers, especially in the religious ministries at overseas DoD facilities. These volunteers, innocent of any criminal wrong doing, may not fall under host country agreements and therefore be unable to continue their work. This would be an unfair outcome for those individuals and the organizations that rely on an already limited pool of volunteers. A similar outcome is possible for those foreign nationals who are military members or spouses who are not yet U.S. citizens that reside in the U.S. and work on DoD facilities.

Response: There are policies and procedures in place to ensure foreign nationals receive appropriate background checks or work under line-of-sight supervision (LOSS) in order to continue their work.

- The rule seems to exclude subcontractors from its application. This may be due to the potential increased burden on first line contractors to ensure all its subs are in compliance. This is frankly unacceptable as a lot of what occurs on DoD facilities, especially overseas, is accomplished by subcontractors.

Response: The exclusion of subcontractors has been deleted from the definition of contractors.

Comment ID DOD-2014-OS-0009-0005: I'm confused by the language in §86.6(b), which references "(a)(6)(i)" and "(a)(6)(ix)" as being "in this section." I can't find the quoted section. This may be my error, or perhaps it is a clerical oversight.

Response: The reference should be (a)(5)(i) and (a)(5)(ix). Section 86.6(b) has been updated with the accurate reference.

Comment ID DOD-2014-OS-0009-0006: Why limit the background checks to individuals with "regular contact with children?" The definition of "regular contact with children" excludes those with access to children. The narrow reach of the proposed rule seems to leave out serious threats. Limited resources could be to blame.

Response: It is beyond the scope of DoD to conduct a background check on any individual who has access to children. This rule/policy is intended to ensure appropriate checks of those who work in DoD-sanctioned child care services programs.

Comment ID DOD-2014-OS-0009-0007: Absent documented statistical research to the contrary, the Department of Defense has not established that individuals who are convicted drug felons are any more likely to threaten a child's safety than any other citizen of the United States. Please modify the proposed rule to omit the class "persons with a drug felony" from the screening process for federal jobs within the Department of Defense that serve children under the age of 18.

Response: Inclusion of a "felony conviction of a drug offense" as an automatic disqualifier was based on careful and objective analysis regarding how to protect children in DoD child care services programs. A felony conviction of a drug offense could adversely impact the integrity of the position and the safety and well-being of children in DoD care.

Comment ID DOD-2014-OS-0009-0008:

- Costs: \$10 million annually is a large amount of money. How crucial are each of the checks and investigations and how necessary is it for reinvestigations to take place every 5 years if the surfacing of derogatory information will trigger a reinvestigation anyways? I like Executive Orders 13563, and it seems to address these questions, however it states that it is not economically significant, which makes me wonder whether alternatives ways to regulate and minimize costs are properly being explored and examined. The price of each component, for example video surveillances or conspicuous marking, should be strictly scrutinized. What other programs is the use of this money being indirectly taken away from? Additionally, what process will determine that the state and local governments will not be substantially affected financially and what does substantial mean? It is great that employers and a substantial number of small entities will not be significantly impacted under the Unfunded Mandates Reform Act and the Regulatory Flexibility Act, but how far do the costs extend to government contracts and employees within the state?

Response: The requirements for the initial checks and regular 5 year reinvestigations are crucial to ensuring protection of children in DoD child care services programs. As background check systems are updated to report derogatory information more immediately, this rule/policy may be updated to revise the every 5 year requirement. The costs of the investigations are borne by the DoD, and not by the individual or his or her employer or the State. This policy update does not and cannot mandate that State, local, and tribal governments adopt new, unfunded regulatory obligations.

- Privacy and Relevancy: Those in charge of the background checks are about to look at any other available information that is relevant (listed under Adjudication). I fear that some may abuse this and unfairly use information that is not so relevant against an applicant.

Response: Adjudicators are trained to appropriately assess information received as part of a background checks in accordance with law and policy. Individuals who abuse their access to information are not operating in accordance with laws, regulations and policies.

- Categorizing Care Provider, Providers, and Personnel performing duties in athletic programs: The definitions for these types of jobs can easily be stretched to many things (for example, could babysitting under certain circumstances count?). Child care or youth activities could mean so many things that do not necessarily require these extensive checks. My obvious hesitancy expressed in these comments and questions comes from my concern for costs for this rule as well as unfair burdens placed on individuals that may have a poor history, but a history that is unrelated to the wrongdoings that their guilt from these tests would be impliedly accusing them of, or a history that is simply in the past and different from their present state (for example a minor criminal record or drug use that has been overcome). It is honorable to aim to protect our children, but it is also important to protect our citizens and employees who are trying to live happy lives and contribute to the economy in the best ways that they can.

Response: The categories of individuals who require a criminal history background check, which includes all individuals who have regular contact with children under 18 years of age in DoD-sanctioned child care services programs, was established in accordance with Public Law 101-647 in order to protect the health and well-being of children in such programs. The costs of the specific investigations required pursuant to this rule have been budgeted and are borne by the Department of Defense and not by the individual or his or her employer or the state.

- Lastly, it concerns me that the DoD Components will evaluate the disqualifications AND ALSO oversee procedures for the appeal of unfavorable determinations. This system has the potential to be unjust.

Response: There is an appeals process that individuals can pursue should they feel they have been treated unjustly. The DoD Components will establish and oversee procedures for the appeal of unfavorable determinations for all categories of individuals. The procedures for civilian personnel are subject to Volume 731 of DoDI 1400.25, DoD Civilian Personnel Management System.

Comment ID DOD-2014-OS-0009-0009: Under §86.4(c), not only individuals who have current DoD affiliation but also individuals who have prior DoD affiliation must undergo an IRC. I am curious why this would be necessary. If a person no longer has an affiliation with the DoD and is not going to have contact with the DoD child care service, why go through the trouble of checking all those individuals with prior affiliation?

Response: Section 86.4(a) has been modified to include this requirement so that it is clear the IRC is only conducted if the individual (who has a prior DoD affiliation) is undergoing a background check because he/she will have regular contact with children in DoD child care services programs.

Comment ID DOD-2014-OS-0009-0010:

- Section 86.4 Policy does not contain any actual policy as to why these rules are being proposed. It would be helpful if the section included something pertaining to the importance of the protection of children from known child abusers, drug users etc. A specific policy will help when looking at what is important in conducting a background check (in example, a person with a former addiction who has undergone rehabilitation who has had no adverse contact with children.) Also, the policy will help the DoD in defending any appeals from potential employees who were denied employment.

Response: Section 86.4 has been updated with additional language indicating why the rule is being promulgated.

- A required amount of employment for a LOSS supervisor as an extra safeguard will also help promote the policy of the proposed rules.

Response: The role of the LOSS supervisor is to ensure that an individual who does not yet have a completed background check remains in the line of sight of another individual who does have a completed background check. The LOSS supervisor is not necessarily supervising the performance of the other individual; the LOSS supervisor is only ensuring that individual is not left alone with children.

Comment ID DOD-2014-OS-0009-0011: It seems as though we should require the caregivers themselves to pay for the background checks. It is not uncommon for employers to require employees to pay the costs associated with licensing or certifications.

Response: Background checks should not be compared to elective licenses and certifications. The costs of the specific investigations required pursuant to this Rule have been budgeted and are borne by the Department of Defense and not by the individual or his or her employer or the state. By law, background checks are required for federal agencies that hire or contract for hire in the provision of care to children under the age of 18. Per this Rule, Office of Personnel Management (OPM) is the only authorized Investigative Service Provider (ISP) that the Military Service Components may use for background investigations. Contracted support must meet the intent of this Rule, DoD policy and the law.

Comment ID DOD-2014-OS-0009-0012:

- Video surveillance violates a person’s “expectation of privacy.” It should be re-written to comply with the 5th Amendment. The procedure may be ruled unconstitutional as it currently stands.

Response: Signage and monitors are placed in highly visible entryways and foyers and inform individuals that video surveillance is being conducted. Video surveillance events occurring in public space for which individuals do not have reasonable expectations of privacy. Video surveillance does not intrude upon an individual’s sphere of privacy; the use of video surveillance equipment (in designated programs) supports the law’s intent for Line of Sight Supervision (LOSS) for individuals whose background checks have been initiated but not completed. Surveillance equipment is also used by staff trainers and managers as a training aid for staff observations and coaching.

- Procedures: Requirements for Criminal background checks. Foreign government background checks for employees working overseas has a 5th Amendment issue. How is an overseas employee challenge the validity of a foreign background check? There may be procedural and language barriers that prevent a fair opportunity to exonerate oneself.

Response: The current rule provides basic guidance regarding background checks for foreign nationals as they relate to DoD child care services programs. See DoD Instruction 5200.46 for more detailed guidance on procedures for foreign nationals.

Comment ID DOD-2014-OS-0009-00015: Of course children of any parentage should be protected from criminals and potential harm via their caretakers; however this cost will most likely be substantial. Please consider you taxpayers when making these choices that can seem frivolous at times.

Response: The costs of the investigations are borne by the DoD, and not by the individual or his or her employer or the State. When contracting for services, the contract must ensure it meets the intent of this Rule and the Crime Control Act of 1990. This Rule is a top priority for DoD to ensure the safety and well-being of all children in DoD child care services programs. By law, background checks are required for federal agencies that hire, contract for hire or use volunteers for the provision of care to children under the age of 18.

Comment ID DOD-2014-OS-0009-00016: The Unfunded Mandates Reform Act states there will be no additional financial expenditures required from the individual or employer while the regulatory act acknowledges potential indirect costs to small entities. If this proposed rule is passed, it would be beneficial to clearly outline what constitutes a small entity, what course of action, if any, can they take to avoid costs, and what kind of notice will they have if they are affected by this rule. When it comes to implementing the rule, if passed, there needs to be guidelines for how businesses that may incur costs can go about managing the financial change comfortably. As a DoD organization, can these small entities expect to qualify for additional funds to offset these costs (costs unspecified at this moment)? If this rule is passed, it should clearly state what the dollar figure will be, and a definite yes or no about eligibility of offsetting the expenses via government funds. If the proposed rule is passed, how immediate will the new procedures effect these small entities? The rule should be altered to include the time frame for implementing the policy and allow organizations to communicate if they need additional accommodations to be effective in its implementation.

Response: DoD has certified that this rule would not have a significant economic impact on a

substantial number of small entities because the costs for the investigation conducted pursuant to this rule are borne by the DoD, and not by the individual or his or her employer. Furthermore, any indirect costs incurred by small businesses as a result of this rule would be minimal.

Comment ID DOD-2014-OS-0009-00017: Not all agencies within individual states make their records available to commercial databases, nor does the FBI make its federal or state criminal records available to commercial services. In addition, the information in commercial databases may only be updated occasionally. Some states have databases that have not been updated to determine if the individual has any arrest history, therefore when a background check is being completed on a federal level, the record may not be current, and in turn, invalid information will be received on that individual. Most states allow criminals who have paid their dues, to erase their criminal records. Currently, 12 states expunge first-time criminal offenses after ex-convicts demonstrate a law-abiding lifestyle for 10 years.

Response: The rule requires multiple levels of investigation in order to ensure the most accurate information possible is captured during the investigation process. The DoD uses various data sources from federal, state and local authorities to obtain information on background investigations, credentialing, suitability determination and security clearances. The primary investigations include the Child Care National Agency Check and Inquiries; the FBI Identification Records check; the State Criminal History Repository Check; the state sex offender registry; the child abuse registry and an Installations Records Check (IRC Derogatory information is identified through this multi-tier investigative process). The Department remains committed in its efforts to ensure those who work with children meet the highest standards of conduct.

Comment ID DOD-2014-OS-0009-00018:

- Will background checks be conducted on the current staff on hand first? Will there be a set time frame to complete the background check? For example, each person attempting to gain employment has a 4-6 month waiting period, prior to a hire date? I know firsthand that some background checks can take a very long time ranging from 4 months to 12 months depending on the individual and their circumstances.

Response: This rule does not create a new system. It updates existing policy for background checks. The provision to work under LOSS allows DoD to employ individuals while the background checks are being completed.

- Has the DoD considered how criminal histories are not always current or may have mistakes? A person may have committed a crime, even serious in nature, but the individual may take a plea, and with 12 months good behavior it may be expunged from their record. Are there any plans or a step to assist with this process? Has the DoD considered using public website searches to assist with this process such as Facebook, Instagram, YouTube, Twitter, etc. to gain more information on that particular individual? Using open source information may quickly display a person behaviors, likes, dislikes, etc., is a cheaper option, and may take only ten minutes depending on what the DoD discovers.

Response: DoD requirements outlined in this rule make use of available legal sources of investigative information to make determinations about individuals' suitability for employment in DoD child care services programs.

Comment ID DOD-2014-OS-0009-00022: I am in support of this proposed rule, but to accomplish greater safeguarding of children as intended, subcontractors should not be excluded as stated. DoD contracts are typically performed by subcontractors who actually perform work around the children, not the prime contractors.

Response: The exclusion of subcontractors has been deleted from the definition of contractors.

Comment ID DOD-2014-OS-0009-00024: The comment urges the DoD to update requirements for criminal background checks on individuals in DoD child care services programs in § 86.5, Responsibilities to align with the provisions recently enacted by the Child Care and Development Block Grant Act of 2014.

Response: We have carefully reviewed the requirements of the proposed rule and the requirements set forth in Public Law 113-186, the Child Care and Development Block Grant Act of 2014. This rule meets or exceeds the requirements of the Child Care and Development Block Grant Act of 2014. We have determined that, while the language of the rule differs slightly from the language of Public Law 113-186, the databases searched yield the same information.

REGULATORY ANALYSIS

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review” direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule has been determined to be a significant regulatory action, although not economically significant, under section 3(f) of Executive Order 12866.

Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”

DoD has reviewed the rule in accordance with the Unfunded Mandates Reform Act of 1995, and compliance with the rule would require no additional expenditures by either public or private

employers. In sum, the final rule does not mandate that State, local, and tribal governments adopt new, unfunded regulatory obligations. The costs of the investigations conducted pursuant to this rule are borne by the DoD, and not by the individual or his or her employer.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

We certify this rule would not have a significant economic impact on a substantial number of small entities because the costs for the investigation conducted pursuant to this rule are borne by the DoD, and not by the individual or his or her employer. Furthermore, any indirect costs incurred by small businesses as a result of this rule would be minimal. Accordingly, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

This rule imposes reporting and record keeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by the Office of Management and Budget and assigned OMB Control Number 3206-0005, “Questionnaires for National Security Positions, Standard Form 86 (SF 86),” OMB Control Number 3206-0261, “SF 85 Questionnaire for Non-Sensitive Positions,” OMB Control Number 3206-0191, “SF 85P Questionnaire for Public Trust Positions,” and OMB Control Number 0704-0516, “Child Care Development Program (CDP) Criminal History.”

Executive Order 13132, “Federalism”

This rulemaking was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). It has been determined that it does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This rulemaking has no substantial effect on the States, or on the current Federal-State relationship, or on the current distribution of power and responsibilities among the various local

officials. Nothing in this document preempts any State law or regulation. Therefore, DoD did not consult with State and local officials because it was not necessary.

List of Subjects in 32 CFR Part 86

Government contracts, Government employees, Infants and children, Investigations.

Accordingly, 32 CFR part 86 is revised to read as follows:

PART 86-BACKGROUND CHECKS ON INDIVIDUALS IN DOD CHILD CARE SERVICES PROGRAMS

Secs.

86.1 Purpose.

86.2 Applicability.

86.3 Definitions.

86.4 Policy.

86.5 Responsibilities.

86.6 Procedures.

Authority: 5 U.S.C. 2105, 10 U.S.C. chapter 47, and 42 U.S.C. 13041.

§86.1 Purpose.

This part establishes policy, assigns responsibilities, and provides procedures to conduct criminal history checks on individuals involved in the provision of child care services for children under the age of 18 in DoD programs.

§86.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD

Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

§86.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

Adjudication. The evaluation of pertinent data in a background investigation, as well as any other available information that is relevant and reliable, to determine whether an individual is suitable for work.

Adult. An individual 18 years of age or older regarded in the eyes of the law as being able to manage his or her own affairs.

Applicant. A person upon whom a criminal history background check is, will be, or has been conducted, including individuals who have been selected or are being considered for a position subject to a criminal history background check, and individuals undergoing a recurring criminal history background check. Includes current employees.

Child. A person under 18 years of age.

Care provider. Current or prospective individuals hired with appropriated funds (APF) and nonappropriated funds (NAFs) for education, treatment or healthcare, child care or youth activities; individuals employed under contract who work with children; and those who are certified for care. Individuals working within programs that include: Child Development Programs, DoD dependents schools, DoD-operated or -sponsored activities, foster care, private organizations on DoD installations, and youth programs.

Child care services. Care or services provided to children under the age of 18 in settings including child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or

not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services, as defined in 42 U.S.C. 13041 Class. With regard to the designation of positions, a categorical descriptor identifying employee, contractor, provider, or volunteer positions by group rather than by individual position or title (e.g., “doctors” or “individuals supervising children in a school”).

Contractor. Any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with DoD or a DoD Component to furnish supplies, services, or both including construction. Foreign governments or representatives of foreign governments that are engaged in selling to DoD or a DoD Component are defense contractors when acting in that context. A subcontractor is any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

Covered position. Defined in volume 731 of DoD Instruction 1400.25, “DoD Civilian Personnel Management System” (available at <http://www.dtic.mil/whs/directives/corres/pdf/140025v731.pdf>).

Criminal history background checks. A review of records, investigative reports, and other investigative elements to generate criminal history background findings to be used to make fitness or suitability determinations.

Derogatory information. Information that may reasonably justify an unfavorable personnel suitability or fitness determination because of the nexus between the issue or conduct and the core duties of the position.

DoD affiliation. A prior or current association, relationship, or involvement with the DoD or any elements of DoD, including the Military Departments.

DoD-sanctioned programs. Any program, facility, or service funded, or operated by the DoD, a Military Department or Service, or any agency, unit, or subdivision thereof. Examples include,

but are not limited to, chapel programs, child development centers, family child care (FCC) programs, medical treatment facilities, Department of Defense Education Activity (DoDEA) schools, recreation and youth programs. These do not include programs operated by other State or Federal government agencies or private organizations without the official sanction of a DoD entity.

Duties. Those activities performed as an employee, contractor, provider, or volunteer that involve interaction with children, including any work performed in a child development program or DoDEA school.

Employee. An individual, paid from funds appropriated by the Congress of the United States, or an individual employed by a NAF instrumentality in accordance with 5 U.S.C. 2105(c). Includes foreign nationals in accordance with Volume 1231 of DoD Instruction 1400.25, “DoD Civilian Personnel Management System” (available at <http://www.dtic.mil/whs/directives/corres/pdf/1400.25-V1231.pdf>), Military Service members working during their off-duty hours, and non-status, non-continuing temporary positions with specified employment periods not to exceed 1 year such as summer hires, student interns, and seasonal hires.

FAP. Defined in DoD Directive 6400.1, “Family Advocacy Program (FAP)” (available at <http://www.dtic.mil/whs/directives/corres/pdf/640001p.pdf>).

FAP records check. A review of FAP records maintained on an individual, including records maintained by the installation office and records in the Service Child and Spouse Abuse Central Registry in accordance with DoD Directive 6400.1. If the individual is the spouse or dependent of a Service member, this may entail review of records maintained on the sponsoring Service member. Installation and Service Central Registry checks are limited to identifying pending and

met criteria incidents of maltreatment and do not include information related to incidents that did not meet criteria or any information contained in the clinical case record that is protected by section 1320d-6 or 5 U.S.C. 552a.

Federal Bureau of Investigation (FBI) criminal history background check. An FBI identification record – often referred to as a criminal history record or a “rapsheet” – is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, federal employment, naturalization, or military service. The process of responding to an identification record request is generally known as a criminal history background check.

FCC. Defined in DoD Instruction 6060.2, “Child Development Programs (CDPs)” (available at <http://www.dtic.mil/whs/directives/corres/pdf/606002p.pdf>).

FCC provider. Defined in DoD Instruction 6060.2.

FCC adult family members. Any adult, 18 years of age or older, who resides in the home of an FCC provider for 30 or more consecutive days.

Fitness. The reference to a person’s level of character and conduct determined necessary for an individual to perform work for, or on behalf of, a Federal Agency as an employee in the excepted service (other than in a position subject to suitability) or as a contractor employee.

Fitness determination. A decision, based on review of criminal history background check findings, that an individual is fit to perform duties in a position subject to criminal history background check. Fitness determinations will be “favorable,” meaning that the individual is fit to perform the duties, or “unfavorable,” meaning that the individual is not.

Foreign nationals. Individuals who are not citizens of the United States.

Foster care providers. A voluntary or court-mandated program that provides 24-hour care and supportive services in a family home or group facility, within government-owned or -leased quarters, for children and youth who cannot be properly cared for by their own family.

Healthcare personnel. Military, civilian, or contract staff involved in the delivery of healthcare services.

Host-government check. A criminal history background check conducted on foreign nationals in accordance with U.S. and host country treaties or agreements.

Interim suitability or fitness determination. Part of the pre-screening process in the identification and resolution of suitability or fitness issues, which occurs prior to the initiation of the required investigation. It involves the review of applications and other employment related documents. A favorable interim suitability or fitness determination is a status granted on a temporary basis, which permits individuals to work under line-of-sight supervision (LOSS) after the return of the advance FBI fingerprint check, pending completion of full investigative requirements and a final suitability determination.

Investigative elements. The records, reports, or other individual elements that comprise the whole of information collected during a criminal history background check and used to make a fitness or suitability determination.

Installations records check (IRC). A query of records maintained on an individual by programs and entities at the military installation where the individual lives, is assigned, or works, including military law enforcement and installation security records, drug and alcohol records, and FAP records for a minimum of 2 years before the date of the application.

Investigative service provider (ISP). The company or agency authorized to perform background investigations on personnel on behalf of the agency.

Line of Sight Supervision (LOSS). Continuous visual observation and supervision of an individual whose background check has not yet cleared, and has a favorable interim suitability or fitness determination, while engaged in child interactive duties, or in the presence of children in a DoD-sanctioned program or activity. The person providing supervision must have undergone a background check and received a final favorable suitability or fitness determination and be current on all periodic reinvestigations as required by this part.

Met criteria. Reported incident of alleged maltreatment found to meet DoD incident determination criteria for child abuse or domestic abuse and entry into the Service FAP central registry of child abuse and domestic abuse reports.

Position. An employee, contractor, provider, or volunteer role or function.

Preliminary investigations. Those investigative elements of a criminal history background check, including those specified in §86.6(f), which must be favorably completed and reviewed before an individual may be permitted to perform duties under LOSS.

Providers. Individuals involved in child care services who have regular contact with children or may be alone with children in the performance of their duties. Includes FCC providers and individuals with overall management responsibility for child and youth programs.

Regular contact with children. Recurring and more than incidental contact with or access to children in the performance of their duties on a DoD installation, program, or as part of a DoD-sanctioned activity.

Reinvestigation. A criminal history background check conducted after the period of time prescribed by this part to ensure the individual remains eligible to provide child care services. Reinvestigation includes the same checks conducted for the initial investigation as outlined in §86.6(b).

Respite care providers. Individuals who provide short-term care and supportive services in a family home or group facility within government-owned or -leased quarters.

State criminal history repository (SCHR). A repository of criminal information that lists past state convictions, current offender information, and criminal identification information (fingerprints, photographs, and other information or descriptions) that identify a person as having been the subject of a criminal arrest or prosecution. Checks of the SCHR may include the State child abuse and neglect repository and the State sex offender registry.

Suitability determination. A decision that a person is or is not suitable for a covered position within the DoD.

Supervisor. The person supervising individuals who are permitted to perform duties only under LOSS, who is not necessarily the same as an employee's supervisor for employment purposes (e.g., ratings, assignment of duties).

Volunteer. There are two types of volunteers:

(1) Specified volunteers. Individuals who could have extensive or frequent contact with children over a period of time. They include, but are not limited to, positions involving extensive interaction alone, extended travel, or overnight activities with children or youth. Coaches and long-term instructors are among those who fall in this category. Specified volunteers are designated by the DoD Component head. Background checks are required in accordance with §86.6(b)(4).

(2) Non-specified volunteers. Individuals who provide services that are shorter in duration than is required to perform a criminal history background check (e.g., one-day class trip, class party). Because non-specified volunteers do not receive the same level of background checks as

specified volunteers, non-specified volunteers must always be in line of sight of a staff member with a complete background check.

Youth program. Defined in DoD Instruction 6060.4, “Department of Defense (DoD) Youth Programs (YPs)” (available at <http://www.dtic.mil/whs/directives/corres/pdf/606004p.pdf>).

§86.4 Policy.

It is DoD policy that:

(a) Individuals who have regular contact with children under 18 years of age in DoD-sanctioned child care services programs will undergo a criminal history background check in order to protect the health, safety and well-being of children in such programs.

(b) All individuals who have regular contact with children under 18 years of age in DoD-sanctioned child care services programs and who also have a current or prior DoD affiliation must also undergo an IRC.

(c) DoD Component heads are delegated the authority to make suitability determinations and take subsequent actions in cases involving applicants and appointees to covered positions as defined by 5 CFR 731.101, subject to the conditions in 5 CFR 731.103. This authority may be further delegated to authorized management officials, in writing, in accordance with volume 731 of DoD Instruction 1400.25.

(1) The DoD Consolidated Adjudications Facility is responsible for making favorable suitability determinations for civilian personnel in accordance with Deputy Assistant Secretary of Defense for Civilian Personnel and Policy Memorandum, “Responsibilities Under the Department of Defense Suitability and Fitness Adjudications for Civilians Employees Programs,” August 26, 2013.

(2) Military members are not subject to suitability adjudication under Volume 731 of DoD Instruction 1400.25, “DoD Civilian Personnel Management System” (available at <http://www.dtic.mil/whs/directives/corres/pdf/140025v731.pdf>). Military members are subject to the background check requirements of DoD Instruction 5200.02, “Personnel Security Program” (available at http://www.dtic.mil/whs/directives/corres/pdf/520002_2014.pdf) and §86.6.

(d) Suitability and fitness determinations for individuals subject to this part will follow the guidance of Volume 731 of DoD Instruction 1400.25 for APF employees and Subchapter 1403 of DoD Instruction 1400.25 for NAF employees. Suitability and fitness are to be applied for the child care worker population in accordance with Volume 731 of DoD Instruction 1400.25 for appropriated fund employees in covered positions as defined by 5 CFR part 731.

(e) Individuals who have received a favorable interim suitability or fitness determination based on the FBI criminal history background check are permitted to work under LOSS pursuant to 42 U.S.C. 13041(b)(3).

§86.5 Responsibilities.

(a) Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), the Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM)):

(1) Ensures the conduct of criminal history background checks complies with DoD policy and the Criminal Justice Information Services Division of the FBI’s operational and security policies and procedures.

(2) Monitors DoD Component compliance with this part, applicable laws, and subsequent guidance issued by the applicable ISP.

(b) Under the authority, direction, and control of the ASD(R&FM), the Deputy Assistant

Secretary of Defense for Civilian Personnel Policy (DASD(CPP)) oversees development of DoD Component policies and procedures for the background check initiation, completion, adjudication, and suitability or fitness determination process for civilian employees in accordance with this part.

(c) Under the authority, direction, and control of the ASD(R&FM), the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)) oversees development of DoD Component policies and procedures related to the background check initiation, completion, adjudication, and fitness determination process for specified volunteers, FCC providers and adults residing in their home, and others as identified in accordance with this part.

(d) Under the authority, direction, and control of the ASD(R&FM), the Deputy Assistant Secretary of Defense for Military Personnel Policy (DASD(MPP)):

- (1) Implements this part for military personnel in accordance with DoD Instruction 5200.02.
- (2) Institutes effective quality assurance and quality control systems for chaplains, support staff, specified volunteers, and contractors who provide support to religious programs and activities identified in §86.6(a)(5)(v) and in accordance with this part.

(e) Under the authority, direction, and control of the Deputy Chief Management Officer (DCMO) of the Department of Defense, the Director of Administration ensures that the adjudication of background investigations of individuals who have regular contact with children under 18 years of age in DoD-sanctioned programs considers the criteria for presumptive and automatic disqualification as specified in this part.

(f) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) establishes policies and procedures for the background check initiation, completion,

adjudication, and fitness determination process for contractors in accordance with the requirements of this part.

(g) The DoD Component heads:

(1) Ensure Component compliance with the requirements of this part, applicable laws, and guidance for civilian employees.

(2) Ensure compliance with suitability and fitness determination policies, requirements, and procedures for individuals in child care services in DoD programs as defined in 42 U.S.C. 13041 and DoD Instruction 1400.25.

(3) Ensure compliance with policies, requirements, and procedures for LOSS of individuals with a favorable interim suitability determination.

(4) Provide support and resources as required to implement this part and any Component-specific policies, requirements, and procedures, and ensure implementation.

§86.6 Procedures.

(a) Requirements for criminal history background checks. (1) All criminal history background checks required by this part must be initiated, tracked, and overseen by properly trained and vetted individuals who have been determined to be responsible for personnel security pursuant to DoD Instruction 5200.02 or human resource functions pursuant to Volume 731 of DoD Instruction 1400.25. Program managers, supervisors, and others not routinely performing personnel security and human resource functions are prohibited from managing the criminal history checks.

(2) All employment applications completed by individuals subject to this part must comply with the requirements of 42 U.S.C. 13041(d).

(3) The DoD Component will ensure that only authorized ISPs are used.

(4) When permitted by the host government, foreign government checks of individuals serving on DoD installations overseas must be requested directly by the employing Military Service or agency in accordance with Volume 1231 of DoD Instruction 1400.25. As an alternative, DoD Components may request that overseas Military Service investigative elements obtain appropriate host-government checks and accept such checks if they are comparable to those required by 42 U.S.C. 13041. Where it is not possible to obtain criminal history checks comparable to those required by 42 U.S.C. 13041, foreign nationals will not be eligible for employment in child care services.

(5) Individuals subject to criminal history background checks are:

(i) All personnel employed or performing duties in DoD Child and Youth or other sanctioned child care services programs.

(ii) Individuals providing in-home FCC.

(iii) Personnel employed or performing duties in child and youth recreational and athletic programs (e.g., Morale, Welfare, and Recreation), including instructors and, when working in a facility when children and youth are present, custodial personnel.

(iv) Individuals employed or performing duties in a DoDEA school (whether or not directly involved with teaching), including but not limited to teachers, administrators, other professional staff, aides, bus drivers, janitors, cafeteria workers, nurses, and attendants.

(v) Chaplains, chaplains' assistants, religious program specialists, and other individuals employed or performing child care services duties for children under 18 years of age on a DoD installation or as part of a military-sanctioned program.

(vi) Foster and respite child care providers on a DoD installation, program, or as part of a military-sanctioned activity.

(vii) Health and mental health care personnel, employed or performing child care services duties on a DoD installation, in a DoD sanctioned program, or as part of a military-sanctioned activity, including but not limited to physicians, dentists, nurse practitioners, clinical social workers, physical therapists, speech-language pathologists, clinical support staff (including residents), registered nurses, licensed practical nurses, nursing assistants, play therapists, and technicians.

(viii) Individuals employed or performing child care duties in social services, residential care, rehabilitation programs, detention, and correctional services on a DoD installation, program, or as part of a military-sanctioned activity.

(ix) Any other individuals reasonably expected to have regular contact with children on a DoD installation, in a DoD sanctioned program, or as part of a military-sanctioned activity, including specified volunteers and any person 18 years of age or older residing in an FCC, foster, or respite care home. Healthcare providers participating in TRICARE shall be governed by TRICARE policy.

(6) The DoD Components will also determine any other classes of positions subject to criminal history background checks, taking care to ensure that all individuals who have regular contact with children when providing child care services are investigated and the requirement must pertain to the class as a whole.

(7) Individuals designated in non-specified volunteer positions must always be under direct LOSS in accordance with paragraph (g) of this section.

(b) Types of background checks. Procedures for conducting a background check on individuals in paragraphs (a)(5)(i) through (ix) of this section differ based on the employment status of the individual. Military members are subject to the background check requirements of DoD Instruction 5200.02 and this section. The FBI criminal history background checks for all

categories of individuals must be fingerprint-based and fingerprints must be captured using an FBI-approved system. SCHR checks may require hardcopy fingerprint submissions. State checks must include the state child abuse and neglect repository and the state sex offender registry. The Component must request a check of the state child abuse and neglect repository and the State sex offender registry if they are not automatically checked as part of the standard SCHR check.

(1) Criminal history background checks for DoD civilian and military personnel who are investigated at the NACI or a higher level pursuant to DoD's personnel security program. (i) DoD civilian and military personnel required by DoD Instruction 5200.02 to be investigated according to the requirements of the National Agency Check and Inquiries (NACI) or a higher level investigation and who have regular contact with children under 18 years of age in DoD-sanctioned programs will be investigated and adjudicated in accordance with the provisions of DoD Instruction 5200.02.

(ii) These personnel will also be subject to the additional requirements of the Child Care National Agency Check and Inquiries (CNACI) and the criteria for presumptive and automatic disqualification as specified in paragraph (c) of this section.

(2) Criminal history background checks for civilian employees (APF and NAF). (i) In accordance with 42 U.S.C. 13041 and Volume 731 and Subchapter 1403 of DoD Instruction 1400.25, complete a CNACI, which includes an FBI criminal history background check conducted through the Criminal Justice Information Services Division of the FBI and SCHR checks through State repositories of all States that an employee or prospective employee lists as current and former residences on an employment application. Results of an advanced FBI

fingerprint check must be provided before completion of the full CNACI to determine employment under LOSS.

(ii) Individuals with a prior DoD affiliation must also complete an IRC, which includes an installation law enforcement check, drug and alcohol records check, and a check of the Family Advocacy Program (FAP) records for a minimum of 2 years before the date of the application.

(3) Criminal history background checks for FCC providers and contractors. (i) In accordance with 42 U.S.C. 13041, complete a CNACI, which includes an FBI criminal history background check conducted through the Criminal Justice Identification Services Division of the FBI and SCHR checks through State repositories of all States that a provider or contractor or prospective provider or contractor lists as current and former residences in an employment application.

Results of an advanced FBI fingerprint check must be provided before completion of the full CNACI. Results for contractors may be used to determine employment under LOSS.

(ii) Individuals with a prior DoD affiliation must also complete an IRC, including an installation law enforcement check, drug and alcohol records check, and a check of the FAP records for a minimum of 2 years before the date of the application.

(4) Criminal history background checks for others. (i) In accordance with 42 U.S.C. 13041, only an FBI advanced fingerprint check is required for criminal history background checks for volunteers and persons 18 years of age or older residing in an FCC, foster, or respite care home.

(ii) Individuals with a prior DoD affiliation must also complete an IRC to include: an installation law enforcement check, drug and alcohol records check, and a check of the FAP records for a minimum of 2 years before the date of the application.

(5) Timely completion. To ensure timely completion, the DoD Components will establish procedures to initiate or request criminal history background check results, follow up to ensure

checks have been completed, and address situations where there is a delay in receiving results. In no event will an individual subject to this part be presumed to have a favorable background check merely because there has been a delay in receiving the results of the requisite background check. If no response from the state(s) is received within 60 days, determinations based upon the CNACI report may be made.

(c) Criteria for disqualification based on results on criminal history background checks. The ultimate decision to determine how to use information obtained from the criminal history background checks in selection for positions involving the care, treatment, supervision, or education of children must incorporate a common sense decision based upon all known facts. Adverse information is evaluated by the DoD Component who is qualified at the appropriate level of command in interpreting criminal history background checks. All information of record both favorable and unfavorable will be assessed in terms of its relevance, recentness, and seriousness. Likewise, positive mitigating factors should be considered. Final suitability decisions shall be made by that commander or designee. Criteria that will result in disqualification of an applicant require careful screening of the data. A disqualifying event may be the basis for a non-selection, withdrawal of a tentative offer of employment, ineligibility for facility access, removal from a contract, a suitability action under 5 CFR part 731, a probationary termination, an adverse action, or other appropriate action.

(1) Criteria for automatic disqualification. No person, regardless of circumstances, will be approved to provide child care services pursuant to this part if the background check discloses:

(i) That the individual has been convicted in either a civilian or military court (to include any general, special or summary court-martial conviction) or received non-judicial punishment

(under Article 15 or chapter 47 of Title 10, U.S.C., also known and referred to in this part as “the Uniform Code of Military Justice (UCMJ)”) for any of the following:

(A) A sexual offense.

(B) Any criminal offense involving a child victim.

(C) A felony drug offense.

(ii) That the individual has been held to be negligent in a civil adjudication or administrative proceeding concerning the death or serious injury to a child or dependent person entrusted to the individual’s care.

(2) [Reserved]

(d) Suitability and fitness determinations for individuals involved with the provision of child care services. Suitability and fitness determinations for individuals subject to this part will be made in accordance with Volume 731, Volume 1231, and Subchapter 1403 of DoD Instruction 1400.25, and part 1201 of 5 U.S.C., as appropriate. The following may be the basis for non-selection, withdrawal of a tentative offer of employment, ineligibility for facility access, removal from a contract, a suitability action under DoD Instruction 1400.25, a probationary termination, an adverse action, or other appropriate action.

(1) Criteria for presumptive disqualification. Officials charged with making determinations pursuant to this part must include in the record a written justification for any favorable determination made where background check findings include any of the following presumptively disqualifying information:

(i) A FAP record indicating that the individual met criteria for child abuse or neglect or civil adjudication that the individual committed child abuse or neglect.

(ii) Evidence of an act or acts by the individual that tend to indicate poor judgment, unreliability, or untrustworthiness in providing child care services.

(iii) Evidence or documentation of the individual's past or present dependency on or addiction to any controlled or psychoactive substances, narcotics, cannabis, or other dangerous drug without evidence of rehabilitation.

(iv) A conviction, including any general, special, or summary court-martial conviction, or non-judicial punishment under Article 15 of the UCMJ for:

(A) A crime of violence committed against an adult.

(B) Illegal or improper use, possession, or addiction to any controlled or psychoactive substances, narcotics, cannabis, or other dangerous drug.

(v) A civil adjudication that terminated the individual's parental rights to his or her child, except in cases where the birth parent places his or her child for adoption.

(2) Evaluation of presumptively disqualifying information. The DoD Components will establish and oversee procedures for the evaluation of presumptively disqualifying information for all categories of individuals in paragraph (b) of this section. Evaluation of presumptively disqualifying information for APF and NAF personnel must be in accordance with Volume 731 and Subchapter 1403 of DoD Instruction 1400.25, respectively.

(3) Criteria for disqualification under LOSS. If an investigation of an individual who is currently working under LOSS subsequently results in an unfavorable determination, the DoD Components will take action to protect children by reassigning or removing the individual from employment, contract, or volunteer status.

(4) Disputes and appeals. The DoD Components will establish and oversee procedures for the communication of determinations and the appeal of unfavorable determinations for all categories

of individuals in paragraph (b) of this section. The procedures for civilian personnel are subject to Volume 731 of DoD Instruction 1400.25 for APF employees and Subchapter 1403 of DoD Instruction 1400.25 for NAF employees.

(e) Reinvestigation. (1) All DoD civilian employees (both APF and NAF), contractors, military personnel, and any other individuals reasonably expected to have regular contact with children on a DoD installation, program, or as part of a military-sanctioned activity, including specified volunteers and any person 18 years of age or older residing in an FCC, foster, or respite care home, who continue to perform duties in the position for which their initial background check was conducted, must undergo a reinvestigation every 5 years. The reinvestigation must consist of the same check conducted for the initial investigation as outlined in paragraph (b) of this section.

(2) All FCC providers and adults residing in an FCC home must undergo an annual reinvestigation utilizing the Special Agreement Check (SAC) for childcare providers. The SAC reinvestigation consists of an update to the initial investigation as outlined in paragraph (b) of this section.

(3) If the reinvestigation results in an unfavorable determination, the DoD Components will take action to protect children by reassigning or removing the individual from employment, contract, or volunteer status.

(4) If derogatory information surfaces within the 5 years before the reinvestigation, the DoD Component will take action to protect children by reassigning or suspending from having contact with children, any individual, contractor or volunteer until the case is resolved.

(f) Self-reporting. (1) Individuals who have regular contact with children under 18 years of age in DoD-sanctioned programs who have a completed background check are required to

immediately report subsequent automatic disqualification criteria under paragraph (c)(1) of this section and presumptive disqualification criteria under paragraphs (c)(2)(i), (iv), and (v) of this section.

(2) The DoD Components will establish procedures for:

(i) Informing individuals of the requirement to immediately report any incident or conviction that may invalidate their prior background check and make them ineligible to work or have contact with children.

(ii) Responding to and evaluating reports made by such individuals, and taking appropriate action until the case has been resolved or closed.

(g) Eligibility to perform duties under LOSS. The DoD Components will establish Component-specific procedures, policies, and requirements, subject to the requirements of this paragraph, to permit applicants for whom a criminal history background check has been initiated but not yet completed, to perform duties under LOSS upon favorable findings of preliminary investigations.

(1) No presumption of right. No individual will be permitted to perform duties under LOSS in a position subject to criminal history background check without authorizing policy or other written permission from a DoD Component head.

(2) Preliminary investigations required. No individual will be permitted to perform duties under LOSS in a position subject to criminal history background check unless the following investigative elements have been reviewed and determined favorably:

(i) An IRC, including installation law enforcement records check, drug and alcohol records, and FAP records check for a minimum of 2 years before the date of the application if the individual has a preexisting DoD affiliation.

(ii) Initial results from the advanced FBI fingerprint criminal history background check (not the full check).

(3) Exception for non-specified volunteers. Due to the controlled, limited duration of an activity for these individuals, an advanced FBI fingerprint criminal history background check is not required. Non-specified volunteers will be permitted to perform duties and services under LOSS for the duration of the activity.

(4) Supervisor requirements. The supervisor must be a person who:

(i) Has undergone and successfully completed the required background check.

(ii) Has complied, as required, with the periodic reinvestigation requirement for a recurring criminal history background check.

(iii) Has not previously exhibited reckless disregard for an obligation to supervise an employee, contractor, or volunteer.

(5) Video surveillance. The use of video surveillance equipment to provide temporary oversight for individuals whose required background checks have been initiated but not completed is acceptable provided it is continuously monitored by an individual who has undergone and successfully completed all required background checks. This provision shall meet the intent of a flexible and reasonable alternative for “direct sight supervision.”

(6) Conspicuous identification of individuals subject to LOSS. Individuals permitted to perform duties solely under LOSS must be conspicuously marked by means of distinctive clothing, badges, wristbands, or other visible and apparent markings. The purpose of such markings must be communicated to staff, customers, parents, and guardians by conspicuous posting or printed information.

(7) Permissible performance of duties without supervision. Individuals otherwise required to perform duties only under LOSS may perform duties without supervision if:

- (i) Interaction with a child occurs in the presence of the child's parent or guardian;
- (ii) Interaction with children is in a medical facility, subject to supervisory policies of the facility, and in the presence of a mandated reporter of child abuse; or
- (iii) Interaction is necessary to prevent death or serious harm to the child, and supervision is impractical or unfeasible (e.g., response to a medical emergency, emergency evacuation of a child from a hazardous location).

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Alternate OSD Federal Register Liaison Officer, Department of Defense.

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