

HUMAN SERVICES DEPARTMENT[441]

Notice of Intended Action

Pursuant to the authority of Iowa Code section 234.6, the Department of Human Services hereby gives Notice of Intended Action to amend Chapter 119, “Record Check Evaluations for Certain Employers and Educational Training Programs,” Iowa Administrative Code.

These amendments add a definition for “deferred judgment” and clarify that deferred judgments will be considered in criminal background checks.

In keeping with case law analysis, the Department evaluates deferred judgments as convictions because the statutes that the Department relies upon to conduct record check evaluations are designed to protect Iowa’s most vulnerable populations. These amendments will assist attorneys who advise clients and judges who consider dispositive options in administrative and criminal venues.

Any interested person may make written comments on the proposed amendments on or before May 17, 2016. Comments should be directed to Harry Rossander, Bureau of Policy Coordination, Department of Human Services, Hoover State Office Building, Fifth Floor, 1305 East Walnut Street, Des Moines, Iowa 50319-0114. Comments may be sent by fax to (515)281-4980 or by e-mail to policyanalysis@dhs.state.ia.us.

These amendments do not provide for waivers in specified situations because requests for the waiver of any rule may be submitted under the Department’s general rule on exceptions at 441—1.8(17A,217).

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code section 234.6.

The following amendments are proposed.

ITEM 1. Adopt the following **new** definition of “Deferred judgment” in rule **441—119.1(135B,135C)**:

“Deferred judgment” means deferred judgment as defined in Iowa Code section 907.1 and is considered an admission of committing an act. Under this chapter, the admission of committing an act must be considered a conviction for purposes of public protection.

ITEM 2. Amend subrule 119.2(1) as follows:

119.2(1) Record check evaluations on prospective employees and students. A requesting entity shall request a record check evaluation prior to employment or enrollment of a person whose background check indicates a criminal or dependent adult abuse or child abuse record. Any deferred judgments will be considered in criminal background checks. Criminal, child abuse and dependent adult abuse background checks are required on all prospective employees or students, including employees or students who have terminated employment or participation in a training program for any reason or any length of time and wish to return to the same employment or training program, unless an exemption is provided in these rules.

a. and b. No change.



Iowa Department of Human Services
Information on Proposed Rules

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1. Give a brief summary of the rule changes:

To bring administrative rules up to date with current practice across programs, please amend 441 IAC 119.1 and 2 to add Deferred Judgments and be clear IDHS considers them in the course of record check evaluations.

2. What is the legal basis for the change? (Cite the authorizing state and federal statutes and federal regulations):

The Department conducts record checks under various statutes, such as 135B, 135C, 135H, 237A, 237, 218, 217, 152, and 125.14A. The statutes under which the Department does record checks trigger an evaluation upon "conviction" of a crime or when a crime or "transgression" is committed.

In 2004, the Department in consultation with the Iowa Attorney General's Office, adopted the Iowa Supreme Court's analysis and test for evaluating broad and narrow interpretations of "convictions" as set forth in Schilling v. Iowa Dept. of Transportation, 646 N.W.2d 69 (Iowa 2002). As record check statutes are for public protection "conviction" is given a broad interpretation to be inclusive of deferred judgments, even deferred judgments that have been discharged.

3. What is the reason for the Department requesting these changes?

Shortly after the Iowa Supreme Court decided the Schilling case, the Department began applying the Court's "conviction" analysis to its record check evaluations of deferred judgments. In the Schilling decision, the Iowa Supreme Court set out that a conviction has a relatively narrow and technical meaning when it is found in statutes related to punishment, but has a broader definition when applied to statutes where the "protection of the public is at stake." The Schilling case established that the broad definition was appropriately applied where "the consequences of the deprivation are relatively slight compared with the gravity of the public interest to be protected."

In keeping with the Schilling case law analysis, the Department evaluates deferred judgments to convictions because the statutes the Department relies upon to conduct record check evaluations are designed to protect Iowa's most vulnerable populations. After using the Schilling analysis for over a decade, the Department believes it would be appropriate to have the Department's administrative rules mirror in its actual policy and practice. This clarification will assist attorneys who advise clients, and judges who consider dispositive options in administrative and criminal venues.

4. What will be the effect of this rule making (who, what, when, how)?

The impact will be to simplify record check evaluation denials that go to appeal. The appeal will be simplified by providing a rule for attorneys and judges who regularly must refer to the Department evaluations of deferred judgments as convictions.

Over time, the rule will also reduce the number of appeals that arise from confusion about the evaluation process of deferred judgments. Attorneys will be able to correctly advise clients of the impact of accepting a deferred judgment if the clients wish to be employed working with vulnerable populations in the future. Currently, judges and attorneys may not tell clients that a deferred judgment could impact certain types of employment which creates confusion then when the client is denied employment after a record check evaluation. In order to provide a fair representation of current Department policy protocol, an administrative rule representing a nearly 12 year practice is in order.

Practice will remain the same for the Department. This program specialist has consulted with Lori Lipscomb, SAM overseeing the RCE (Record Check Evaluation) Unit and Jason Geyer, SWA for the RCE unit. Both support the rule change. The rule change is also supported by program managers of the foster/adoption care and child care units as the rule reflects their current practice.

5. Is the change mandated by State or Federal Law?

No, but the change is bolstered by state and federal case law.

6. Will anyone be affected by this rule change? If yes, who will be affected and will it be to the person's (organization's) benefit or detriment?

Yes, it will impact attorneys, judges, and IDHS on appeals of record check evaluations decisions in that our current practice across programs will now be supported in administrative rule.

7. What are the potential benefits of this rule?

The benefit will a citation for attorneys, ALJ's and other Judges to consistently refer to regarding IDHS evaluation of deferred judgments so that they can correctly advise those accepting DJs.

8. What are the potential costs, to the regulated community or the state of Iowa as a whole, of this rule?

There are no anticipated costs associated with this rule change other than an anticipated reduction in cost over time due to fewer appeals.

9. Do any other agencies regulate in this area? If so, what agencies and what Administrative Code sections apply?

Other agencies regulate the requesting entities but do not have authority for record check evaluations. IDHS has authority to perform record check evaluations for certain employers and educational training programs under various statutes such as 135B, 135C, 135H, 237A, 237, 218, 217, 152, and 125.14A.

10. What alternatives to direct regulation in this area are available to the agency? Why were other alternatives not used?

On Appeal, the Iowa Attorney General's office cites the Schilling v. Iowa DOT case but as this comes up repeatedly, a request was made by both judges and attorneys for a rule citation. We have also looked to other citations on what is considered a "conviction" and whether or not a deferred judgment can be considered a "conviction." The Supreme Court of Iowa determined that when "protection of the public is at stake," a conviction without judgment (deferred judgment) can and should be considered pertaining to record check evaluations for certain employers and educational training programs.

11. Does this rule contain a waiver provision? If not, why?

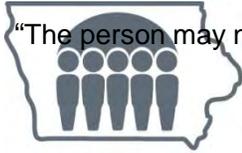
These rules do not contain waiver provisions.

12. What are the likely areas of public comment?

Public comment may entail statements about how previous determinations were unfair because all parties were not clear on the impact of deferred judgments pertaining to employment.

13. Do these rules have an impact on private-sector jobs and employment opportunities in Iowa? (If yes, describe nature of impact, categories and number of jobs affected, state regions affected, costs to employer per employee)

The impact will not differ from what happens now which is that if a deferred judgment is on record, IDHS will evaluate it and potentially, the person could be denied employment by virtue of and evaluation finding conclusion of:



“The person may not be employed by the entity or enroll in the training program.”

Administrative Rule Fiscal Impact Statement

Date: 10-30-2015

Agency: Human Services

IAC citation: 441 IAC 119

Agency contact: Catherine Stack

Summary of the rule:

This change is to bring administrative rules up to date to align with current practice across various programs.

Fill in this box if the impact meets these criteria:

No fiscal impact to the state.

Fiscal impact of less than \$100,000 annually or \$500,000 over 5 years.

Fiscal impact cannot be determined.

Brief explanation:

This is only a procedural clarification related to record check evaluations. There will be no change to the number of record checks ordered or the cost of obtaining them, therefore there is no fiscal impact.

Fill in the form below if the impact does not fit the criteria above:

Fiscal impact of \$100,000 annually or \$500,000 over 5 years.

Assumptions:

Describe how estimates were derived:

Estimated Impact to the State by Fiscal Year

	<u>Year 1 (FY)</u>	<u>Year 2 (FY)</u>
Revenue by each source:		
General fund	_____	_____
Federal funds	_____	_____
Other (specify):	_____	_____
TOTAL REVENUE	_____	_____
Expenditures:		
General fund	_____	_____
Federal funds	_____	_____
Other (specify):	_____	_____
TOTAL EXPENDITURES	_____	_____
NET IMPACT	_____	_____

_____ This rule is required by state law or federal mandate.
Please identify the state or federal law:
Identify provided change fiscal persons:

_____ Funding has been provided for the rule change.
Please identify the amount provided and the funding source:

_____ Funding has not been provided for the rule.
Please explain how the agency will pay for the rule change:

Fiscal impact to persons affected by the rule:

None

Fiscal impact to counties or other local governments (required by Iowa Code 25B.6):

None

Agency representative preparing estimate: Kathy Blume
Telephone number: 515-281-4196