

COVID 19 Guidance

Update on Fingerprinting Issues

As COVID 19 may have closed some Identogo hand scan sites (<https://www.identogo.com/>), travel to open sites may involve health risks, and the New York State Board of Regents has passed emergency amendments to mandatory background check regulations (8 NYCRR § 87.2), the Charter Schools Institute (the “Institute”) would like to provide information to charter schools authorized by the State University of New York (“SUNY”) Board of Trustees.

The New York State Education Department (“NYSED”) has assured SUNY that its Office of School Personnel Review and Accountability (“OSPRA”) is functioning. If a charter school prospective employee with a clean background completes a hand scan, OSPRA should be able to process and clear the person for employment in a normal time frame. Research and review of employees with convictions, arrests, or unclear judicial dispositions, are the only areas currently experiencing delays per NYSED.

To date, no executive orders or amendments to the State Commissioner of Education regulations have modified the time frames or requirements of the N.Y. Charter Schools Act of 1998 (as amended, the “Act”) regarding criminal history record checks in N.Y. Education Law § 2853(3)(a-2).

Regulatory Update

The emergency amendments to the State Commissioner of Education regulations (8 NYCRR § 87.2), approved by the Board of Regents on April 7, 2020, include in the definition of a prospective employee, who must have a criminal history records check, any employee who will engage in “online communication or interaction directly with [] students during the period of a school closure ordered pursuant to an Executive Order of the Governor pursuant to a State of [E]mergency for the COVID-19 crisis.” Previously, such employees would not necessarily have fit into the definition.

Needed Policy Update

Apropos of the current teaching environment and delivery of related services and counselling, charter schools should modify their supervision policies “for the safety of the children who have contact with an employee holding conditional appointment or emergency conditional appointment,” Education Law § 2853(3)(a-2)(iv). Such modification should:

- 1) acknowledge that “contact” includes video or telephone contact;
- 2) provide appropriate supervision strategies, such as a supervisor auditing a videoconference with a student; and,
- 3) notify employees that such practices will be in use and that they should have no expectation of privacy in communications with students. Note that such policies must still adhere to any applicable provisions of the Family Educational Rights and Privacy Act (FERPA) and Health Insurance Portability and Accountability Act (HIPPA).

Charter school boards or delegated leaders should update supervision policies as soon as practicable. The Institute will not treat such policy revisions as formal charter revisions under the Act, so schools will

not have to seek permission of the Institute to implement policy changes, and districts will not need to hold virtual hearings on such revisions.

COVID 19 Impacts

Current law, regulations and executive orders do not take into account that prospective employees may be exposed to COVID 19 in travelling to IdentoGo locations for hand scanning, exposed during hand scanning, or may be violating executive orders or Department of Health quarantine rules for such travel. NYSED confirms that per the amendments to 8 NYCRR § 87.2, employees who have not been hand scanned should not directly instruct students on-line. This situation sets up a number of hiring issues.

Hires for Next School Year

With respect to prospective employees being hired for next school year, the Institute's best advice would be to have them fill out the required form for regular hand scanning (available in TEACH or from OSPRA) and then determine if there is a safe IdentoGo location for them to be scanned. All but a small proportion of prospective employees should receive clearances. Prospective employees with some issues in their background may receive a notice of potential denial or a conditional clearance good for only 45 days under Education Law § 2853(3)(a-2). Either way, the school and the employees have clear paths to appointment approval or denial.

If there is no safe or practical location for a hand scan, then an education corporation could wait to have prospective employees printed as they will not have physical or on-line interaction with students until the new school year. The downside is the school will also not know if an employee will be rejected and then the school will have to fill a position later. If an education corporation has this concern, it could run private background checks but these are not necessarily reliable and *do not* substitute for a NYSED background check under the Act. For the reasons described below, this category of prospective employee is not a good fit for a conditional or emergency conditional appointment.

Hires for Current, Open Positions

With respect to prospective employees being hired to immediately instruct students on-line, the choices are far murkier. NYSED has made clear that these employees must undergo a hand scan supported criminal background check or they cannot interact directly with students. The best course again is to have the employee fill out the forms for hand scanning and get scanned if that is safe and available.

While the emergency conditional appointment process in Education Law § 2854(3)(a-2)(iii) may seem like the best fit for the situation, schools will encounter several issues with such an appointment. Both conditional and emergency conditional appointments require a school to submit to OSPRA proof of a completed hand scan from an approved vendor with the application for the appointment. NYSED has stated that if just a name is submitted for either a conditional or an emergency conditional appointment, it will likely deny the application for lack of a hand scan. Upon such notification from NYSED, the education corporation in turn should terminate the employee within two weeks per NYSED's guidance, <http://www.p12.nysed.gov/psc/aboutcharterschools/lawsandregs/aprilmemo.pdf>, and the school must submit documentation to the TEACH system to that effect. Even if the prospective employee is put in a position that does not have direct contact with students, he or she may later have issues being cleared by NYSED when hand scanning is available. An advantage of the emergency conditional clearance process is the school receives an employee's statement regarding not having

pending criminal charges or convictions (Ed. Law § 2854(3)(a-2)(iii)). Also, if an employee lies on the emergency conditional appointment form, the school could later terminate the employee, but the process does not bring the education corporation closer to compliance.

If a school does not hand scan prospective employees and lets them work in direct on-line contact with students, it will similarly be in violation of the Education Law. School counsel will have to chart the best course as the law, regulations, and executive orders all point to the conclusion that prospective employees who will have contact with students this school year cannot legally be hired at this time without a hand scan.

Please direct any questions to charters@suny.edu. Some basic information on the hand scanning process follows.

Fingerprinting Nuts & Bolts

While the Act still references “fingerprinting,” criminal history record background checks are currently matched to individuals through digital hand scanning, which enables the N.Y. Division of Criminal Justice Services (“DCJS”) to run a N.Y. State criminal history check as well as electronically contact the Federal Bureau of Investigation for a 50-state and federal criminal history database check. DCJS sends the results to NYSED, which clears or denies the prospective employee.

Prospective employees who have been fingerprinted or hand scanned by the New York City Department of Education, another school district, or another charter school do not need to be hand scanned again. NYSED’s TEACH system allows a charter school to inform NYSED of the proposed employment, and NYSED should be able to access that prior criminal history records check. General questions regarding these processes should be directed to OSPRA through the contacts at <http://www.nysed.gov/educator-integrity/fingerprinting>.

Noteworthy points about the hand scanning process include:

- Education Law § 2854(3)(a-2) requires, “Prior to initiating the fingerprinting process, the prospective employer shall furnish the applicant with the form described in [Ed. Law § 305(30)(c)] and shall obtain the applicant’s consent to the criminal history records search.”
- The form described immediately above (available in TEACH and from OSPRA) per Education Law § 305(30)(c) must indicate the prospective employee has:
 - been informed of the right and procedures necessary to obtain, review and seek correction of his or her criminal history information;
 - been informed of the reason for the request for his or her criminal history information;
 - consented to such request for a report;
 - supplied on the form a current mailing or home address for the prospective employee;
 - been informed that he or she may withdraw his or her application for employment [], without prejudice, at any time before employment is offered or declined, regardless of whether the prospective employee or employer has reviewed such prospective employee’s criminal history information;

- been informed that in the event his or her employment is terminated and such person has not become employed in the same or another school district, charter school, board of cooperative educational services, or nonpublic or private elementary or secondary school within twelve [] months of such termination, the [State Education Commissioner] shall notify [DCJS] of such termination, and [DCJS] shall destroy the fingerprints of such person. Such person may request that the [State Education Commissioner] notify [DCJS] that his or her fingerprints shall be destroyed prior to the expiration of such twelve month period in which case the [C]ommissioner shall notify [DCJS] and [DCJS] shall destroy the fingerprints of such person promptly upon receipt of the request; and,
- been informed of the manner in which he or she may submit to the [State Education Commissioner] any information that may be relevant to the consideration of his or her application for clearance including, where applicable, information in regard to his or her good conduct and rehabilitation.