



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents

FROM: John L. D'Agati *John L. D'Agati*

SUBJECT: Proposed Amendment to Section 83.4(d) and Addition of 83.5(b)(1)(iv) to the Regulations of the Commissioner of Education Relating to Moral Character Determinations

DATE: July 15, 2013

AUTHORIZATION(S):

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SUMMARY

Issue for Decision

Should the Board of Regents adopt, on an emergency basis, the proposed amendment to sections 83.4(d) and addition of 83.5(b)(1)(iv) of the Commissioner's regulations to establish a rebuttable presumption that an individual convicted of a crime involving the submission of false information or who has committed fraud related to criminal history record checks lacks good moral character?

Proposed Handling

The proposed amendment is submitted to the Higher Education Committee for recommendation and to the Full Board for adoption, as an emergency rule at its July 2013 meeting. A copy of the proposed amendment and a Statement of Emergency Facts and Circumstances is attached. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

The Department's Office of School Personnel Review & Accountability (OSPRA) is responsible for facilitating fingerprint generated criminal background checks in accordance with the Education Law (Chapter 180 of the Laws of 2000). All prospective covered school employees and/or applicants for a teaching certificate must be fingerprinted.

Generally, fingerprints are collected across the state at school districts, Boards of Cooperative Educational Services (BOCES), colleges and universities, and law enforcement agencies. Fingerprints are received by the Department in two formats:

hard cards containing fingerprints that are collected through the “ink and roll” method and mailed, and scanned fingerprint images captured on a scanner and transmitted electronically via a server. All fingerprint images are delivered by the Department to the state Division of Criminal Justice Services (DCJS) to conduct a state criminal history records check and to forward them to the Federal Bureau of Investigation (FBI) for processing against their criminal record repository.

The Department has taken steps to better ensure the security of fingerprints in recent years by expanding the number of places where fingerprints can be collected electronically. Approximately 75 percent of fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised.

The Department has begun to review the fingerprinting process to close potential gaps that may exist, such as the ability of a person to submit false fingerprints. The proposed amendment enhances the Department’s current authority to address teacher discipline in this context by establishing a rebuttable presumption that a teacher who is convicted of any crime relating to the submission of false information, or who committed fraud related to his/her criminal history record check lacks good moral character.

Following the 45-day public comment period required under the State Administrative Procedure Act, the proposed amendment was revised in response to public comment. An assessment of public comment is attached.

Recommendation

VOTED: That subdivision (d) of section 83.4 be amended to the Regulations of the Commissioner of Education and that a new subparagraph (iv) shall be added to paragraph (1) of subdivision (b) of section 83.5 of the Regulations of the Commissioner of Education, which was adopted by the Board of Regents as an emergency action on June 18, 2013, effective July 22, 2013, is rescinded; and it is further

VOTED: That subdivision (d) of section 83.4 be amended to the Regulations of the Commissioner of Education and that a new subparagraph (iv) shall be added to paragraph (1) of subdivision (b) of section 83.5 of the Regulations of the Commissioner of Education, as submitted, effective July 22, 2013 as an emergency action upon a finding by the Board of Regents that such action is necessary for preservation of the general welfare to immediately implement the revised rule to ensure that action can be taken expeditiously to revoke or suspend the certificates of teachers and school administrators who commit a crime involving fraud or submission of information related to their criminal history record checks in order to ensure the safety of the children and faculty of the schools in this State, and to ensure that it remains continuously in effect until it can be adopted as a permanent rule.

Timetable for Implementation

If the proposed amendment is adopted by the Board of Regents as an emergency rule at its July 2013 meeting, the proposed amendment will become effective on July 22, 2013. It is anticipated that the revised rule will be presented for adoption as a permanent rule at the September Regents meeting.

Attachment A

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 305, 3001, 3004, 3004-c, 3006, 3009, 3010 and 3035 of the Education Law.

1. Subdivision (d) of section 83.4 of the Regulations of the Commissioner of Education shall be amended, effective July 22, 2013, to read as follows:

(d) Evidence of conviction of a crime shall be admissible in any proceeding conducted pursuant to this Part, but such conviction shall not in and of itself create a conclusive presumption that the person so convicted lacks good moral character. Except as otherwise provided in paragraph (4) of this subdivision, [In] in the case of a certified individual, proof of conviction for any of the following acts constituting a crime in New York State and committed subsequent to certification shall create a rebuttable presumption that the individual so convicted lacks good moral character.

(1) . . .

(2) . .

(3) . . .

(4) any crime committed involving the submission of false information, or the commission of fraud, related to a criminal history record check.

2. A new subparagraph (iv) shall be added to paragraph (1) of subdivision (b) of section 83.5 of the Regulations of the Commissioner of Education, effective July 22, 2013, to read as follows:

(iv) any crime committed involving the submission of false information, or the commission of fraud, related to a criminal history record check.

8 NYCRR §83.4

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

The Department's Office of School Personnel Review & Accountability (OSPRA) is responsible for facilitating fingerprint generated criminal background checks in accordance with the Education Law (Chapter 180 of the Laws of 2000). All prospective covered school employees and/or applicants for a teaching certificate must be fingerprinted.

Generally, fingerprints are collected across the state at school districts, Boards of Cooperative Educational Services (BOCES), colleges and universities, and law enforcement agencies. Fingerprints are received by the Department in two formats: hard cards containing fingerprints that are collected through the "ink and roll" method and mailed, and digital fingerprint images captured on a scanner and transmitted electronically via a server. All fingerprint images are delivered by the Department to the state Division of Criminal Justice Services (DCJS), which conducts a state criminal history records check and then forwards the images to the Federal Bureau of Investigation (FBI) for processing against their criminal record repository.

The Department has taken steps to better ensure the security of fingerprints in recent years by growing the number of fingerprints collected electronically. Approximately 75 percent of fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised.

In an effort to close potential gaps that may exist (such as the ability of a person to submit false fingerprints), the Department began a review of the fingerprinting

process. As part of this review, the Department has determined that there are no provisions to expeditiously address actions related to fingerprint fraud. As such, individuals with serious criminal histories, whose presence in the classroom or school poses a danger to the safety of students and/or staff, may be able to evade the criminal history record check process and gain access to schools. The proposed amendment establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. In addition to shifting the burden to the teacher or school administrator in Part 83 proceedings, such an amendment would serve as a deterrent for individuals who may be inclined to submit false information relative to a criminal history background check. Based on public comment received following the 45-day public comment period required under the State Administrative Procedure Act, the proposed amendment was revised to clarify that the rebuttable presumption for fingerprinting fraud applies not only to crimes committed after certification, but also to convictions of individuals for submission of false fingerprints or other fraudulent acts undertaken to obtain their certification. In addition, the proposed amendment was revised to allow the Commissioner to initiate a review of the findings and recommendations of a hearing officer or hearing panel, including fingerprinting fraud.

Emergency action is needed for the preservation of the general welfare in order to ensure that action can be taken expeditiously to revoke or suspend the certificates of teachers and school administrators who commit a crime involving fraud or submission of information related to their criminal history record checks in order to ensure the safety of the children and faculty of the schools in this State.

Emergency action is also needed for the preservation of the general welfare in order to immediately the revised rule and to ensure that the revised rule remains continuously in effect until it can be adopted as a permanent rule. The proposed amendment was adopted as an emergency rule at the April 22-23, 2013 Regents meeting, effective April 23, 2013. A Notice of Emergency Action and Proposed Rule Making was published in the State Register on May 8, 2013. Following the 45-day public comment period required under SAPA, the proposed rule was revised in response to public comment. Following the 30-day public comment period for a revised rule making under SAPA, the proposed amendment will be adopted as a permanent rule. Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment can be presented for permanent adoption, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period required under the State Administrative Procedure Act §202(4-a). However, the April emergency rule will expire on July 22, 2013. A lapse in the rule will disrupt the revocation or suspension of certificates of teachers and school administrators who commit a crime involving fraud or submission of information related to their criminal history record checks in order to ensure the safety of the children and faculty of the schools in this State and to otherwise ensure that the emergency rule adopted at the April Regents meeting, as so revised, remains continuously in effect until it can be presented and made effective as a permanent rule.

It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at its September meeting, which is the first scheduled meeting after expiration of the 30-day public comment period mandated by the State Administrative Procedure Act for revised rule makings.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 8, 2013, the State Education Department received the following comments:

1. One commenter notes that currently 8 *NYCRR* §83.4(d) lists three categories of crimes that create a rebuttable presumption related to moral character: Penal Law drug offenses, physical or sexual abuse of a minor or student, and any crime committed on school property or while performing teaching duties. However, in all three cases the presumption is limited to only such crimes that are “committed subsequent to certification.” It is not clear that this limitation should properly pertain to a conviction for fingerprinting fraud. Instead, it would seem appropriate to apply such a presumption not only to crimes committed after certification, but also to convictions of individuals for submission of false fingerprints or other fraudulent acts undertaken to obtain their certification.

DEPARTMENT RESPONSE:

The Department agrees and proposed amendment was revised to clarify that the presumption related to crimes for fingerprinting fraud also apply to the conviction of individuals for submission of false fingerprints or other fraudulent acts undertaken to obtain their certification.

2. COMMENT:

The commenter also notes that §83.5(b) of the Commissioner’s regulations provides that the Commissioner may initiate a review of the findings and recommendations of a hearing officer or hearing panel, but only in cases involving convictions of specific crimes – specifically, this provision relists the three categories of

crimes in §83.4(d). If SED believes that acts involving fingerprinting/criminal history fraud merit inclusion in the rebuttable presumption provisions in §83.4(d), it may also find it appropriate to add such offenses to the list of crimes in §83.5(b) that enable the Commissioner to initiate a review of a hearing officer report involving such cases.

DEPARTMENT RESPONSE:

The Department agrees and has revised §83.5 of the Commissioner's regulations accordingly.