

## **PROPOSED EMERGENCY REGULATIONS RELATING TO CRIMINAL HISTORY CHECKS FOR SCHOOL EMPLOYEES**

### **603 CMR 51.00**

- Presented to the Board of Elementary and Secondary Education for vote as emergency regulations on: **September 24, 2013**
- Period of public comment: **through November 8, 2013**
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**Summary:** The regulations provide for a fingerprint-based national criminal background check for school employees. As required by the law, the regulations provide that new employees will undergo the checks during the 2013-2014 school year and returning employees will undergo checks prior to the start of the 2016-2017 school year. Going forward, all newly hired employees will be subject to the checks. The regulations also detail the circumstances under which a new school employer may rely on a suitability determination made by a previous school employer.

### **603 CMR 51.00: Criminal History Checks for School Employees**

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51.01 Authority, Scope, and Purpose.

- (1) Authority. 603 CMR 51.00 is promulgated pursuant to the authority of the Board of Elementary and Secondary Education under M.G.L. c. 71 § 38R and Chapter 77 of the Acts of 2013.
- (2) Scope. 603 CMR 51.00 governs the state and national criminal history checks of individuals working in or applying to work in Massachusetts public and private schools as required and permitted by M.G.L. c. 71 § 38R. M.G.L. c. 6, §§ 167-178B and 803 CMR 2.00 et seq. also apply to such criminal history checks.
- (3) Purpose. The purpose of 603 CMR 51.00 is to provide school employers and employees with consistent rules and procedures regarding criminal history background checks.

## 51.02 Definitions.

As used in 603 CMR 51.00, unless the context clearly requires otherwise, terms shall have the following meanings:

**Board:** The Massachusetts Board of Elementary and Secondary Education or a person duly authorized by the Board.

**Commissioner:** The Massachusetts Commissioner of Elementary and Secondary Education or his or her designee.

**Conditional Employee:** An individual who may have direct and unmonitored contact with children hired by a school employer without the employer's first obtaining the results of a state and national fingerprint-based criminal history check because the school employer determines that exigent circumstances exist as set forth in 51.05(4).

**Criminal Justice Information (CJI):** For the purposes of these regulations CJI refers to data provided by the Federal Bureau of Investigation (FBI) Criminal Justice Information Services Division (CJIS) to civil agencies to perform their mission; including, but not limited to data used to make hiring decisions.

**Criminal History Record Information (CHRI):** Information provided by the FBI and the Massachusetts State Police State Identification Section, through the Massachusetts Department of Criminal Justice Information Services (DCJIS). CHRI is defined by the FBI as any notations or other written or electronic evidence of an arrest, detention, complaint, indictment, information or other formal criminal charge relating to an identifiable person that includes identifying information regarding the individual as well as the disposition of any charges.

**Criminal Offender Record Information (CORI):**

Records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 17 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 17; provided, however, that if a person under the age of 17 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration. Massachusetts school employers' access to, and treatment of, CORI is governed by M.G.L. c. 71, § 38R, M.G.L. c. 6, §§ 167-178B and 803 CMR 2.00 et seq.

**Department of Criminal Justice Information Services (DCJIS):** The Commonwealth agency statutorily designated to provide a public safety information system and network to support data collection, information sharing and interoperability for the Commonwealth’s criminal justice and law enforcement community and to oversee the authorized provision of CORI to the non-criminal justice community.

**Direct and unmonitored contact with children:** Contact with students when no other employee, for whom the employer has made a suitability determination pursuant to these regulations of the school or district is present. “Contact” refers to any contact with a student that provides the individual with opportunity for physical touch or personal communication. The school employer may determine when there is potential for direct and unmonitored contact with children by assessing the circumstances and specific factors including but not limited to, whether the individual will be working in proximity with students, the amount of time the individual will spend on school grounds, and whether the individual will be working independently or with others. An individual shall not be considered to have the potential for direct and unmonitored contact with children if he or she has only the potential for incidental unsupervised contact in commonly used areas of the school grounds.

**Department:** The Massachusetts Department of Elementary and Secondary Education.

**Employee:** An individual working, or applying to work, in a Massachusetts public or private school. Employees shall include any apprentice, intern, or student teacher or individuals in similar positions.

**National Criminal History Check:** The process of submitting fingerprints to the FBI and Massachusetts State Police (MSP) State Identification Section to obtain state and national criminal history record information.

**School:** A Massachusetts public school, including a collaborative school, charter school, virtual school or innovation school; or a Massachusetts private day or residential school, including a special education school program approved under chapter 71B; or a Massachusetts independent or parochial school or schools.

**School Employer:** The superintendent of any city, town, or regional school district, principal, or other administrator of Massachusetts public or private schools, including a special education school program approved under chapter 71B. For the purposes of an individual directly hired by a Massachusetts school committee, the school committee is the school employer.

**Subcontractor or Laborer:** An individual not employed by the school employer but commissioned by the school committee or school, or employed by the city or town, or employed by a non-school employer under contract or lease with the school, school district, city, or town to perform work on school grounds or with students. Such individuals may be the employees of a contractor or vendor hired by a school, or may be independent contractors or service providers hired by a school or may be performing services on school grounds under a contract or lease with the school, school district, city or town.

**Substitute Employee:** An individual who is employed, on a temporary basis, to take the place of an employee who is absent.

**Suitability Determination:** A determination made by a school employer concerning whether anything contained in the individual's CHRI renders the individual unfit for employment that may include direct and unmonitored contact with children. A suitability determination may also be made by the Department of Elementary and Secondary Education.

**Volunteer:** An individual who performs a service for a school employer on an unpaid basis, who is not an apprentice, intern or student teacher.

51.03 Individuals Subject to a National Criminal History Check for Suitability Determinations.

- (1) School employers shall review the results of a national criminal history check for all current and prospective school employees in the following categories:
  - (a) Any full or part-time employee who may have direct and unmonitored contact with children;
  - (b) Any substitute employee who may have direct and unmonitored contact with children;
  - (c) Any student teacher, apprentice or intern working at a school who may have direct and unmonitored contact with children; and
  - (d) Any individual who regularly provides school related transportation to children.
  
- (2) School employers may review the results of a national criminal history check for certain individuals who may have direct and unmonitored contact with children, including:
  - (a) Any volunteer; and
  - (b) Any subcontractor or laborer commissioned by the school employer, or employed by the city or town, to perform work on school grounds or with students.
  
- (3) In the case of an individual directly hired by the school committee, such as a superintendent of schools, the chair of the school committee shall review the results of the national criminal history check.

51.04 School Employer Policies on National Criminal History Checks and Suitability Determinations; Confidentiality; Dissemination; Audit.

- (1) Each school employer that receives CHRI shall maintain a written CHRI policy that meets the minimum standards of the DCJIS model CORI Policy and that complies with all federal rules and regulations regarding CHRI, including limitations on record retention and the requirement of CHRI consent forms.
- (2) Security of CHRI: School employers will conform to all of the requirements of the FBI Criminal Justice Information System (CJIS) security policy and the DCJIS security policies and procedures pertaining to the use, storage, dissemination, and destruction of CHRI and CJ.
- (3) Before taking any adverse action based on CHRI, a school employer shall:
  - (a) comply with applicable federal and state laws and regulations, which may include, but are not limited to, M.G.L. c. 71, §§ 42 and 42D, and c. 150E, if applicable;
  - (b) notify the individual in person, by telephone, fax, or electronic or hard copy correspondence of the potential determination;
  - (c) provide a copy of the individual's CHRI to the individual;
  - (d) provide a copy of the employer's CHRI policy to the individual;
  - (e) identify the information in the individual's CHRI that is the basis for the potential determination;
  - (f) provide the individual with the opportunity to dispute the accuracy of the information contained in the CHRI;
  - (g) provide the individual with a copy of state and FBI information regarding the process for correcting CHRI; and
  - (h) document all steps taken to comply with 603 CMR 51.04.
- (4) Dissemination. Upon receiving the national criminal history check results for a given employee, a school employer shall disseminate those results to only the following recipients:
  - (a) the employee, in a confidential and secure manner, pursuant to the standards for providing CORI information under 803 CMR 2.13(a) or upon the employee's request; and
  - (b) the Department, if reporting to the Commissioner is required pursuant to section 603 CMR 51.07, Reporting National Check Results to the Commissioner.
- (5) Confidentiality, Storage and Destruction. A school employer shall adhere to the following standards regarding the confidentiality, storage and destruction of national criminal history check results:

- (a) The employer may not receive an individual's national criminal history check results unless the individual has authorized the employer to receive the results through a CHRI consent form;
  - (b) While employment decisions are pending, the employer shall store the national criminal history check results pursuant to the restrictions regarding CORI storage set forth in 803 CMR 2.11(1), (2), and (3); and
  - (c) Once employment decisions are complete and the requirements set forth in 51.07 of these regulations, if applicable, are met, the employer shall destroy national criminal history check results pursuant to the requirements regarding CORI destruction set forth in 803 CMR 2.12.
- (6) Audit. School employers are subject to Compliance Audits by the DCJIS and the FBI. These audits will assess the adherence to DCJIS, FBI CHRI and CJJ handling laws, regulations, policies, and procedures.

#### 51.05 Timing of National Criminal History Checks

- (1) For individuals who began work or service before the 2013-2014 school year:
- (a) An employee, subcontractor, laborer, individual who regularly provides school related transportation to children, volunteer or other individual will be considered to have begun work or service for a school employer before the 2013-2014 school year if he or she performed work for that school employer prior to July 1, 2013.
  - (b) Before the start of the 2016-2017 school year and according to a schedule established by the Department, school employers shall obtain and review national criminal history checks, and make required suitability determinations, for all employees who began work before the 2013-2014 school year and for all individuals who regularly provide school related transportation to children and who began work before the 2013-2014 school year.
  - (c) School employers may obtain and review national criminal history checks, and make suitability determinations for subcontractors, laborers or volunteers who began work or service before the 2013-2014 school year according to a schedule established by the Department.
- (2) For individuals who begin work or service during the 2013-2014 school year:
- (a) For employees who may have direct and unmonitored access to children, and for individuals who regularly provide school related transportation to children, school employers shall:



- (i) Obtain and review the applicant's Massachusetts CORI and determine whether the CORI results preclude employment before hiring the individual;
    - (ii) If the Massachusetts CORI results do not preclude employment, the employer shall require the individual to submit his or her fingerprints for a national criminal history check according to the process created by the Commonwealth and according to a schedule established by the Department; and
    - (iii) Make a suitability determination after the results of the national criminal history check are available; or, if permitted by 603 CMR 51.06, obtain documentation of a previous suitability determination.
  - (b) For subcontractors, laborers and volunteers who begin work or service during the 2013-2014 school year, the school employer may require the individual to submit fingerprints for a national criminal history check according to the procedures set out in 51.05(2)(a).
- (3) For individuals who begin work or service during or after the 2014-2015 school year, school employers shall secure national criminal history checks before finalizing an offer of employment, as follows:
- (a) Obtain and review the applicant's Massachusetts CORI and determine whether the CORI results preclude employment;
  - (b) If the CORI results do not preclude employment, require the individual to submit his or her fingerprints for a national criminal history check according to the process created by the Commonwealth and according to a schedule established by the Department, unless permitted by 603 CMR 51.06, to rely on a previous suitability determination; and
  - (c) Make a suitability determination after the results of the national criminal history check are available; or, if permitted by 603 CMR 51.06, obtain documentation of a previous suitability determination.
- (4) In exigent circumstances, a school employer may hire an employee conditionally for whom a national criminal history check is required, or permit a subcontractor, laborer or volunteer for whom the school employer seeks a national criminal history check to begin service, without first receiving the results of a national criminal history check.
- (a) The exigent circumstances in which a school employer may hire a conditional employee include:

- (i) The school determines it must fill a position that is created or becomes open during the school year;
  - (ii) The school seeks to fill a position less than one month before the start of a school year;
  - (iii) The school seeks to hire an individual for whom a national criminal history check has been requested, but the school employer is unlikely to receive the results before the individual's employment will begin;
  - (iv) The school requires the service of a subcontractor, laborer or volunteer who has submitted fingerprints for the purposes of a national criminal history check, but the school employer has not yet received the results of the national criminal history check.
- (b) In order to hire a conditional employee or permit an individual to begin providing services under subsection (a), a school employer:
- (i) Shall obtain and review the results of a Massachusetts CORI check;
  - (ii) Shall require the individual to submit fingerprints for a national criminal history check, unless the school employer first obtains the CORI results and determines they preclude employment, or unless the school employer is permitted by 603 CMR 51.06 to rely on a previous suitability determination;
  - (iii) May, until the school employer makes a suitability determination based on the results of a national criminal history check or documentation of a previous suitability determination is received, require an individual to provide information regarding the individual's history of criminal convictions; however, the individual cannot be asked to provide information about juvenile adjudications or sealed convictions; and
  - (iv) Shall make a suitability determination after the results of the national criminal history check become available, or, if permitted by 603 CMR 51.06, obtain documentation of a previous suitability determination.

51.06 Employer Documentation of Suitability Determination; Reliance Thereon; Subsequent Checks.

- (1) Employer Documentation of Suitability Determination. Employers must retain documentation of the school employer's review of an employee, applicant, subcontractor, laborer, school transportation provider, or volunteer's national criminal history check results for the duration of an employee's employment or for seven years, whichever is longer. The documentation must include, and is limited to, the following:
  - (a) The name and date of birth of the employee or applicant;
  - (b) The date on which the school employer received the national criminal history check results; and,
  - (c) The suitability determination (either "suitable" or "unsuitable").
- (2) Documentation to be Provided upon Request. A school employer must provide a copy of the documentation of the suitability determination of an individual to another school employer, or to the individual, upon request of the individual for whom the school employer conducted a suitability determination.
- (3) Reliance on a Favorable Suitability Determination. When an individual for whom a school employer or the Department of Elementary and Secondary Education has made a suitability determination applies to work for a school employer, the school employer may obtain and may rely on a favorable suitability determination, if the following criteria are met:
  - (a) The suitability determination was made within the last 7 years; and
  - (b) The individual has not resided outside Massachusetts for any period longer than 3 months since the suitability determination was made; and either
  - (c) The individual has been employed continuously for one or more school employers or has gaps totaling no more than 2 years in his or her employment for school employers; or
  - (d) If the individual works as a substitute employee, the individual is still deemed suitable for employment by the school employer who made a favorable suitability determination. Upon request of another school employer, the initial school employer shall provide documentation that the individual is still deemed suitable for employment by the initial school employer.
- (4) Documentation of Reliance on a Previous Favorable Suitability Determination. In any instance where a school employer relies on a suitability determination made by another school employer or by the Department of Elementary and Secondary Education, the relying school employer shall retain the following documentation:
  - (a) A copy of the documentation received from the school employer or agency that made the relied-upon suitability determination, and

(b) Documentation establishing that the individual met the criteria of 603 CMR 51.06 (3) (a), (b), and either (c) or (d).

(5) Subsequent Checks; Fees.

- (a) Unless a school employer may rely on a previous determination pursuant to part (3) of this section, the school employer shall require a new national criminal history check at the individual's expense.
- (b) If a previous school employer's documentation demonstrates the employee was deemed "unsuitable" for employment, another school employer shall require a new national criminal history check at the individual's expense.
- (c) A school employer may choose to perform a new national criminal history check on an individual rather than rely on a previous favorable suitability determination. The school employer shall bear the cost of such a new check.

51.07 Reporting National Criminal History Check Results to the Commissioner.

- (1) Any school employer who has dismissed, declined to renew the employment of, obtained the resignation of, or declined to hire a licensed educator or an applicant for a Massachusetts educator license because of information discovered through a national criminal history check shall report such decision or action to the Commissioner in writing within 30 days of the employer action or educator resignation. The report be in a form requested by the Department and shall include the reason for the action or resignation as well as a copy of the national criminal history check results. The school employer shall notify the employee or applicant that it has made a report pursuant to 603 CMR 51.07(1) to the Commissioner.
- (2) Any school employer who discovers information from a national criminal history check about a licensed educator or an applicant for a Massachusetts educator license that implicates grounds for license action pursuant to 603 CMR 7.15(8)(a) shall report to the Commissioner in writing within 30 days of the discovery, regardless of whether the employer retains or hires the educator as an employee. The report must include a copy of the national criminal history check results. The school employer shall notify the employee or applicant that it has made a report pursuant to 603 CMR 51.07(2) to the Commissioner and shall also send a copy of the national criminal history check results to the employee or applicant.
- (3) The failure of a school administrator who holds an educator license to make any such report to the Commissioner shall be grounds for license sanction pursuant to 603 CMR 7.15(8)(h).
- (4) The Department shall treat CHRI in a manner consistent with the DCJIS model CORI Policy and in compliance with all federal rules and regulations regarding CHRI, including limitations on record retention.