



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

**TO:** Full Board

**FROM:** John D'Agati

**SUBJECT:** Proposed Amendment of Section 87.5 of the Regulations of the Commissioner of Education, Relating to Due Process Procedures for Criminal History Record Checks of Prospective School Employees and Applicants for Certification

**DATE:** September 2, 2011

**AUTHORIZATION(S):**

### **SUMMARY**

#### Issue for Decision (Consent Agenda)

Should the Board of Regents adopt as a permanent rule the amendment to section 87.5 of the Regulations of the Commissioner of Education to conform to a recent change in the organization of the Department's Office of Teaching Initiatives?

#### Reason(s) for Consideration

Implementation of Regents Policy

#### Proposed Handling

The proposed amendment is being submitted to the full Board for adoption as permanent rule. A second emergency adoption is also necessary to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until the effective date of the permanent rule. A statement of the specific facts and circumstances which necessitate emergency action is attached.

#### Procedural History

The proposed amendment was adopted as an emergency rule at the June Regents meeting, effective June 24, 2011. A Notice of Proposed Rule Making was

published in the State Register on July 6, 2011. Supporting materials are available from the Secretary to the Board of Regents.

### Background Information

The proposed amendment is necessary to conform the Commissioner's Regulations to changes in the internal organization of the State Education Department. Under the current Commissioner's Regulation [8 NYCRR section 87.5(a)(5)], Department determinations denying clearance for employment to prospective school employees and certification applicants may be appealed to the assistant commissioner of the Office of Teaching Initiatives (or, in one instance, to the executive director of such Office). The proposed amendment will replace references to the specific staff titles with the terms "designee of the Commissioner" or "Commissioner's designee." The amendment thereby provides flexibility in responding to future changes in the internal organization of the Department, and avoids the necessity of amending the regulation each time such changes occur. As a result of the retirement of Assistant Commissioner Robert Bentley, effective June 23, 2011, the responsibility for determining appeals under section 87.5(a)(5) was assumed by Allison Armour-Garb, as the Commissioner's designee for such purpose.

### Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That subparagraphs (vii) and (viii) of paragraph (4) of subdivision (a), paragraph (5) of subdivision (a), and subdivision (b) of Section 87.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective October 5, 2011; and it is further

VOTED: That subparagraphs (vii) and (viii) of paragraph (4) of subdivision (a), paragraph (5) of subdivision (a), and subdivision (b) of Section 87.5 of the Regulations of the Commissioner of Education be amended, as submitted, effective September 22, 2011, as an emergency measure upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until the effective date of the permanent rule.

### Timetable for Implementation

The June emergency rule will expire on September 21, 2011. If adopted at the September Regents meeting, the second emergency rule will take effect on September 22, 2011 and the permanent rule will take effect on October 5, 2011.

PROPOSED AMENDMENT OF SECTION 87.5 OF THE REGULATIONS OF THE  
COMMISSIONER PURSUANT TO EDUCATION LAW SECTIONS 207, 305, 3001-d  
AND 3035, RELATING TO DUE PROCESS PROCEDURES FOR CRIMINAL HISTORY  
RECORD CHECKS OF PROSPECTIVE SCHOOL EMPLOYEES AND APPLICANTS  
FOR CERTIFICATION  
STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE  
EMERGENCY ACTION

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to changes in the internal organization of the State Education Department. Under the current Commissioner's Regulation [8 NYCRR section 87.5(a)(5)], Department determinations denying clearance for employment to prospective school employees and certification applicants may be appealed to the Assistant Commissioner of the Office of Teaching Initiatives (or, in one instance, to the executive director of such Office). The proposed amendment will replace references to the specific staff titles with the terms "designee of the Commissioner" or "Commissioner's designee." The amendment will thereby provide flexibility in responding to future changes in the internal organization of the Department, and avoid the necessity of amending the regulation each time such changes occur. It is anticipated that, as a result of the retirement of the current Assistant Commissioner, effective June 23, 2011, the responsibility for determining such appeals will be assumed by a designee of the Commissioner of Education for such purpose.

The proposed amendment was adopted as an emergency action at the June Regents meeting, effective June 24, 2011. A Notice of Proposed Rule Making was published in the State Register on July 6, 2011.

The proposed amendment has been adopted as a permanent rule at the September 12-13, 2011 Regents meeting. Under the State Administrative Procedure Act (SAPA), the earliest the permanent rule can take effect is October 5, 2011, the date the notice of adoption is published in the State Register. However, the June emergency adoption will expire on September 21, 2011, 90 days after its filing with the Department of State on June 24, 2011. A lapse in the rule's effectiveness could disrupt the appeal process for determinations denying employment clearances to prospective school employees. A second emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the June 2011 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

## AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Sections 207, 305, 3001-d and 3035 of the Education Law.

1. Subparagraph (vii) of paragraph (4) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective September 22, 2011, as follows:

(vii) Where the prospective school employee does not submit a response within the timeframe prescribed in subparagraph (vi) of this paragraph, the department shall make a determination denying clearance for employment and notification of such denial, along with the basis for such determination, shall be transmitted to the prospective school employee by certified mail, return receipt requested. In the case of a prospective school employee requesting conditional clearance for employment, such determination shall also deny the conditional clearance for employment. In the case of a prospective school employee who has already been granted conditional clearance for employment, such determination shall also terminate the conditional clearance for employment. Such notification shall state that the prospective school employee may appeal the determination to [the executive director of the Office of Teaching Initiatives of the State Education Department] a designee of the Commissioner of Education, at the address specified in the notification, in accordance with paragraph (5) of this subdivision, and shall include instructions for such an appeal. Notification of the denial of clearance for employment and denial or termination of conditional clearance for employment shall also be given to the covered school.

2. Subparagraph (viii) of paragraph (4) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective September 22, 2011, as follows:

(viii) Where the prospective school employee submits a response within the timeframe prescribed in subparagraph (vi) of this paragraph, the department shall, upon review of the prospective school employee's criminal history record, related information obtained by the department pursuant to the review of such criminal history record, and information and written argument provided by the prospective school employee in his or response, make a determination on whether clearance for employment shall be granted or denied. In such review, the department shall apply the standards for the granting or denial of a license or employment application set forth in Correction Law, section 752 and shall consider the factors specified in Correction Law, section 753. Such review shall be conducted in accordance with the requirements of section 296(16) of the Executive Law. Where the department's determination is that clearance for employment is denied, the decision shall include the basis for such determination, and shall state that the prospective employee may appeal the department's determination to [the assistant commissioner of the Office of Teaching Initiatives of the State Education Department] a designee of the Commissioner of Education, at the address specified in the determination, in accordance with paragraph (5) of this subdivision, and shall include instructions for such an appeal. A copy of the determination that clearance for employment is denied, or notice that such clearance is granted, as the case may be, shall be transmitted to the prospective school employee. Where clearance for employment is denied, such determination shall be sent to the prospective school employee by certified mail, return receipt requested. Where clearance for employment is granted, such determination shall be sent to the prospective school employee by regular first class mail. Where clearance for employment is denied and the prospective school employee also requested conditional clearance for employment, such determination shall also deny the conditional clearance for employment. Where

clearance for employment is denied and the prospective school employee has already been granted conditional clearance for employment, such determination shall also terminate the conditional clearance for employment. In addition, the covered school shall be notified of the denial or granting of clearance.

3. Paragraph (5) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective September 22, 2011, as follows:

(5) Appeal of department's determination.

(i) A prospective school employee who was denied clearance for employment by a determination of the department pursuant to paragraph (4) of this subdivision, may appeal that determination to [the assistant commissioner of the Office of Teaching Initiatives of the State Education Department] a designee of the Commissioner of Education who did not participate in the department's determination, provided that such appeal is mailed by regular first class mail or certified mail or is hand delivered to the address specified in the department's determination within 25 calendar days of the mailing of such determination denying clearance. [Such appeal shall be heard by the assistant commissioner of the Office of Teaching Initiatives or a State review officer designated by the assistant commissioner who did not participate in the department's determination].

(ii) . . .

(iii) Such appeal papers, submitted within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph, may include any affidavits or other relevant written information and written argument which the prospective school employee wishes the [assistant commissioner, or a State review officer designated by the assistant commissioner,] Commissioner's designee to consider in support of the position that clearance for employment should be granted, including, where applicable, information in

regard to his or her good conduct and rehabilitation. The prospective school employee may request oral argument and must do so in the appeal papers submitted within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph. Such oral argument shall be conducted in accordance with the requirements of subparagraph (iv) of this paragraph.

(iv) A prospective school employee may request oral argument as part of the appeal of the department's determination denying clearance for employment. The department shall notify the prospective school employee of the time and location of such oral argument. Such argument shall be heard before the [assistant commissioner, or a State review officer designated by the assistant commissioner] Commissioner's designee. At the oral argument, the prospective school employee may present additional affidavits or other relevant written information and written argument which the prospective school employee wishes [ the assistant commissioner, or the State review officer designated by the assistant commissioner,] the Commissioner's designee to consider in support of the position that clearance for employment should be granted, including, where applicable, written information in regard to his or her good conduct and rehabilitation. No testimony shall be taken at the oral argument and no transcript of oral argument shall be made. The prospective school employee may make an audio tape recording of the oral argument. However, such audio tape recording or transcript thereof shall not be part of the record upon which the [assistant commissioner or a State review officer designated by the assistant commissioner] Commissioner's designee makes the determination on whether clearance for employment shall be granted or denied.

(v) Where a timely request for an appeal is received, upon review of the prospective school employee's criminal history record, related written information



obtained by the department pursuant to the review of such criminal history record, written information and written argument submitted by the prospective school employee in this appeal within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph, and written information provided at oral argument if requested by the prospective school employee, the [assistant commissioner of the Office of Teaching Initiatives or a State review officer designated by the assistant commissioner who did not participate in the department's determination,] Commissioner's designee shall make a determination of whether clearance for employment shall be granted or denied. In such appeal, the [assistant commissioner or his or her designee] Commissioner's designee shall apply the standards for the granting or denial of a license or employment application set forth in Correction Law, section 752 and shall consider the factors specified in Correction Law, section 753. Such appeal shall be conducted in accordance with the requirements of section 296(16) of the Executive Law. Where the determination of the [assistant commissioner, or his or her designee,] Commissioner's designee is that clearance for employment is denied, his or her decision shall include the findings of facts and conclusions of law upon which the determination is based. A copy of the determination that clearance for employment is denied, or notice that such clearance is granted, as the case may be, shall be transmitted to the prospective school employee by regular first class mail. In addition, the covered school shall be notified of the denial or granting of clearance.

4. Subdivision (b) of section 87.5 of the Regulations of the Commissioner is amended, effective September 22, 2011, as follows:

(b) Procedures for clearance for certification. Where the criminal history record reveals conviction of a crime, or an arrest for a crime, the department shall transmit the criminal history record and related information to the department's [assistant

commissioner of the] Office of Teaching Initiatives for a determination of good moral character pursuant to Part 83 of this Title, which procedure shall determine the clearance for certification.

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