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Audit Objective..... 2

Audit Results - Summary..... 2

Background..... 3

**Audit Findings and
Recommendations..... 4**

Delays in Completing Background
Checks..... 4

Recommendations..... 7

Noncompliance with Special
Reporting Requirements 7

Recommendations..... 8

Audit Scope and Methodology..... 8

Authority 9

Reporting Requirements..... 9

Contributors to the Report 9

Appendix A - Auditee Response.. 10

**STATE EDUCATION
DEPARTMENT**

**CRIMINAL HISTORY
BACKGROUND CHECKS
FOR SCHOOL EMPLOYEES**

Report 2007-S-119

AUDIT OBJECTIVE

Our objective was to determine if the State Education Department is effectively overseeing the completion of criminal history background checks on applicants for school employment.

AUDIT RESULTS - SUMMARY

In accordance with legislation enacted in 2000, applicants for teaching and most other positions in New York's public schools must be checked for criminal histories by the Division of Criminal Justice Services (DCJS) and the FBI. Outside New York City, these criminal history background checks are coordinated and overseen by the State Education Department (Department). The Department receives the initial applications for background checks, forwards the applications for processing, receives the results of the background checks from DCJS and the FBI, determines whether the applicants can be given clearance to work in schools (a criminal history does not necessarily disqualify an applicant), and notifies the schools of its determinations. The Department receives more than 50,000 applications a year for such background checks.

Schools are allowed to hire individuals, conditionally, before their background checks are completed. As a result, there is a risk that individuals with inappropriate criminal backgrounds could be hired by schools and have contact with students at the schools. This risk is minimized if the time taken to complete the background checks is also minimized, but we found that background checks were sometimes subject to long delays.

For example, when we initiated our audit, we identified more than 400 background checks

that had yet to be completed and had been in process for an average of at least eight months. Since the Department was not monitoring the status of its ongoing background checks, it did not know that the checks were still in process and that many could not be completed because of data transmission failures or blurred fingerprint images. These background checks were only completed because we intervened and asked the Department to follow up with the FBI and DCJS.

When the background checks were finally completed, we determined that at least 157 of the 469 applicants being checked had been hired by public schools before their background checks were completed, 30 of the 157 had some kind of criminal history, and one of the 30 would not have been cleared to work in schools if the background check had been completed before the applicant was hired. We therefore concluded that, despite the legislation requiring background checks for school employment, individuals with inappropriate criminal backgrounds could still be hired by schools and have contact with students for extended periods of time.

To better meet the intent of this legislation, we recommend the Department actively monitor whether all requested background checks are being completed in a timely manner and take appropriate action when they are not. In addition, since schools are sometimes inappropriately hiring applicants before requesting background checks on the applicants, we recommend the Department remind the schools of their obligation to request background checks before applicants are hired.

Department officials generally agreed with our report's findings and recommendations. They stated that our audit covered a period of critical transition when the work flow process

was undergoing dramatic change from a largely paper-based process to a completely electronic process. During this transition period, there were significant work backlogs that limited the development of system generated management reports. Officials further indicated that a number of improvements have already been implemented, and new monitoring practices will soon be in place.

This report, dated February 12, 2009, is available on our website at <http://www.osc.state.ny.us>. Add or update your mailing list address by contacting us at: (518) 474-3271 or
Office of the State Comptroller
Division of State Government Accountability
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BACKGROUND

The Safe Schools Against Violence in Education (SAVE) Act, which became effective in July 2000, requires applicants for teaching and most other positions in New York's public schools to be checked for criminal histories. The applicants' fingerprints are to be obtained and forwarded, along with certain background information, to the New York State Division of Criminal Justice Services (DCJS). DCJS is to check its fingerprint database for possible criminal history information, and forward the fingerprints to the FBI for a national database check.

Outside New York City, the State Education Department (Department) is responsible for coordinating and overseeing these criminal history background checks. All applications for background checks are to be submitted to the Department, along with the applicants' fingerprints and background information. The applications may be submitted by the

school districts or the applicants themselves. The Department forwards the fingerprints and background information to DCJS, and DCJS forwards the information to the FBI. The Department then receives the results of the background checks from DCJS and the FBI, determines whether the applicants can be given clearance to work in schools (a criminal history does not necessarily disqualify an applicant), and notifies the school districts or applicants of its determinations.

An applicant's background check is not completed until the Department receives the results of both the DCJS and the FBI criminal history checks. However, school districts may hire individuals, conditionally, before their background checks are completed. Such individuals may be hired with either "emergency conditional clearance" or "conditional clearance."

Local school boards have the authority to grant "emergency conditional clearance" to an applicant. This clearance lasts for up to 20 days. If neither the DCJS nor the FBI criminal history check is completed by the end of the 20-day period, the clearance expires. However, a school board can repeatedly grant an applicant this 20-day clearance until the criminal history checks are completed. Emergency conditional clearance should only be granted to applicants for whom a background check has been requested.

The Department may grant "conditional clearance" to an applicant on the basis of the DCJS criminal history check (in most cases, the DCJS check is completed before the FBI check). This conditional clearance can be revoked on the basis of the FBI check, but if nothing disqualifying is identified by the FBI check, full clearance is granted. There are no time limits on this conditional clearance.

The Department receives more than 50,000 applications a year for background checks. The applications are processed and administered by the Department's Office of School Personnel Review and Accountability (OSPRA). The applications may be submitted manually (i.e., on paper) or online through the Department's automated TEACH system (the applicant's fingerprints are scanned optically for on-line applications). TEACH is an online application and database system that is used for background checks, teacher certifications, and other educational certifications.

The SAVE Act does not require that a background check be completed within any specified timeframe. However, the Act does state that the check should be completed "promptly." In addition, if a determination of conditional clearance is not made within 15 business days of the submission of a background check application (i.e., if DCJS does not complete its background check and the Department does not either grant the applicant conditional clearance or deny clearance within that timeframe), the SAVE Act requires the Department to notify the school district and the applicant and provide a good faith estimate of the amount of additional time that will be needed for such a determination.

AUDIT FINDINGS AND RECOMMENDATIONS

Delays in Completing Background Checks

Schools are allowed to hire individuals, conditionally, before their background checks are completed. As a result, there is a risk that individuals with inappropriate criminal backgrounds could be hired by schools and have contact with students at the schools. This risk is minimized if the time taken to complete the background checks is also

minimized. However, if the completion of the background checks is delayed for weeks, or even months, the risk increases, because the individuals would have the opportunity for sustained contact with students during this interval. It is thus important for background checks to be completed promptly.

OSPRA is responsible for processing applications for background checks. It is also responsible for the automated TEACH system. This system has a database with information about each application that has been submitted for processing (whether manually or online), and consequently, the system can produce management reports showing the status of each application (e.g., awaiting the results of the DCJS background check, awaiting the results of the FBI background check, completed, etc.).

Thus, OSPRA has the ability to monitor whether the applications are being completed promptly, and to take appropriate action if this is not the case. For example, OSPRA could follow up with DCJS and/or the FBI to determine why a background check was being delayed, and notify the school districts about such delays so they could decide how to proceed. In fact, OSPRA is required by law to provide such notification whenever DCJS's background check is not completed within 15 business days.

However, we found that OSPRA was not performing such monitoring, and as a result, was in no position to take appropriate action when background checks were delayed. For example, OSPRA did not have the TEACH system routinely produce management reports that tracked the status of each outstanding application or highlighted applications that had been outstanding for long periods of time. Consequently, OSPRA officials did not know whether applications for background checks were being processed in a timely manner or

whether any applications had been outstanding for long periods of time.

In addition, OSPRA was not adequately tracking the processing time of background check applications, as certain key processing dates, such as the date processing began (i.e., the date the applicant's fingerprints and background information were received by OSPRA) were not captured on the TEACH system. As a result, OSPRA officials did not know whether DCJS background checks were being completed within 15 days, and accordingly, were in no position to provide applicants and school districts with the 15-day notification required by law.

To determine whether many of the background checks were subject to long delays, we reviewed information on the TEACH system database about the 105,932 background check applications that were submitted to OSPRA between March 14, 2006 and March 13, 2008. We were unable to determine how long it took for the completed applications to be completed, because, as was noted, certain key processing dates were not recorded on the database. However, we were able to identify the applications that had yet to be completed and, from information that was available, were able to determine that many of these applications had been subject to long delays.

Specifically, we determined that, as of March 28, 2008, 469 of the 105,932 background check applications had yet to be completed. A total of 64 of these applications were awaiting the results of the DCJS background check, while 405 were awaiting the results of the FBI background check.

Since OSPRA officials were not monitoring the status of the applications, they were not aware that 469 applications were outstanding. We noted that 193 of the applications had

been awaiting the results of the FBI background check for at least three months, as the results of the DCJS background check had been received in 2006 or 2007, but nothing had been received from the FBI as of March 28, 2008. OSPRA officials, who had told us that the FBI response was usually received within two days of the DCJS response, did not know the reasons for these delays.

We asked OSPRA officials to follow up with the FBI and/or DCJS on these 469 applications. As a result of this follow-up, the uncompleted background checks were completed for 427 of the 469 applications (OSPRA sent letters to the remaining 42 applicants - and the related schools - requesting that they submit a new set of fingerprints to reinstate their background checks).

We were able to determine that the 427 completed applications were outstanding for an average of at least eight months, as this was the average length of time between the completion of the first background check for each applicant (usually by DCJS) and the completion of the second background check (usually by the FBI). One application was outstanding for at least 27 months, as this was the length of time between the first and second checks.

The risk to students increases significantly when background checks are subject to such long delays. If an individual is hired, conditionally, before his background check is completed, and the background check is not completed for several months, the individual is able to have sustained contact with students during those months. If the individual is eventually found to have an inappropriate criminal background and loses his clearance to work in schools, it is too late to protect the students who were in contact with the

individual during the months of conditional clearance.

To determine how many of the 469 applicants with incomplete background checks were hired by schools before their background checks were completed, we reviewed hiring information recorded on the New York State Retirement System, the New York State Teacher's Retirement System, and OSPRA's TEACH system. We found that at least 157 of the 469 applicants were working for school districts before their background checks were completed.

To determine whether criminal histories were identified for any of these 157 individuals when their background checks were finally completed, we reviewed their completed background checks. We found that 30 of the 157 individuals did have criminal histories of some sort. The more serious charges against these individuals included assault, gross sexual imposition, and criminal possession of a controlled substance. While many of the individuals were not convicted of the charges, their employment in public schools is still a cause for concern.

According to OSPRA officials, even if the background checks of these 30 individuals had been completed before they were hired, only one of the individuals would have been denied clearance for employment. The officials further noted that, in this case, the individual was hired (and terminated) eight months before a background check was even requested by the school district (as is discussed later in this report, contrary to expectations, school districts do not always request background checks on applicants before they are hired).

We note that, for 28 of the 30 individuals, it was the FBI background check that was delayed. An average of 19 months elapsed

between the completion of their DCJS background check and the completion of their FBI background check. For the other two individuals, it was the DCJS background check that was delayed, by an average of seven months. We further note that all 30 individuals might have been able to work indefinitely without full clearance had we not prompted OSPRA to follow up on the status of their incomplete background checks.

We therefore conclude that, despite the requirement for criminal history background checks, individuals with inappropriate criminal backgrounds may still be hired by schools and have contact with students for extended periods of time. It thus appears that the current process for administering background checks is not working as effectively as was intended by the SAVE Act.

To improve the effectiveness of this process, and better meet the intent of the legislation, we recommend OSPRA actively monitor whether all requested background checks are being completed in a timely manner and take appropriate action when they are not. To facilitate this monitoring, we recommend OSPRA modify the TEACH system to capture all pertinent information about applications for background checks, and routinely produce management reports tracking the status of each outstanding application and highlighting applications that have been outstanding for long periods of time. For appropriate action, we recommend OSPRA follow up with DCJS and/or the FBI to determine why a background check is being delayed, and notify the school districts about such delays so they can decide how to proceed.

We also recommend OSPRA monitor whether DCJS background checks are being completed within 15 days, and if not, provide applicants and school districts with the 15-day

notification required by law. We further note that an audit report issued in 2003 by the Office of the State Comptroller (Report 2003-J-1) identified similar problems and made similar recommendations.

OSPRA officials generally agreed with our findings and recommendations. They stated that our audit period covered a critical transition time when the work flow process was undergoing dramatic change from a largely paper-based process to a completely electronic process. They noted that OSPRA experienced significant work backlogs during this period and faced limitations regarding the production of automated management reports on the TEACH system.

The officials further stated that poor fingerprint images (the images were rejected by the FBI) and failures in data transmission were responsible for the delays we identified, and they have taken action to address these issues. For example, they noted that OSPRA has implemented a new technology called Live Scan which should improve fingerprint scanning, and implemented a new version of the TEACH system to provide applicants and schools with more detailed information on the status of their applications. They also stated that they have created management reports (and other electronic mechanisms) to identify outstanding background check applications, and plan to produce these management reports on a weekly basis.

Recommendations

1. Modify the TEACH system so that it captures all pertinent information for each background check application and routinely produces management reports that (a) track the status of each outstanding application and (b) highlight applications that have been outstanding for long periods of time.

Use these management reports to determine whether all requested background checks are being completed in a timely manner, and when they are not, follow up with DCJS and/or the FBI and notify the affected school districts about the delays. Develop written procedures and/or guidelines for this monitoring process.

(Department officials believe that all pertinent information is already captured by the TEACH system. However, they agree that improved management reports are needed and they have instituted actions to improve monitoring.)

2. Monitor whether DCJS background checks are being completed within 15 days, and if not, provide applicants and school districts with the 15-day notification required by law.

(Department officials agree with this recommendation.)

Noncompliance with Special Reporting Requirements

In addition to its other requirements, the SAVE Act also requires school districts to notify the Department whenever they hire or terminate an employee, and requires the Department to notify DCJS whenever a terminated employee is not rehired by a school district within 12 months (so that DCJS can delete the individual's fingerprints from its files).

However, we found that the school districts and the Department are not complying with these requirements, mainly because the TEACH system is not properly set up to

record the dates an applicant is hired and terminated. The system has no data field for a hiring date, and the field for the termination date can only record the date the data is entered, which may not be the same as the date of the actual termination. We recommend the TEACH system be modified so that it can record the dates an applicant is hired and terminated.

We note that these dates would also enable the Department to ensure that school districts are requesting background checks on applicants before hiring the applicants. When we contacted 14 school districts and reviewed the hiring dates for selected employees, we found that nine of the districts had hired employees between two and ten months prior to requesting background checks for the individuals. In fact, two of the districts had already terminated the employees when they requested the background checks for the individuals.

For example, one of the two districts told us they hired an employee in January 2006 and terminated the employee in March 2006. However, the district did not request a background check on this individual until November 2006. Such practices are contrary to the intent of the SAVE Act. To help ensure that school districts fully comply with the hiring and related requirements in the SAVE Act, we recommend OSPRA regularly remind the districts of their obligation to comply.

Recommendations

3. Modify the TEACH system so that it can record the dates applicants are hired and terminated, and instruct the school districts to begin entering this information in as timely a manner as possible.

(Department officials have agreed to modify the TEACH system and have already begun work on this change.)

4. Regularly remind school districts of their obligation to comply with the hiring and reporting requirements in the SAVE Act.

(Department officials agree with this recommendation.)

AUDIT SCOPE AND METHODOLOGY

We audited the Department's administration of criminal history background checks on applicants for school employment. Our audit covered the period March 14, 2006 through August 18, 2008.

To accomplish our objective, we interviewed Department officials and reviewed relevant laws, regulations and Department procedures. In addition, we also reviewed information on the TEACH system database about background check applications that were submitted to OSPRA between March 14, 2006 and March 13, 2008. In conjunction with this review, we reviewed hiring information recorded on the New York State Retirement System, the New York State Teacher's Retirement System, and OSPRA's TEACH system for certain of the individuals addressed in these background checks. We also contacted officials in 14 school districts to review certain aspects of the districts' hiring practices.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence

obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

AUTHORITY

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution, and Article II, Section 8 of the State Finance Law.

REPORTING REQUIREMENTS

We provided a draft copy of this report to Department officials for their review and formal comment. We considered the Department's comments in preparing this report and have included them as Appendix A. Department officials fully agreed with two of our report's four recommendations and partially agreed with the remaining two recommendations. Department officials further indicated the steps that they have taken and will be taking to implement the recommendations.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the State Education Department shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

CONTRIBUTORS TO THE REPORT

Major contributors to this report include Steven Sossei, Brian Mason, William Clynes, Claudia Christodoulou, Andrea Dagastine, Laurie Burns and Dana Newhouse.

APPENDIX A - AUDITEE RESPONSE



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November 24, 2008

Mr. Brian E. Mason
Audit Supervisor
Office of the State Comptroller
110 State Street, 11th Floor
Albany, NY 12236

Dear Mr. Mason:

I am responding to your letter of October 16, 2008 addressed to Commissioner Mills regarding the Office of the State Comptroller's (OSC) draft audit report (2007-S-119) entitled "Criminal History Background Checks for School Employees." I offer some overall comments on the contents of the report and then specifically address each of the four recommendations.

While the Department recognizes that the audit identified areas where improvements to process were warranted, we note that the audit period (March 14, 2006-March 13, 2008) covered a critical transition time when the fingerprint work flow process was undergoing dramatic change from a largely paper (manual) based process to a completely electronic process. This transition has been completed, and many of the problems have been corrected.

During this transition the Office of School Personnel Review and Accountability (OSPRA) experienced significant work backlogs and faced certain limitations regarding the production of system generated reports. Further, many of the incomplete records referred to in the audit were incomplete due to transmission problems experienced by other agencies involved in the processing of criminal histories, namely, the FBI and the Division of Criminal Justice Services ("DCJS"). Despite these limitations, the audit revealed that the Department successfully processed more than *99 percent of the 105,932 records* analyzed by the auditors.

Since this time, the Department has created regular management reports to identify all records in an incomplete status, created a daily work queue to identify incomplete records, and undertaken measures to address and resolve all incomplete records.

The audit also noted that there were many failures at the school employer level with respect to employment of individuals prior to the receipt of a full clearance. These ranged from employment

of individuals prior to the submission of fingerprints for a criminal history background check,¹ to extended employment of individuals with a conditional clearance.² The Department has attempted in many ways to make school employers aware of their responsibilities under The Safe Schools Against Violence in Education Act (SAVE) through:

- An online data management system (TEACH) where all school employers can electronically submit and monitor fingerprint applications;
- A website to disseminate information and forms;
- Customer telephone service 5-days a week and 24/7 email access where customers can usually receive a response to their inquiry within a day; and
- Workshops and technical forums to assist school staff and administrators in understanding and complying with SAVE's requirements.

In December, the Department will issue an annual memo to schools advising them of their obligations under SAVE and has made a modification to TEACH to allow schools to more readily identify any employee working under a conditional clearance.

Additionally, the Department received additional State funding for OSPRA and plans to hire eight more professionals. This influx of additional resources will enable OSPRA to provide more technical support to schools in the form of targeted workshops and presentations on fingerprinting.

The Department's specific response to the draft audit is organized to correspond to the specific recommendations.

Recommendation 1:

Modify the TEACH system so that it captures all pertinent information for each background check application and routinely produces management reports that (a) track the status of each outstanding application and (b) highlight applications that have been outstanding for long periods of time. Use these management reports to determine whether all requested background checks are being completed in a timely manner, and when they are not, follow up with DCJS and/or the FBI and notify the affected school districts about the delays. Develop written procedures and/or guidelines for this monitoring process.

We partially agree with this recommendation. The Department believes that it already captures all of the pertinent information for processing fingerprint applications and notes that the vast majority of applications are processed in less than one week. With respect to the remainder of the recommendation, the Department has developed a three pronged approach -- internal processing changes, increased notification to school districts, and increased notification to individual applicants.

¹ The one individual with the very serious criminal history fell into this category.

² While many of the identified individuals fell into this category, at the time a conditional clearance was issued, OSPRA's business process was to send a letter to both the school employer and the individual advising them of the steps that they must take to obtain a full clearance, namely, the submission of an additional set of fingerprints.

The Department has also made modifications to TEACH to identify all records that are in an incomplete status irrespective of the reason (e.g., transmission failures among the three entities responsible for fingerprint processing – SED, DCJS and the FBI, or human process errors). We are developing procedures to incorporate the reconciliation of these records into the daily work routine of the fingerprint processing staff.

The Department has also modified TEACH to allow school districts to more precisely identify the processing status of both the fingerprint application and their request for clearance. There are approximately 30 different status messages that are updated instantly as soon as the status changes. School districts now have the ability to more readily single out which of their employees are working under a conditional clearance (and thus in an incomplete status) so they can take the appropriate follow up measures.

Finally TEACH has been modified to allow an individual to more precisely monitor the processing status of his or her application through a series of approximately 18 fingerprint application processing status messages. Additionally, the Department has implemented a letter notification to individuals who have filed their fingerprint application online, paid online and then who seem to have inadvertently failed to complete the process by neglecting to submit fingerprints.

Recommendation 2:

Monitor whether DCJS background checks are being completed within 15 days, and if not, provide applicants and school districts with the 15-day notification required by law.

We agree with this recommendation. Given the current technology, the vast majority of fingerprints are processed within 15 days. Further, given the modifications to TEACH identified in the response to Recommendation 1, school districts will have a clear indication of the small minority of individuals whose fingerprints cannot be processed within 15 days. The majority of this remaining group is individuals whose history has been referred for investigative and/or legal review. The Department is working to provide the appropriate status message in TEACH without compromising the due process rights of the individual whose criminal history is under review. This process will take a longer time due to the complexity of the technical solution involved.

Recommendation 3:

Modify the TEACH system so that it can record the dates applicants are hired and terminated, and instruct the school districts to begin entering this information in as timely a manner as possible.

We partially agree with this recommendation. The Department is currently working to update the TEACH system to capture this data. We would like to note, however, that this data does not trigger a processing action within the Department. The only date that can initiate a processing action is the date that the data is actually entered by the school district, not the date that is recorded as the hiring or termination date. In other words, the actual hiring and termination takes place entirely outside the control of the Department. The date that the Department is notified by the

school district of the hiring or termination of an employee is the only date that can drive Department actions.

Recommendation 4:

Regularly remind school districts of their obligation to comply with the hiring and reporting requirements in the SAVE Act.

We agree with this recommendation. In December, the Department will issue an annual memo to school districts reminding them of their obligations under the SAVE Act. Additionally, OSPRA plans to use new funding to provide technical support to school employers on the fingerprinting requirements through the use of workshops and presentations.

If you have any questions regarding this response, please contact Deborah Marriott (518) 408-1521.

Sincerely,



Theresa E. Savo

c: Deborah Marriott