



**Fingerprint-Based Checks And Schools In Massachusetts:
Tip And Traps For Implementing The New Regulations**

By Sara Goldsmith Schwartz¹
President, Schwartz Hannum PC
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A “soft roll out” of the new fingerprint-based check system is now underway across the Commonwealth of Massachusetts. Regulations based on a final version of the law were issued in December 2013, covering applicants, employees, volunteers and contractors who work in public and private schools and programs overseen by the Massachusetts Department of Elementary and Secondary Education (“DESE”) and the Massachusetts Department of Early Education and Care (“EEC”), respectively. Accordingly, it is now time for independent schools and EEC-affiliated programs to bring their criminal background check procedures into compliance.

This article will update the White Paper published in February 2013 on this topic. Section I describes the fingerprint-based check requirements applicable to independent schools in Massachusetts. Section II outlines the fingerprint-based check requirements applicable to programs licensed, funded or approved by the EEC. Section III addresses the timeline for compliance, frequency of checks and fees. Section IV details our recommendations to assist independent schools and EEC-affiliated programs in complying with the new law and regulations. Section V addresses a few of the many questions that have arisen since the regulations have been promulgated and advice with respect to best practices when the regulations do not specify procedures for compliance.

Schwartz Hannum’s advice with respect to camps regulated by the Department of Public Health continues to be that such camps are not subject to the new law. A “camp” located at a school can be considered a camp (and therefore not subject to the new fingerprinting requirements) only if it is registered as a separate corporate entity, with its own staff, run separately from the school. On the other hand, “summer programs” that are not separate corporate entities from the school, that take place at the school and are operated by school staff, will likely be covered by the new regulations. This White Paper will address questions related to summer camps in Section V below.

¹ Sara Goldsmith Schwartz is the President of Schwartz Hannum PC. Sara represents independent schools, colleges and universities with respect to the myriad issues that arise each day for school administrators, including student and employee matters, internal grievances and investigations, risk management, education of employees, students and Board members, regulatory compliance and governance best practices. Sara gratefully acknowledges the assistance of Susan E. Schorr and Soyoung Yoon in preparing this White Paper.

I. Requirements Affecting Massachusetts Public And Private Elementary and Secondary Schools

a. Who Must Undergo A Fingerprint-Based Check?²

Under the recently enacted law and regulations, all public and private elementary and secondary schools in Massachusetts are required to obtain fingerprint-based checks for the purpose of determining the suitability of current and prospective employees who may have “direct and unmonitored contact with children.” 603 CMR 51.03 (last updated December 26, 2013). More specifically, the new regulations *require* schools to obtain fingerprint-based checks for all full or part-time employees, substitute employees, student teachers, apprentices or interns who may have direct and unmonitored access to children, and for any individual who regularly provides school-related transportation to children. 603 CMR 51.03(1). Independent schools *may* obtain fingerprint-based checks on volunteers and subcontractors who perform work on school grounds or with students. 603 CMR 51.03(2). This last option is an important revision from the initial regulations, which required that fingerprint-based checks be conducted on all school personnel; now, volunteers and subcontractors may be asked to undergo a fingerprint-based check at the discretion of the school.

The regulations define “direct and unmonitored contact with children” as follows:

Contact with students when no other employee, for whom the employer has made a suitability determination pursuant to 603 CMR 51.00 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.

603 CMR 51.02. This definition is consistent with the standard for “potential for unsupervised contact with children” as it appears in the recently-issued EEC regulations for fingerprint-based checks, discussed further in Section II below. 606 CMR 14.04 (effective December 12, 2013).

² A note regarding nomenclature: the regulations issued by DESE define the process of submitting fingerprints to the FBI and Massachusetts state police as a “national criminal history record check” 603 CMR 51.02; the Department of Early Education and Care defines the same process as a “fingerprint-based check” 606 CMR 14.04. For ease of reference, this article will use the term “fingerprint-based check” to apply to the process of conducting criminal background checks via scans of fingerprints regardless of the state agency that regulates the school or program.

Though the new regulations do not require that volunteers and subcontractors undergo fingerprint-based checks, schools should strongly consider requiring such checks of volunteers and subcontractors who may have direct and unmonitored access to children.

b. Procedure for Conducting Fingerprint-Based Checks

The Commonwealth of Massachusetts has contracted with MorphoTrust, the vendor selected to administer the fingerprint-based checks state-wide. In due course, approximately 30 sites will be available across the state where employees (and others) subject to the fingerprint-based checks will go to have their prints scanned. More details about the process are provided below.

Fingerprint-Based Checks For Points Of Contact

Schools should already have identified the individuals who will be responsible for reviewing the results of the fingerprint-based checks (the "Points of Contact") (akin to a CORI reviewer designated by the school) as part of the registration process with the Statewide Applicant Fingerprint Identification Services ("SAFIS").

Points of Contact should now be making appointments with MorphoTrust to have their fingerprints scanned. Schools will not be able to receive and process information regarding covered employees' fingerprint-based checks until Points of Contact have been cleared through the system. Because there are currently just a few vendor sites established for scanning fingerprints in Massachusetts (though approximately 30 such sites are planned), Points of Contact may have to travel one hour or more to the nearest fingerprint-check site.

Identify Covered Employees And Volunteers

Next, schools should identify all: (1) employees, substitute employees, student teachers and interns who may have direct and unmonitored contact with children, and (2) individuals who regularly provide school-related transportation to children (collectively referred to in this section as "Employees") who began work during the *2013-2014 school year only* (defined as starting employment after July 1, 2013). 603 CMR 51.05(1)(a). Employees who have worked at a school since before that date will be fingerprinted based on a schedule not yet released by the DESE.

Note that schools have *the option* to require that volunteers and subcontractors who will have direct and unmonitored access to children (collectively referred to in this section as "Volunteers") also undergo a fingerprint-based check. If a school decides to require that Volunteers undergo such fingerprint-based checks, Volunteers should be treated just like Employees with respect to enrolling them in the fingerprint-based check process described in this section. As explained in section (c) below, CORI regulations stipulate different requirements for volunteers and subcontractors. As with CORI checks, we recommend that Volunteers undergo fingerprint-based checks if they will have more than cursory exposure to children enrolled at a school (whether on or off campus).

If the school has conducted CORI checks on Employees and Volunteers, and their CORI results do not preclude employment, then these Employees and Volunteers are required to proceed with the fingerprinting process via SAFIS (as described further below). If an Employee or Volunteer has not yet been successfully CORI checked, then the Employee or Volunteer must be CORI checked *before* undergoing a fingerprint-based check, as CORI results alone may preclude employment.

Employee And Volunteer Registration For Fingerprinting

Schools should notify Employees, Volunteers and Points of Contact to register and make an appointment for a fingerprint-based check through MorphoTrust. Through the SAFIS system, schools have been contacted directly via email, and have been provided with a form to use for making such appointments. It is important that schools instruct Employees and Volunteers to review two important documents: (a) the SAFIS Registration Guide for PreK-12th Grade Education and (b) How to Change, Correct, or Update Your National Criminal History Record Response. Both of these forms are available online. In addition, schools should provide Employees and Volunteers with the 8-digit DESE organizational code already issued to each school, which Employees and Volunteers will use as the “Provider ID” during the registration process.

As of now, it appears that a consent form to authorize the collection of fingerprints will be provided via SAFIS/MorphoTrust as part of the registration process. However, we recommend that independent schools have Employees, Volunteers and Points of Contact sign an authorization and consent form provided by the school so that schools will reap the benefit of the protections offered by such consent and authorization. After an Employee or Volunteer has his or her prints scanned by MorphoTrust, the vendor will provide a receipt to the Employee or Volunteer. The school’s designated Point of Contact should obtain a copy of this receipt from each Employee and Volunteer. The receipt will provide the school with confirmation that the fingerprints were captured and will also include important reference information should the school need assistance from the Department of Criminal Justice Information Services (“DCJIS”) with regard to the fingerprint-based check.

Post-Fingerprinting

DCJIS will send fingerprint-based check results to the designated Point of Contact for each school, through the “SecureMail” system. As of now, results are arriving within one or two business days. Before taking an adverse action based on fingerprint-based check results, schools must: (a) comply with applicable federal and state laws and regulations, (b) notify the Employee or Volunteer, (c) provide a copy of the fingerprint-based check results to the Employee or Volunteer, (d) provide a copy of the fingerprint-based check policy to the Employee or Volunteer, (e) identify the information in the Employee’s or Volunteer’s fingerprint-based check results that is the basis for the potential determination, (f) provide the Employee or Volunteer with the opportunity to dispute the accuracy of the information contained in the fingerprint-based check results, (g) provide the Employee or Volunteer with a copy of Massachusetts and FBI information regarding the process for correcting the fingerprint-based check information, and (h) document all steps taken to comply with applicable regulations.

c. CORI Checks And Relationship To Fingerprint-Based Checks

Schools are required to continue to obtain all available CORI from DCJIS periodically, but not less than every three (3) years, for any current or prospective employee *and* volunteer who may have direct and unmonitored contact with children. M.G.L. c. 71, § 38R; 803 CMR 2.02. Schools are *permitted* to obtain CORI for subcontractors and laborers who may have direct and unmonitored contact with children, including any individual who regularly provides school-related transportation to children. Again, this option is a change from prior iterations of the fingerprint-based check law that was enacted early in 2013 and was subsequently revised, to make *CORI* checks on *contractors* optional. We continue to advise schools to run CORI checks on all contractors and subcontractors who may have direct and unmonitored access to children.

II. Requirements For Programs Licensed, Funded Or Approved By The EEC

a. Who Must Undergo A Fingerprint-Based Check?

The regulations require that any individual: (a) seeking an employee, volunteer, or intern position at an EEC licensed, funded or approved program or (b) “currently employed or serving as a regular intern or volunteer” (collectively referred to as “Candidates”), in such a program, who has the “potential for unsupervised contact with children,” submit to a fingerprint-based background check. 606 CMR 14.04.

To elaborate on the definition of “potential for unsupervised contact with children” as hinted at earlier, such contact is defined as “a reasonable likelihood of contact with children in an EEC licensed, approved and/or funded program when no other Background Record Check cleared employee is present. A person having only the potential for incidental unsupervised contact with children in commonly used areas such as elevators, hallways and waiting rooms shall not be considered to have the potential for unsupervised contact with children. These commonly used areas do not include bathrooms and other isolated areas (not commonly utilized or separated by sight and sound from other staff) that are accessible to children.” 606 CMR 14.04.

Any program conducted during a school vacation or off-site must require Candidates to undergo a fingerprint-based check, if the program is licensed, approved or funded by the EEC. If Candidates are guests at a school that is not licensed, approved or funded by the EEC (such as a K-12 public or private school), that “host” school has the option to require the EEC-program Candidates to undergo fingerprint-based checks before they are permitted to have “direct and unmonitored contact” with children (per the DESE standard, as described above).

b. Procedure for Conducting Fingerprint-Based Checks

Similar to the process outlined for DESE-covered schools, Candidates at EEC-based programs will be required to schedule a fingerprinting appointment through the MorphoTrust online registration website or by calling the MorphoTrust Massachusetts Customer Service Center. Once scanned, fingerprints will be sent electronically to the Massachusetts State Police (MSP) for a statewide criminal history record check and to the Federal Bureau of Investigation

(FBI) for a nationwide criminal record check. The results of both the state and national fingerprint-based criminal history record checks are returned to the MSP and DCJIS and disseminated to the EEC, which will subsequently notify the employer if a Candidate is suitable for employment. 606 CMR 14.08(6). As of now, dissemination of the history record check reports from the MSP and DCJIS to the EEC sometimes takes a week or more due to the need to review the reports to make them consistent with the Commonwealth's CORI statute.

Employers will have to provide Candidates with consent forms permitting the employer to receive fingerprint-based check information from the EEC, which may be similar to the consent forms we suggest providing to personnel who will be screened by K-12 independent schools; employers must also provide Candidates with a notification that designated staff at the employer and the EEC may be reviewing the background check information. 606 CMR 14.06(1).

Employers must maintain the EEC's approval of the fingerprint-based check in a locked, secure file separate from the Candidate's personnel file. If the Candidate is hired, the employer should document, in the personnel file, the date on which EEC approval was received. Employers must also notify the EEC of the date the Candidate commences employment (if a new hire). 606 CMR 14.11(1).

III. Timeline For Compliance, Frequency Of Fingerprint-Based Checks And Fees

Timeline For Compliance

All new staff (hired after July 1, 2013), for both DESE and EEC schools and programs, must be fingerprinted during the 2013-2014 school year. These agencies are working on a schedule for implementing fingerprint-based checks for existing employees, as the law requires that all veteran employees undergo a fingerprint-based check prior to the beginning of the 2016-2017 school year. Though the regulations do not specify a rationale for staggering the schedule in this way and do not explicitly prohibit veteran staff from having their fingerprints scanned now, it is likely that vendor capacity is insufficient to process fingerprint-based checks for all school personnel at this time; hence, we recommend that more senior personnel should not attempt to schedule an appointment for a fingerprint scan until notified by either DESE or EEC that it is appropriate to do so.

With respect to a compliance due date for new hires (covered individuals who commenced working for the School during the 2013-2014 school year), the recently issued regulations do not specifically mandate a date by which the new hires must complete the fingerprint-based checks. As a prudent measure, we recommend having the new hires be fingerprinted by/before the end of the 2013-2014 school year, or by June 30, 2014 at the latest.

Frequency of Checks

For EEC-programs, fingerprint-based checks must be conducted every three years. Individuals who fall within the following exceptions must be fingerprinted prior to new or continued employment: employees/volunteers who have resided outside of Massachusetts; a Candidate who has disclosed to the hiring authority that new criminal charges have been filed

against him or her; and a Candidate who has a break of one year or more from working in an EEC licensed, approved and/or funded program. 606 CMR 14.08(7).

The DESE has not established regulations regarding the frequency of checks, but the regulations do permit schools to rely on “suitability determinations” made by other Massachusetts schools if: (a) fingerprints were checked during the prior seven years, (b) the individual has not resided outside of Massachusetts for longer than three years since suitability for employment was determined (*i.e.* successful completion of a fingerprint-based check), and (c) the individual has been continuously employed by a Massachusetts school or does not have gaps in employment totaling more than two years. 603 CMR 51.06(3); M.G.L. c. 71, § 38R.

Fees

Pursuant to the new regulations, individuals will be required to pay a fee associated with undergoing a fingerprint-based check. The fee cannot exceed \$35 for individuals who are not certified educators or \$55 for individuals who are certified educators. Employers may reimburse individuals for all or part of the fee, due to financial hardship. The new law is silent with respect to whether schools are permitted to reimburse individuals regardless of financial hardship, and thus schools and EEC-programs apparently have flexibility to reimburse personnel. M.G.L. c. 71, § 38R.

IV. Recommendations For Independent Schools and School-Based EEC-Affiliated Programs In Massachusetts

In light of the new fingerprint-based check requirements, we recommend that independent schools and school-based EEC-affiliated programs in Massachusetts take the following steps.

First: assess, with the assistance of experienced legal counsel, all of the background check requirements to which the school may be subject, and update the school’s background check policy and compliance package to incorporate these new requirements. If your school or program does not have a general background check policy in place, now is the time to implement this policy, which should include procedures for fingerprint-based checks and any other relevant background checks (CORI, sex offender registry information (“SORI”), motor vehicle, credit reports, drug testing, etc.) that an independent school or EEC program may perform on applicants, employees, volunteers and contractors. Such a policy should include, at a minimum, provisions that address: consent and authorization for background checks, notifying employees of findings of concern, permitting employees to contest background check results, taking adverse employment action based on the results, and disseminating and storing background check information.

Second: review application and new hire documentation (such as employment applications, offer letters and employment agreements), and update these documents to reflect that both initial and continued employment are contingent upon successful completion of all legally required and school-required background checks, including review of CORI, SORI and fingerprint-based checks.

Third: assess which employees, volunteers, and subcontractors will be subject to each of the new background check requirements. If it is unclear whether an individual may have direct and unmonitored contact with children or the potential for unsupervised contact with children, we recommend consulting with experienced legal counsel to assess the potential applicability of the regulations with respect to such individuals.

Fourth: as required, conduct fingerprint-based checks on individuals who regularly provide school-related transportation to children.

Finally, we reiterate and recommend that employment, volunteer and contractor decisions based on fingerprint-based checks be made in a consistent, non-discriminatory manner. In this regard, it is imperative that schools and programs develop a background check protocol that outlines the list of crimes with respect to which a conviction will result in mandatory disqualification, presumptive disqualification, or discretionary disqualification from a position at the school. The school's written protocol for assessing information obtained through fingerprint-based background checks, CORI, SORI and other sources should be consistent with the guidance recently issued by the Equal Employment Opportunity Commission.³ To assist schools with compliance, Schwartz Hannum provides a comprehensive criminal records compliance package which includes:

- CORI and Fingerprinting-Based Check Overview and Instruction Memorandum (which explains the documents listed below in detail);
- CORI and Fingerprint-Based Check Acknowledgment Forms;
- Criminal, Sex Offender and Fingerprint Record Review Consent Form;
- Criminal, Sex Offender and Fingerprint Background Check Policy;
- Criminal, Sex Offender and Fingerprint Background Check Guidelines (with a list of criminal offenses that would disqualify employment at the School);
- SORI Request Form; and
- DCJIS Information Concerning the Process to Correct a Criminal Record.

As you may know, Schwartz Hannum does not recommend that employers utilize generic forms and policies for compliance, as it is important that all such documentation sync appropriately with each school's policies, procedures, protocols and applicable legal requirements. We recommend that schools consult with experienced legal counsel to ensure that the background check policy and related authorizations and releases are legally sound and reflect best practices.

V. Recent Questions About The New Regulations

In recent weeks, the Education Practice Team at Schwartz Hannum has fielded numerous questions related to the new regulations and their implementation. We thought it might be helpful to share our responses to some of the questions that have general applicability. Please note that the term "employee" as used in this section refers to employees, volunteers and/or subcontractors—any individual who schools decide may need a criminal background check.

³ EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April 25, 2012) *available at*: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

When do summer camp staff need to undergo fingerprint-based checks?

If a summer program is operated by a school (and not as a separate organization regulated by the Department of Public Health), the recently-issued regulations may apply; however, the regulations do not specifically address summer camps or when the “school year” ends and a camp session begins; for now, we infer (and recommend) that any new hires during the 2013-2014 school year (those who commenced working for a school after July 1, 2013) (including those who will be working at the summer camp) should be fingerprinted. Any existing employees prior to July 1, 2013, but who will also be working at the summer camp, may not have to be fingerprinted for this summer as the regulations are silent on this issue; however, it would be a best practice to conduct fingerprint-based checks on all 2014 summer program employees, volunteers and contractors who may have direct and unmonitored access to children.

Are camp staff who have worked for a school before the 2013-2014 considered new because they are re-hired every summer?

Given the lack of regulatory guidance on this issue, and in an abundance of caution, we recommend that these returning staff be considered new hires and thus be fingerprint-checked before working at the camp during the 2014 season. However, one could plausibly assert that summer camp returning employees are analogous to public school teachers who move around between schools in the same district—these teachers do not need to be re-fingerprint-checked as long as they stay within the same district. As the School’s camp staff are returning to the camp year after year, an argument could be made that they not be considered new hires for the 2013-2014 year. They may well have to be fingerprint-checked based on the as-yet-to be-issued schedule for more seasoned employees.

Does our school have to conduct fingerprinting on summer camp employees who may be minors?

With respect to camp employees who are minors, the CORI (and fingerprint-based checks) broadly apply to applicants or employees who may have direct and unmonitored contact with children (no age limits are specified). However, please note that CORI does not include “information regarding criminal offenses or acts of delinquency committed by any individual before the individual attained the age of 17 unless the individual was adjudicated as an adult.” The fingerprinting regulations are silent on this issue, though we do know that some states provide information regarding juvenile offenses to entities that run background checks; thus, you may obtain criminal record information from other states via a fingerprint-based check. Thus, even if they are minors, we recommend having summer camp employees submit to a fingerprint-based check if they will have direct and unmonitored access to children, as this national check may provide additional background information beyond the scope of a Massachusetts criminal records check.

Do staff absent on a maternity leave have to undergo fingerprint-based checks if they will not return to work after this school year?

Employees on maternity leave are still current employees, so if they were new hires for the 2013-2014 school year, then we recommend that they undergo a fingerprint-based check prior to June 30, 2014.

If someone has previously been fingerprinted (such as when they took a bar exam in another state) can those records be accessed somehow, or does the employee need to be fingerprinted again?

The fingerprinting regulations require covered individuals to undergo a “national criminal history check,” which is accomplished by providing fingerprints to the FBI via MorphoTrust. Under limited circumstances, a school can rely on a suitability determination made by another Massachusetts-based school, but a school cannot rely on a suitability determination made by an entity that performed a check out of state. Thus, any school personnel coming from out of state should undergo a fingerprint-based check even if he/she has submitted to such a check outside of Massachusetts.

Most of our teachers are not certified and thus are not licensed educators. Do they check the “other” box on the registration form, which I assume is primarily for administrators and staff?

It is correct that covered individuals who are not certified/licensed educators should select/click “All Other School Personnel” in the online registration process. The distinction between a licensed educator and all other school personnel appears to be made solely for the purpose of imposing a different fee structure (\$35 for all other school personnel, and \$55 for a licensed educator), so this process could help cap costs for most private school teachers.

Should our school rely completely on the fingerprinting results or may we conduct our own assessment of an applicant or employee using our internal policy and CORI results?

CORI results are limited to criminal background information from Massachusetts only; fingerprint-based checks provide criminal history information for all 50 states. Thus, a fingerprint-based check does not supplant CORI, but rather, supplements it. Schools should be conducting CORI background checks on appropriate employees first; if the CORI report is clean, then a fingerprint-based check is required. If CORI results preclude employment (after the employee has a chance to contest the results), then a fingerprint check is not required.

Do staff need to have proof of fingerprinting in their wallets?

No. Indeed, fingerprint-based check information should be maintained by a school in a locked, secure location separate from the employee/volunteer’s personnel file and not disseminated.

What findings bar us from hiring/keeping the employee?

The same discretionary and presumptive disqualifications applicable to CORI/SORI checks also apply to fingerprint-based checks. For a Table of CORI Offenses that presumptively disqualify individuals from employment, please see 606 CMR 14.18. Schwartz Hannum’s criminal records compliance package, referenced above, includes a tailored list of mandatory and discretionary disqualifying offenses for independent schools.

Can staff refuse or opt out of being finger printed?

Only staff who do not have direct and unmonitored contact with children or the potential for unsupervised contact with children can opt out of undergoing a fingerprint-based check. For staff with unsupervised or unmonitored contact with children, refusal to be fingerprinted would typically lead to reassignment or termination of employment.

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For an assessment of criminal background check requirements applicable to your school or school-based EEC program, please contact Sara Goldsmith Schwartz at (978) 623-0900 or at sschwartz@shpclaw.com, or another member of the Firm’s Education Practice Group by visiting www.shpclaw.com.