



ASSOCIATION
FOR BEHAVIORAL
HEALTHCARE

September 21, 2020

Jenna Buonopane Kimble
Paralegal
Department of Early Education and Care
51 Sleeper Street, 4th Floor
Boston, MA 02210

**Re: Comments Regarding Amendments to 606 CMR 14.00, Criminal Offender
and Other Background Record Checks**

Dear Ms. Buonopane Kimble,

The member organizations of the Children's League of Massachusetts (CLM), the Association for Behavioral Healthcare (ABH), the Providers' Council and the Massachusetts Association of 766 Approved Private Schools (MAAPS) thank the Department of Early Education and Care (EEC) for the opportunity to submit our joint comments on the proposed regulation amendments to 606 CMR 14.00: *Criminal offender and other background record checks* (BRC) as they apply to residential programs and placement agencies.

We understand that these BRC changes are proposed to comply with the Family First Prevention Services Act and in response to *Gregory v. Commonwealth of Massachusetts*. It is important to note, however, that the *Gregory* lawsuit was specific to childcare workers and was not applicable to foster, adoption and residential services. Accordingly, our organizations want to continue to work with EEC to protect the care of the children of our Commonwealth but not unduly prolong the BRC process which impacts the ability of children to access the safe, supportive placements they need to help them heal from trauma.

I. Proposed Amendments

While we appreciate the regulatory changes EEC proposes, these changes do not go far enough to ensure equitable BRC reviews.

Specifically, the re-categorization of juvenile delinquency adjudications in 606 CMR 14.10(5) from *mandatory* to *presumptive* disqualification remains unjust. A presumptive disqualification still inhibits the review of background results in a way that allows for context and discussion, as well as impedes the goal of creating a strong, diverse workforce. In particular, hiring staff with lived experience is critical to supporting youth in EEC licensed residential and placement programs. **A juvenile record should not disqualify any candidate if it is older than 3 years and eligible for sealing.**

Additionally, in 606 CMR 14.10(1), the amendment carves out "youthful offender" adjudications as a mandatory disqualification. This continues to be problematic as there is no guidance on how long ago that adjudication occurred and again creates limits on the ability to hire adults with lived experience. **We recommend that EEC change youthful offender adjudications to presumptive disqualifications and allow the disqualifications to be rebuttable and not a mandatory disqualification if the sentence ended 7 years prior.**

Lastly, the proposed adjudicatory appeal process for residential program and placement agency candidates as outlined in 606 CMR 14.14(5) must be more substantive, EEC should have the burden to make a genuine effort to track down missing disposition information related to disqualifying offenses, not the BRC applicant who has been deemed not suitable. Timely written appeal responses, issued within 30 days, must become part of the procedural response.

II. EEC Medical and Criminal Justice Documentation Burden

There is a significant burden placed on employees and applicants to produce medical and/or criminal justice documentation. These records are very difficult to get, time-consuming, and costly. During the COVID-19 pandemic, EEC has been more flexible with employees and reduced the burden of collecting excessive medical and criminal justice documentation. As a result of this flexibility, at a time when it has been imperative children needed staff to care for them, the hiring process has been less onerous and quicker.

It is also important to note that while the current regulations give EEC the authority to request this documentation, the documentation is not a requirement for processing background record checks. Historically, EEC has interpreted these regulations rigidly and demanded any and all documentation from each employee and applicant. Additionally, the regulations do not specify instances where the documentation should be produced.

The flexibilities afforded during the pandemic regarding document production should be extended beyond the state of emergency. EEC should delineate within their regulations when and where documentation is essential, based on clearly defined criteria that is applied consistently. These criteria should take into consideration nature of offense(s), time elapsed since the offense(s), nature of

employment, ability to access supporting documentation and be informed by professionals with expertise in areas of mental health, substance use disorder and domestic violence.

III. Outstanding Challenges from October 2018 Revised Regulations

The retro-active application of the October 2018 regulations has resulted in programs losing long-time, respected employees. EEC has implemented the updated background record check regulations since October 2018 with limited success. Only recently has the “new” electronic BRC system become operational. With the implementation of the October 2018 regulations, our members have found it more challenging to meet contractual staffing ratio requirements. In addition, children placed in our members’ programs have been negatively impacted in their receipt of appropriate levels of supervision and care. The revised regulations expanded and re-categorized the list of disqualifying offenses and require agency employees to complete the BRC process every three years. Since October 2018, DEEC has applied the newly expanded list of offenses retroactively to employees hired prior to October 2018 upon their 3-year review. As a result, long-term employees who were previously approved for hire through the BRC process have been informed that they do not meet the updated suitability designations and must be terminated for issues on their record (as long as 30 years ago for one employee) despite excelling at their jobs.

Furthermore, these regulations as amended continue to reinforce racial and cultural disparities and further impact certain individuals from gainful employment opportunities. We know that communities of color face disproportionate rates of arrest, charges, and conviction, and often lack access to adequate counsel.^{1 2}

Lastly, these changes fail to acknowledge the value of staff with lived experience relevant to the children and youth they serve. Lived experience for staff is invaluable. A large part of the Children’s Behavioral Health Initiative is based on hiring and training peer mentors and parent partners who have had experience within the juvenile justice and criminal system. Yet, the way EEC’s BRC process is administered prevents qualified people from being hired, forces the termination of exceptional employees, and disregards the value of lived experience which is vital to help children and youth identify with strong adult role models and achieve safety, permanency and well-being.

¹ African Americans, incarcerated at a rate of 655 per 100,000 in Massachusetts are incarcerated at nearly eight times the rate of whites (82 per 100,000), while Hispanics, incarcerated at a rate of 401 per 100,000 are incarcerated at a rate that is 4.9 times greater than whites. In both of these measures, the disparities are considerably larger than the national averages for these groups. MASSACHUSETTS SENTENCING COMMISSION, SELECTED RACE STATISTICS 2 (Sept. 27, 2016), <https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf>.

²Meanwhile youth of color are still disproportionately represented at every level of the juvenile justice system. Early Impacts of “An Act Relative to Criminal Justice Reform”, Juvenile Justice and Policy Data Board (November 2019) p. 7, <https://www.mass.gov/doc/early-impacts-of-an-act-relative-to-criminal-justice-reform-november-2019/download>

Thank you for your consideration and your commitment to help safeguard the care of the children of our Commonwealth.

Sincerely,



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