



Karen B. Salmon, Ph.D.
State Superintendent of Schools

TO: Members of the State Board of Education
FROM: Karen B. Salmon, Ph.D.
DATE: August 25, 2020
SUBJECT: COMAR 13A.07.14 Child Sexual Abuse and Sexual Misconduct History
PERMISSION TO ADOPT

PURPOSE:

The purpose of this item is to request permission to adopt a new regulation regarding the child sexual abuse and sexual misconduct history review required by Md. Code, Education Article §6-113.2.

BACKGROUND:

Effective July 1, 2019, House Bill 486, *Child Sexual Abuse and Sexual Misconduct Prevention*, became law and was codified in Md. Code, Education Article §6-113.2. The law establishes a process, including requirements for specific documentation regarding whether an individual has ever been disciplined for allegations of “child sexual abuse” or “sexual misconduct,” for the hiring of public school and nonpublic school employees who have direct contact with minors. This law applies to local boards of education, nonpublic schools, and contracting agencies that contract with a county board of education or nonpublic school to provide a service to a school or the students of a school.

The law states that the Maryland State Department of Education (MSDE) may adopt regulations establishing procedures for disciplinary proceedings and the assessment of penalties against an applicant, employee, contracting agency, or school administrator for willful violations of the requirements of the statute.

On December 3, 2019, the State Board of Education granted permission to publish Code of Maryland Regulation (COMAR) 13A.07.14 *Child Sexual Abuse and Sexual Misconduct History*. The regulation (attached) was published in the Maryland Register on July 6, 2020. The opportunity for public comment was available through August 5, 2020. No public comment was received. Additionally, the regulation was published on the Maryland State Department of Education website as a regulation that would impact small businesses, as required by State Government Article §2-1505. .

PROPOSED REGULATION:

The proposed regulation outlines the following with respect to the requirements of the employee history review required by Md. Code, Education Article §6-113.2:

- Scope
- Definitions
- General Provisions
- Reporting Violations
- Penalties

Members of the State Board of Education

August 25, 2020

Page 2

- Appeal

EXECUTIVE SUMMARY:

The MSDE is establishing a new regulation regarding the child sexual abuse and sexual misconduct history review required by Md. Code, Education Article §6-113.2.

ACTION:

Request permission to adopt regulation COMAR 13A.07.14.

Attachment

Title 13A

STATE BOARD OF EDUCATION

Subtitle 07 SCHOOL PERSONNEL

13A.07.14 Child Sexual Abuse and Sexual Misconduct History

Authority: Education Article, §§2-205(c) and 6-113.2, Annotated Code of Maryland

Notice of Proposed Action

[20-118-P]

The Maryland State Board of Education proposes to adopt new Regulations **.01—06** under a new chapter, **COMAR 13A.07.14 Child Sexual Abuse and Sexual Misconduct History**. This action was considered by the State Board of Education at their December 3, 2019, meeting.

Statement of Purpose

The purpose of this action is to implement Education Article, §6-113.2, Annotated Code of Maryland, and establish a process, including requirements for obtaining specific documentation, regarding whether an individual has ever been disciplined for allegations of “child sexual abuse” or “sexual misconduct,” for the hiring of public school and nonpublic school employees who have direct contact with minors. The regulation establishes a process for reporting violations and penalties, including imposing fines, and for an appeals process. This law applies to local boards of education, nonpublic schools, and contracting agencies that contract with a county board of education or nonpublic school to provide a service to a school or the students of a school.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact. This regulation, which is a direct response from Education Article, §6-113.2, Annotated Code of Maryland, will have a fiscal and operational impact on the Maryland State Department of Education (MSDE), local school systems, nonpublic schools, and contracting agencies that do business with Maryland schools. Due to the requirements of the statute, the MSDE will need to hire additional staff to conduct audits of local school systems, nonpublic schools, and contracting agencies hiring practices to ensure compliance with the background and reference checks of employees, as well as hire staff to manage the fines imposed on those employers who are noncompliant. Given that the regulation implements fines for those employers who do not comply, it will have a negative fiscal impact for those employers and a positive impact on the State.

Education Article, §6-113.2, Annotated Code of Maryland, requires local school systems, nonpublic schools, and/or contracting agencies to conduct a more rigorous vetting process prior to hiring individuals with direct contact with students. In addition, the law requires the MSDE to assure compliance with the requirements of H.B. 486 of 2019 for each local school system (24), each nonpublic school (1,000), and each contracting agency. The law also requires the MSDE to initiate disciplinary action against an employee, any applicant, any contracting agency, or any school administrator who does not meet the reference and background check requirements of individuals with access to students. As such, the general and fiscal impact on the MSDE will be significant. During the 2019 legislative session, the MSDE submitted a detailed fiscal analysis requesting funds to establish a new office to manage and monitor the requirements of Education Article, §6-113.2, Annotated Code of Maryland. This analysis determined that a total of 9 staff would be required to ensure fidelity (one education program supervisor, five education specialists, and three support staff).

Additionally, the law has had an impact on local school systems, nonpublic schools, and contracting agencies. While these three entities have established hiring practices which include background and reference checks, the law requires these entities to now collect specific information on all applicants that have direct access to students. In addition, the law mandates timelines for the collection and review of the required documents. As such, local school systems, nonpublic schools, and contracting agencies may need to hire additional staff if they do not have dedicated human resources staff and/or systemwide databases to meet the additional requirements.

Given the fine incorporated into the regulation, there is an anticipated increase in revenue.

II. Types of Economic Impact.

Revenue (R+/R-)

Expenditure

(E+/E-)

Magnitude

A. On issuing agency:		
(1)	(E+)	Unknown
(2)	(R+)	Unknown
B. On other State agencies:	NONE	
C. On local governments:	(E+)	Unknown
	Benefit (+)	
	Cost (-)	Magnitude
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D. On regulated industries or trade groups:	(-)	Unknown
E. On other industries or trade groups:	NONE	
F. Direct and indirect effects on public:	NONE	

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A(1). Education Article 6-113.2 requires local school systems, nonpublic schools, and/or contracting agencies to conduct a more rigorous vetting process prior to hiring individuals with direct contact with students. In addition, the law requires the Maryland State Department of Education to assure compliance with the requirements of H.B. 486 of 2019 for each local school system (24), each nonpublic school (1,000) and each contracting agency. The law also requires the MSDE to initiate disciplinary action against an employee, any applicant, any contracting agency, or any school administrator who does not meet the reference and background check requirements of individuals with access to students. As such, the general and fiscal impact on the MSDE will be significant. During the 2019 legislative session, the MSDE submitted a detailed fiscal analysis requesting funds to establish a new office to manage and monitor the requirements of Education Article, §6-113.2, Annotated Code of Maryland. This analysis determined that a total of nine staff would be required to ensure fidelity (one education program supervisor, five education specialists, and three support staff).

A(2). Given that the regulations implement fines for those employers who do not comply, it will have a positive impact on the State.

C. Statute and regulations have an impact on local school systems, nonpublic schools, and contracting agencies. While these three entities have established hiring practices which include background and reference checks, the law requires these entities to now collect specific information on all applicants that have direct access to students. In addition, the law mandates timelines for the collection and review of the required documents. As such, local school systems, nonpublic schools, and contracting agencies may need to hire additional staff if they do not have dedicated human resources staff and/or systemwide databases to meet the additional requirements. Given that the regulations implement fines, this may also contribute to the increase in expenditures for these entities.

D. Statute and regulations have an impact on local school systems, nonpublic schools, and contracting agencies. While these three entities have established hiring practices which include background and reference checks, the law requires these entities to now collect specific information on all applicants that have direct access to students. In addition, the law mandates timelines for the collection and review of the required documents. As such, local school systems, nonpublic schools, and contracting agencies may need to hire additional staff if they do not have dedicated human resources staff and/or systemwide databases to meet the additional requirements. Given that the regulations implement fines, this may also contribute to the increase in expenditures for these entities.

Economic Impact on Small Businesses

The proposed action has a meaningful economic impact on small business. An analysis of this economic impact follows.

It is unknown how many nonpublic schools and contracting agencies are considered small businesses. As this regulation will affect all schools and contracting agencies that do business with schools, any small businesses impacted will be required to undergo the employee history review, which will take a significantly longer period of time than the running only a background check. Additionally, if a contracting agency is not able to receive the results of the history in a short enough time to provide a contractual employee, they will lose that potential business. Subsequently, it is anticipated that small schools will not be able to fill substitute and high need area positions that are often filled temporarily with contractual employees. Finally, it is anticipated that smaller businesses will be at risk of incurring fines as they may not have the human capital to respond to the employee history requests in the time frame required by the law.

Impact on Individuals with Disabilities

The proposed action has an impact on individuals with disabilities as follows:

Given the extensive nature of the required employee history review process, it takes significantly longer to fill positions that have direct contact with children. Given the nature of special education, many students with disabilities require the services of paraprofessionals or specialists such as a speech pathologist or occupational therapist. Those students with services on an Individualized Education Program (IEP) may have a delay in services due to not being able to staff the required positions in a timely manner.

Opportunity for Public Comment

Comments may be sent to Sarah Spross, M.Ed., Assistant State Superintendent, Division of Educator Certification and Program Approval, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, or call 410-767-0385 (TTY 410-333-6442), or email to sarah.spross@maryland.gov, or fax to 410-333-8963. Comments will be accepted through August 5, 2020. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by the State Board of Education during a public meeting to be held on August 25, 2020, at 9 a.m., at 200 West Baltimore Street, Baltimore, MD 21201.

.01 Scope.

This chapter establishes the general provisions to comply with the child sexual abuse and sexual misconduct background history review established by Education Article, §6-113.2, Annotated Code of Maryland. Included in the chapter are definitions, reporting violations of the general provisions, penalties for entities that fail to comply with the provisions, and the establishment of an appeals process.

.02 Definitions.

A. In this subtitle, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Child sexual abuse" means an act by an adult involving a minor or a student that constitutes a sexual offense under the laws of the State, or any sexual contact between an adult and a minor.

(2) "Current or former employer" means a county board, nonpublic school, or any other entity through which an individual had direct contact with minors.

(3) "Department" means the Maryland State Department of Education.

(4) "Direct contact with minors" means the possibility of care, supervision, guidance, or control of a minor or routine interaction with a minor.

(5) "Prospective employer" means a county board, nonpublic school, or contracting agency that is considering hiring an applicant for a position involving direct contact with minors.

(6) "Sexual misconduct" means an act by an adult, including an oral, nonverbal, written, or electronic communication, or a physical activity directed toward or with a minor that is designed to promote a romantic or sexual relationship with the minor, including:

(a) Sexual or romantic invitation;

(b) Dating or soliciting dates;

(c) Engaging in sexualized or romantic dialogue;

(d) Making sexually suggestive comments;

(e) Grooming behaviors;

(f) Self-disclosure or physical exposure of a sexual, romantic, or erotic nature; and

(g) A sexual, indecent, romantic, or erotic contact with the minor.

.03 General Provisions.

A. A county board, nonpublic school, or contracting agency shall follow the requirements of Education Article, §6-113.2, Annotated Code of Maryland, to obtain information on an applicant's child sexual abuse and sexual misconduct history from current and former employers prior to hiring that individual for a position involving direct contact with minors.

B. Current and former employers shall complete and return the employment history review form to a prospective employer within 20 days of receiving the employment history review form.

C. Employers shall provide the information required by Education Article, §6-113.2, Annotated Code of Maryland, unless an exception provided for in the law does not require disclosure of the information.

.04 Reporting Violations.

A. Except as provided in §D, a prospective employer shall report to the Department if a current or former employer does not complete and return the employment history review form within 20 days of its receipt.

B. The prospective employer shall make the report immediately to the Department using a form specified by the Department.

C. The report shall include:

(1) The name, address, phone number, fax number, and email address for the current or former employer;

(2) A detailed list of all attempts made by the prospective employer to contact the current or former employer, including method of contact, date of attempted contact, and any response;

(3) Any supporting documentation or other information relevant to the report; and

(4) The name of the individual making the report, along with the individual's title, employer, address, phone number, and email address.

D. The prospective employer may not make a report to the Department if:

(1) The current or former employer has no record of employing the applicant, no longer retains records for the applicant, or otherwise has no records available about the applicant;

(2) The current or former employer is no longer in business and no other entity has records for the closed business;

(3) The current or former employer did not complete the form because:

(a) *The laws of the state in which the current or former employer is located prohibit the release of the information or records requested; or*

(b) *The disclosure of the information and records requested is restricted by the terms of a contract entered into on or before June 30, 2019; or*

(4) *The prospective employer did not make three attempts to obtain the form.*

E. *A current or former employer shall report to the Department if it learns that a certificated employee has knowingly provided false information in connection with an employment history review form or deliberately withheld information concerning past incidents of child sexual abuse or sexual misconduct.*

.05 Penalties.

A. *Subject to §§B—D of this regulation, the Department may impose a fine against any current or former employer that does not provide the information required by the employment history review form within 20 days of its receipt.*

B. *Prior to imposing a fine, the Department shall send a warning letter to the current or former employer that explains:*

(1) *The requirements of the law; and*

(2) *How the current or former employer failed to comply with the law.*

C. *The Department shall provide the current or former employer with 10 additional days in which to complete the employment history review form or explain why it is exempt from the reporting requirements.*

D. *If, after the 10 additional days have passed, the current or former employer has not returned a completed employment history review form or provided a legal exemption from the reporting requirements, the Department may impose a fine.*

E. *Fine Schedule. The fine imposed under §D of this regulation shall be:*

(1) *\$1,000 for a first offense;*

(2) *\$2,500 for a second offense; and*

(3) *\$5,000 for a third or subsequent offense.*

F. *Penalties Against Applicants or Employees.*

(1) *An applicant or employee who provides false information to or deliberately withholds information regarding current or past employment from an employer as part of the child sexual abuse and sexual misconduct background history review may be denied employment or terminated from employment, if consistent with the employer's policies.*

(2) *For professionally certificated personnel, the Department may take action to deny, suspend, or revoke an educator's certificate based on providing false information or deliberately withholding information, in addition to any discipline imposed by an employer.*

.06 Appeal.

A. *A current or former employer may appeal a fine in writing to the State Superintendent of Schools within 15 days of the Department imposing the fine.*

B. *The appeal shall include the reasons for taking the appeal, along with any supporting documentation.*

C. *The State Superintendent of Schools shall forward the appeal to the Office of Administrative Hearings for a proposed decision, including findings of fact and conclusions of law.*

D. *An employer or the Department may file exceptions to the Administrative Law Judge's proposed decision within 15 days of the decision being issued.*

E. *The State Superintendent of Schools may affirm, reverse, or modify the Administrative Law Judge's proposed decision.*

F. *The decision of the State Superintendent of Schools is the final decision of the agency.*

KAREN B. SALMON, Ph.D.
State Superintendent of Schools



ARCHDIOCESE OF WASHINGTON

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Archdiocese of Washington's Comments to Proposed Regulation .01 -- .06 under COMAR 13A.07.14 Child Sexual Abuse and Sexual Misconduct History

The Archdiocese of Washington and its Catholic schools are committed to creating a safe environment for children, youth, and any person; to prevent physical abuse, sexual abuse, and neglect. The Archdiocese has had a written Child Protection Policy since 1986, and has required electronic background checks for employees having direct contact with minors since 2002. As a part of the Archdiocese's periodic review and update of policies, a revised child protection policy was released in July 2019, and may be found at adw.org.

The Archdiocese of Washington Catholic Schools have embraced the requirements now codified at Md. Code, Educ. §6-113.2 (the "Act"), which create protections in the hiring process for Maryland schools. However, the additional requirements in the proposed regulations pose substantial challenges for prospective employers in Maryland.

First, the proposed regulations should address the fact that non-Maryland employers are not expressly bound by Maryland law to comply with the Act and are not required to respond to the employment history review form request from prospective Maryland employers. The proposed regulations should clarify that non-Maryland employers are excluded from the scope of the required review and/or follow-up reporting for prospective employers.

Additionally, the proposed regulations establish a penalty structure for an employer's simple failure to respond, which fails to fully appreciate and follow the statutory mandate that penalties are only for willful failures to respond or the provision of false information.

Below are additional comments on specific provisions of the proposed regulations:

1. The requirement under .04 that prospective employers report alleged violations to the Maryland State Department of Education (MSDE) is overly burdensome for employers and not supported by the language of the Act.
 - a. The Act does not include, either expressly or by implication, any requirement that prospective employers immediately report a former employer that "does not complete and return the employment history review form within 20 days of its receipt." The Act requires only that prospective employers perform a pre-hire review of applicants with direct contact with minors, by contacting current and former employers. Md. Code, Educ. §6-113.2 (c). The Act does not impose the additional burden of enforcing its provisions on prospective employers. Instead, the Act establishes a penalty structure for a current or former employer's willful failure or provision of false information, to be administered and enforced by MSDE. As stated in the Department of Legislative Services analysis of the law passed in 2019 the Act creates a substantial burden on Maryland schools and requires dedicated staff to administer. The reporting obligation

in the proposed regulations passes the burden of enforcing the Act onto Maryland schools, and should be removed from the proposed regulations.

- b. The Act does not and cannot apply to non-Maryland employers, who are not subject to Maryland law or the jurisdiction of the MSDE. Current and former employers outside of the state of Maryland are not and cannot be required to respond to any request from a prospective Maryland employer, regardless of whether their own state law allows or prohibits a response. The proposed regulations should clarify that the scope of prospective employers' review extends only to current and former employers located in of the state of Maryland. Specifically, 04(D)(3)(a), which currently carves out employers who are restricted from reporting because "[t]he laws of the state in which the current or former employer is located prohibit the release of the information or records requested," should be revised as follows:
"The current or former employer is not located within the state of Maryland."
2. The proposed regulation's reporting obligation in section .04 poses additional challenges for employers to implement:
 - a. The prospective employer has no way of knowing when – or if – a former employer received the request for information, assuming that the prospective employer mailed the request to the correct party, office or address. Accordingly, prior employers may end up with less than 20 days to respond before being subjected to investigation or penalty.
 - b. Per .04(D)(4) of the proposed regulations, a prospective employer must make three attempts to obtain the form from a current or former employer before making a report to the Department. The proposed regulations should clarify that these attempts may be made within the 20 day response period under .04(A).
3. The proposed regulations fail to address situations where prospective employers have less than 20 days to hire an applicant to fill an open position. Often, Maryland schools do not have twenty days to fill a sudden vacancy, especially in the middle of a school year. Md. Code, Educ. §6-113.2(c) does not require that prospective employers receive a response from current and former employers before hiring an applicant. Instead, Md. Code, Educ. §6-113.2(c) requires only that prospective employers (1) contact the employers listed by the applicant and (2) request the report from MSDE regarding the applicant. Therefore, the proposed regulations should clarify that a prospective employer is not prohibited from hiring an applicant at any time prior to the full twenty day response period so long as the prospective employer has made three documented attempts to contact each employer listed by the applicant and requested the report from MSDE.
4. Contrary to section (k) of Md. Code, Educ. §6-113.2, mandating that penalties are only for an employer's **willful failure** to respond or for the provision of **false information**, the proposed regulations establish a penalty structure for an employer's simple failure to respond.
 - a. The proposed regulation would wrongly impose a penalty without the necessary finding under the statute of a "willful failure" to respond or otherwise provide the information. The proposed procedures whereby MSDE sends a warning letter to the former employer does not suffice for a showing of willful failure to comply.

The proposed regulations should clarify that the penalties only apply upon an adjudicated finding, following a hearing in the first instance with notice and an opportunity to be heard, of a former employer's **willful failure** to respond or the provision of **false information**

- b. Additionally, consistent with 1(b), above, the proposed regulation is beyond the constitutional jurisdiction of MSDE or the State of Maryland generally to the extent that it purports to be able to impose penalties on out-of-state former employers or to otherwise require them to provide the requested information.