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**Thomas P. DiNapoli  
COMPTROLLER**



**Audit Objective..... 2**

**Audit Results - Summary..... 2**

**Background..... 3**

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

Agency and Provider Compliance.... 4

OMRDD Oversight ..... 5

Recommendations..... 6

**Audit Scope and Methodology..... 6**

**Authority ..... 6**

**Reporting Requirements..... 6**

**Contributors to the Report ..... 7**

**Appendix A - Auditee Response.... 8**

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**OFFICE OF THE  
NEW YORK STATE COMPTROLLER**

**DIVISION OF STATE  
GOVERNMENT ACCOUNTABILITY**

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**OFFICE OF MENTAL  
RETARDATION AND  
DEVELOPMENTAL  
DISABILITIES**

**OVERSIGHT OF CRIMINAL  
HISTORY RECORD CHECKS  
FOR EMPLOYEES OF  
VOLUNTARY AGENCIES  
AND REGISTERED  
PROVIDERS**

**Report 2007-S-112**

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## AUDIT OBJECTIVE

The objective of our audit was to determine whether the Office of Mental Retardation and Developmental Disabilities (OMRDD) provides adequate oversight to ensure that criminal history record checks for employees of voluntary agencies and registered providers are performed as required.

## AUDIT RESULTS - SUMMARY

OMRDD provides residential, day, and family support services to approximately 140,000 New Yorkers with developmental disabilities. According to OMRDD, as of October 2007, there were 675 voluntary agencies (Agencies) that assist the developmentally disabled with a variety of activities throughout the State. As of September 2007, there were 278 registered providers (Providers) delivering services such as transportation and staffing to Agencies.

New York State's Mental Hygiene Law (Law) requires all prospective employees, volunteers and operators of Agencies and Providers, who have regular and substantial unsupervised or unrestricted physical contact with the developmentally disabled, to undergo a background check as a condition of their employment.

We determined that, in general, Agencies and Providers are complying with the Law. We also found that OMRDD's oversight procedures appear adequate to detect instances of noncompliance in Agencies. However, certain improvements in OMRDD's oversight procedures would minimize the length of time instances of noncompliance remain undetected in Agencies and would provide greater oversight to Providers.

OMRDD's Criminal Background Check Unit (Unit) is responsible for processing the

required background check requests from Agencies and Providers and maintains a database of all persons whose names are submitted. The actual background checks are performed by the New York State Division of Criminal Justice Services (DCJS). Between April 1, 2005 and August 31, 2007, the Unit processed more than 116,000 requests for approximately 105,000 applicants. (Some employee applicants apply to more than one Agency or Provider resulting in multiple tests performed on each.) According to the database, 2,531 applicants (2.4 percent) were denied employment as a result of information uncovered as a result of their respective background checks.

We selected a sample of 15 Agencies and 15 Providers, employing a total of 2,682 and 296 employees respectively, to determine whether background checks were being performed as required. These employees were hired during the period November 2007 to January 2008. Most of the sampled employees received background checks as required. However, we found that at three of the sampled Agencies and two of the sampled Providers, 55 of their 749 collective employees (7 percent) did not undergo the required background checks prior to their respective employment. As a result, these applicants were hired without first obtaining required assurances that they posed no potential threats to the developmentally disabled.

The Unit's database identified 2,531 Agency and Provider job applicants who, between April 1, 2005 and August 31, 2007, were determined to be ineligible (disqualified) for employment based on their criminal histories. We selected a sample of 25 of the 2,531 disqualified applicants to determine whether any of them had been hired by the 22 Agencies and 3 Providers they had individually applied to. We found that none

of them had been hired by their prospective employers.

As part of its oversight responsibilities, OMRDD performs periodic reviews of Agencies to determine their compliance with the Law. We found that as a result of its reviews, OMRDD staff has identified findings similar to ours. However, OMRDD has not been including Providers in its oversight practices leaving Providers to comply with the Law on an honor system.

Our audit report contains two recommendations addressing OMRDD oversight practices.

In response to our draft report, OMRDD officials note that they have since implemented a “risk-based” approach to assist them in determining the appropriate time intervals between reviews. They also note that they will study the feasibility and cost benefits of expanding OMRDD oversight of providers.

This report, dated June 4, 2009, is available on our website at: <http://www.osc.state.ny.us>. Add or update your mailing list by contacting us at: (518) 474-3271 or Office of the State Comptroller  
Division of State Government Accountability  
110 State Street, 11<sup>th</sup> Floor  
Albany, NY 12236

## BACKGROUND

The Office of Mental Retardation and Developmental Disabilities (OMRDD) provides residential, day, and family support services to approximately 140,000 individuals with developmental disabilities throughout the State. OMRDD operates 14 regional Developmental Disabilities Service Offices (DDSO) that provide services to consumers

either directly or through voluntary agencies (Agencies). Agencies, in turn, are often assisted by registered providers (Providers).

As of October 2007, there were 675 Agencies providing the developmentally disabled with a variety of OMRDD-related services such as counseling, rehabilitation programs and housing, assisted by 278 Providers delivering services such as consumer transportation and staffing. Providers are required to register with OMRDD detailing the types of services each provides.

The New York State Criminal History Record Check Law (Mental Hygiene Law, Section 16.33 and Executive Law, Section 845-b), effective April 1, 2005, for Agencies and October 1, 2005 for Providers, requires all prospective employees, volunteers and operators of Agencies and Providers, that have regular and substantial unsupervised or unrestricted physical contact with the developmentally disabled, to undergo a criminal history record (background) check. The background checks are to be performed before prospective employees are hired. When registering, Providers are asked to sign a form acknowledging this requirement.

OMRDD regulations require Agencies and Providers to each designate one of their staff to be responsible for requesting the required background checks on the prospective employees of those Agencies and Providers. The requests are to be submitted to OMRDD’s Criminal Background Check Unit (Unit). To process a request, the prospective employee provides his/her fingerprints to the applicable DDSO which in turn forwards the prints to the Unit. Upon receipt, the Unit forwards the prints to the New York State Division of Criminal Justice Services (DCJS) which performs the actual background checks. Once a background check is

completed, usually within two or three days of receipt, DCJS sends the results back to the Unit.

If the results of the background check indicate that the prospective employee has a criminal record in an area deemed a potential threat to the developmentally disabled, a disqualification assessment is made by OMRDD attorneys. If the OMRDD attorneys determine that a true threat exists, they forward their determination to the affected Agency or Provider so they are made aware not to hire that applicant.

The Unit maintains a database of all background checks requested and performed. Between April 1, 2005 and August 31, 2007, the Unit processed more than 116,000 background checks on approximately 105,000 applicants. (Approximately 9,500 applicants each applied to more than one Agency or Provider resulting in multiple background checks performed on each).

According to the database, 2,531 applicants (2.4 percent) were denied employment with the Agencies and Providers they applied to as a result of their background checks.

## **AUDIT FINDINGS AND RECOMMENDATIONS**

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### *Agency and Provider Compliance*

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Our audit determined that Agencies and Providers generally complied with the Law. We found that the overwhelming majority of Agency and Provider job applicants (93 percent) received the required background checks prior to their employment. However, reported misunderstandings of the requirements allowed some individuals to be hired without the requisite background check.

According to the Law, any prospective employee of an Agency or Provider with a previous felony conviction involving a sex offense, physical violence, or for physically endangering the welfare of an incompetent or physically disabled person, should be denied employment with an authorized Agency or Provider.

We selected a sample of 15 Agencies and 15 Providers to determine whether they were complying with the Law and securing the required background checks before hiring prospective employees. During the period November 2007 to January 2008, based on their employee rosters, the 15 sampled Agencies and Providers had 2,692 and 296 employees, respectively, subject to background checks based on the nature of their jobs.

We found that 55 of the 749 employees hired by three of the sampled Agencies and two of the sampled Providers did not undergo the required background checks prior to their employment. For example:

- One Agency, which also provided services to the NYS Office of Children and Family Services (OCFS), did not request a background check for 38 of their 40 employees who were required to have them. The Agency's Executive Director told us that because these employees had undergone background checks through OCFS, the Agency did not think it needed to do the same through OMRDD. However, due to the unique nature of OMRDD's responsibilities and consumers, its policy and practice requires that background checks of prospective Agency and Provider employees be made through OMRDD regardless of whether any previous

ones had been done through other agencies of the State.

- Another Agency did not request background checks for 11 of its 674 employees required to have them. After we brought this to the Agency's attention, a representative told us that it must have been an oversight and he requested the required checks. No disqualifying histories were identified as a result of those checks. However, we note that each of these 11 employees was working for this Agency anywhere from three months to five years. Thus, the individuals it serves may have been at risk had the background checks found otherwise.

As an additional check to determine whether Agencies and Providers were hiring employees who should not have been hired based on their criminal histories, we selected 25 of the 2,531 disqualified applicants identified in the Unit's database and compared them to the employee rosters maintained by the 22 Agencies and three Providers they respectively applied to. We did not find any matches.

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#### *OMRDD Oversight*

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OMRDD's Bureau of Compliance Management (BCM), as part of its routine reviews of Medicaid billings, using its own staff, reviews Agency compliance with background check requirements at about 36 Agencies annually. BCM also contracts with several independent contractors to perform an additional 72 reviews each year. As such, about 108 of the 675 Agencies are reviewed for compliance each year, resulting in each Agency being reviewed approximately once every six years.

In addition, as part of its responsibility to certify group homes (residences housing persons with developmental disabilities under the purview of an Agency), OMRDD's Bureau of Program Certification (BPC) performs background checks of the staff employed by each group home. According to OMRDD, approximately 6,800 group homes were operating during the audit period and over 93 percent of them undergo a BPC review each year.

From our review of the oversight procedures employed by BCM and BPC, as well as the results of 14 sampled BCM reviews - which identified findings of noncompliance similar to ours - we determined that, for the Agencies they review each year, OMRDD's oversight procedures are sufficient for assessing Agency compliance with the Law. However, because a significant number of Agencies are not reviewed for compliance each year, potential instances of noncompliance may go undetected for up to six years.

We also found that OMRDD has not included Providers in its compliance reviews since Providers contract directly with Agencies - not OMRDD. OMRDD officials assumed Agencies were overseeing Provider compliance.

Conversely, some of the Agency representatives we discussed this issue with told us that they were under the impression that OMRDD was reviewing Provider compliance with the Law since OMRDD regulations require Providers to comply. As a result, neither OMRDD nor the Agencies are overseeing Provider compliance.

Although our own testing found Providers are generally complying with the Law, the lack of oversight could allow instances of noncompliance to remain undetected.

## Recommendations

1. Consider the benefits of reducing the time intervals between reviews to minimize the length of time potential instances of noncompliance would go undetected.
2. Include Providers in OMRDD's compliance reviews.

## AUDIT SCOPE AND METHODOLOGY

Our audit determined whether OMRDD provided adequate oversight to ensure that prospective Agency and Provider employees, who have regular and substantial unsupervised or unrestricted physical contact with the developmentally disabled, received the background checks as required by law. Our audit covered the period April 1, 2005 through January 31, 2008.

To accomplish our audit objective, we interviewed OMRDD, Agency and Provider officials, and reviewed the governing Law and regulations. We also reviewed OMRDD's background check database, and selected a sample of Agency and Provider employee rosters, to assess compliance with the Law. We also selected a random sample of disqualified applicants to determine whether they were ultimately hired by the Agencies or Providers to which they applied, reviewed a judgmental sample of Program reviews performed by OMRDD's BCM.

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.

## 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

A draft copy of this report was provided to OMRDD officials for their review and comments. Their comments were considered in preparing this final report and are included in their entirety as Appendix A.

Within 90 days of the final release of this report, in accordance with Section 170 of the Executive Law, the Commissioner of OMRDD shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, explaining the actions taken by the OMRDD officials to implement the recommendations contained

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therein, and where not implemented, the reasons therefor.

### **CONTRIBUTORS TO THE REPORT**

Major contributors to this report include William Challice, Frank Patone, Albert Kee, Brian Lotz, Scott Heid, Brian Krawiecki, Jennifer Bachinsky, Richard Canfield, and Sue Gold.

## APPENDIX A - AUDITEE RESPONSE



NYS Office of Mental Retardation and Developmental Disabilities



David A. Paterson, Governor  
Diana Jones Ritter, Commissioner

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May 12, 2009

Mr. Frank Patone, CPA  
Audit Director  
Office of the State Comptroller  
Division of State Government Accountability  
123 William Street - 21st Floor  
New York, NY 10038

Dear Mr. Patone:

The Office of Mental Retardation and Developmental Disabilities (OMRDD) has reviewed the Office of the State Comptroller's draft report (Report No: 2007-S-112) regarding OMRDD's "*Oversight of Criminal History Record Checks For Employees of Voluntary Agencies and Registered Providers.*"

Our responses to the findings contained in the report are attached for your consideration. Again, I want to thank you and your team for their professionalism. If you have any questions or concerns, please do not hesitate to contact me directly at 518.474.4376 or [Mary.E.Peck@omr.state.ny.us](mailto:Mary.E.Peck@omr.state.ny.us).

Sincerely,

Mary E. Peck  
Director, Office of Internal Control

#### Attachment

cc: Commissioner Ritter  
Mr. Chmura  
Ms. Burns  
Ms. Martinelli  
Ms. McBain  
Mr. Monteiro  
Mr. Moran  
Mr. Nellegar  
Mr. Sleasman  
Mr. Triller

We help people with developmental disabilities live richer lives.

**Office of Mental Retardation and Developmental Disabilities (OMRDD)  
Response to the Office of the State Comptroller's (OSC)  
Draft Audit Report (2007-S-112)**

***Oversight of Criminal History Record Checks For Employees of  
Voluntary Agencies and Registered Providers***

**Recommendation #1:**

*Consider the benefits of reducing the time intervals between reviews to minimize the length of time potential instances of noncompliance would go undetected*

**Response**

We believe that our criteria for reviews should not solely be driven by the interval of time since the last review. Subsequent to the inception of this audit, OMRDD adopted a risk-based approach for monitoring voluntary agency compliance with the Criminal Background Check (CBC) regulations. The Division of Quality Management<sup>1</sup> will audit voluntary agencies on a more frequent basis only in those cases where a pattern of non-compliance with the CBC or other OMRDD regulations has been identified. Agencies which have demonstrated a high degree of compliance and fiscal viability will not be subject to an increased audit schedule. This risk-based protocol allows OMRDD to focus its reviews on agencies that have been identified to have the highest risk of non-compliance, while avoiding the use of limited resources on agencies with a track record of compliance.

It is important to note that, as the audit findings have indicated, voluntary agencies under OMRDD's auspices have demonstrated a compliance rate of nearly 93% and there are no known instances where an individual who was denied employment based upon a criminal background check was subsequently hired.

**Recommendation #2:**

*Include Providers in OMRDD's compliance reviews.*

**Response**

OMRDD recognizes the importance of monitoring the Registered Provider<sup>2</sup> community and while it is correct that they are not included in the Division of Quality Management's compliance reviews, we believe that this group is nonetheless adequately monitored and controlled.

<sup>1</sup> Reviews of voluntary agencies are conducted by the Division's Bureau of Compliance Management and the Bureau of Program Certification.

<sup>2</sup> The Registered Provider agencies affiliated with voluntary agencies and OMRDD's Developmental Disabilities Service Offices (DDSOs) generally provide contract services such as transportation and temporary staffing services.

The CBC Unit maintains a webpage with all pertinent policies, procedures, and forms, and Registered Provider compliance is monitored on a regular basis.

Each month, the CBC Unit contacts each Registered Provider who received a "Final Denial" or an "Abeyance" letter to ensure they did not employ the applicant in a position that requires them to have "regular and substantial unsupervised or unrestricted physical contact with persons with developmental disabilities"<sup>3</sup> and confirms that the required status change form<sup>4</sup> has been received for each applicant who was denied employment due to their criminal history.

Additionally, each Registered Provider is required to submit an annual assertion statement<sup>5</sup> by April 1st, certifying compliance with the CBC regulations. This notarized statement is signed by the Registered Provider's CEO, or local responsible party.

- The annual form includes a roster of employees and volunteers that are subject to the CBC requirements. This documentation is reviewed by the CBC Unit to ensure the names on the roster match the CBC database of the persons fingerprinted by the Registered Provider.
- Registered Providers not in compliance with the Annual Statement requirement are removed from the Registered Provider listing maintained on OMRDD's webpage. Removal from the listing effectively precludes a Registered Provider from future contracting opportunities with voluntary agencies.

Given these controls, and the past performance of the Registered Providers, we don't have any immediate plans to include them in the existing compliance review process. However, in the interest of continuous improvement, the Division of Workforce and Talent Management will organize a project team to determine the feasibility and cost-benefit of expanding OMRDD's oversight of Registered Providers.

We would like to take this opportunity to thank your audit team for their professionalism, and also for the opportunity to respond to the findings contained in this report. Should you have any questions, please don't hesitate to contact Mary Peck, Director of Internal Control, at 518.474.4376 or [Mary.E.Peck@omr.state.ny.us](mailto:Mary.E.Peck@omr.state.ny.us).

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<sup>3</sup> Mental Hygiene Law, § 16.33

<sup>4</sup> Form OMR 104, *Subject Party Change in Status*

<sup>5</sup> Form OMR 109, *Annual Criminal History Record Check Statement*