**SUBJECT:** Fingerprinting & Criminal Background Checks

**New Rules:**
- OAR 581-021-0510 Definitions
- OAR 581-021-0511 Fingerprinting of Subject Individuals in Positions Not Requiring Licensure as Teachers, Administrators, Personnel Specialists, School Nurses
- OAR 581-021-0512 Non-employment criminal records checks for school districts
- OAR 581-045-0584 Definitions
- OAR 581-045-0587 Non-employment criminal records checks for private schools

**Amends:**
- OAR 581-045-0586 Fingerprinting of Subject Individuals Employed by Private Schools in Positions Not Requiring Licensure as Teachers, Administrators, Personnel Specialists, School Nurses

**Repeals:**
- OAR 581-021-0500
- OAR 581-021-0501
- OAR 581-021-0503

**STAFF NAME & OFFICE:**
Stacey Guise, Deputy Superintendent’s Office
Candace Pelt & Elliot Field, Office of Student Services

**SUMMARY OF ISSUE:**
Proposed rules/amendments conform the impact of diversion programs and deferred adjudication to current practice and Oregon State Police reporting. Proposed rules/amendments also address the effect of a pardon on the criminal history of non-licensed school employees, prospective employees, and volunteers. Finally, proposed amendments clarify and streamline language regarding Department fingerprinting processes for both public and private school.

**Action:**
- Presentation

**New Rule**
- Amend Existing Rule
- Repeal Rule
BACKGROUND

State law requires background checks for school employees and volunteers. The Department of Education offers, for a fee, the service of fingerprint-based criminal background checks for public and private schools that employ non-licensed personnel and have volunteers on campus who may have direct, unsupervised contact with students. In 2018, the Board adopted rules governing the fingerprint-based criminal background check process for volunteers, pursuant to the passage of 2017’s HB 2992.

Currently, the Department’s fingerprinting rules lead to background check results that may not accurately reflect an individual’s criminal record. Specifically, the rules currently state that a conviction exists for purposes of a background check, even if a person has obtained a dismissal pursuant to participation in a diversion program or some other deferred adjudication or delayed entry of judgment. Also, under the existing rules, individuals going through the Department’s fingerprint-based criminal background check process who had received a pardon by executive order are being classified as still having a conviction on their record. Finally, the rules are not updated to conform to current Department practices regarding fee collection and use of advanced technology for processing fingerprints.

The proposed rules will do the following:

- Revise the definition of conviction so that it no longer includes circumstances where a dismissal has been entered into the record in connection with a diversion program or other deferred adjudication or delayed entry of judgment.
- Revise the definition of conviction to indicate that a conviction does not include circumstances where an individual is granted a full pardon by executive order of the Governor. Pardons by executive order from other jurisdictions will continue to be considered convictions for purposes of fingerprint-based background checks unless the Superintendent of Public Instruction determines that the pardon issued by another jurisdiction is equivalent to an Oregon full pardon by executive order.
- Update language addressing the Department process for conducting fingerprint-based background checks (e.g., fee collection, use of electronic fingerprinting) and also harmonize definitions and terms used in the Department background check rule scheme.
- Reorganize the rules to make them more user friendly by relocating the rule pertaining to background checks for volunteers in private schools to the same division as other rules pertaining to fingerprinting in private schools.

These proposed revisions are discretionary and are not required by statute.

Department staff shared the original proposed rules that were submitted to the State Board of Education for first reading with the following stakeholders: OEA, OSBA, COSA, all stakeholders on the Department’s fingerprinting listserv, and other individuals who have contacted the Department with questions about fingerprint-based criminal background check processes. The department received
comments to the proposed rules and amended the rules based on those comments. The department sent a final draft of the rules to the same group of stakeholders for any final comments on June 5, 2019.

SUMMARY OF PREVIOUS BOARD ACTION

The Department has conducted fingerprint-based criminal background checks for school employees for more than 20 years. In 2018, pursuant to the passage of HB 2992 (2017), the Board adopted rules governing fingerprint-based criminal background checks for public and private school volunteers.

HAS THE RULE CHANGED SINCE LAST BOARD MEETING?

☐ N/A; first read—hasn’t been before board
☐ No; same as last month
☒ Yes – As follows:

STAKEHOLDER COMMENTS

1. One stakeholder group commented that the group was in favor of the proposed rules because the rules better reflect subsequent legal precedence and more accurately aligns with practice. The group specified that they are especially in favor of the language allowing legal dismissal and pardon circumstances to negate convictions.

   Action: Nothing to change based on this comment.

2. One stakeholder commented that the proposed rules make the requirements clearer and align them better with actual processes. The commenter suggested that the remaining definitions be moved to the new definition rules for consistency and to avoid confusion.

   Action: We have incorporated all remaining terms/definitions into the definition rules for both school districts and private schools and eliminated the terms from the other rules.

ADDITIONAL CHANGES:

1. We deleted “newly hired” as a defined term. That term was used only in the definition for “subject individual.” We added language into the definition for the term “subject individual” to replace that term. See 581-021-0510(11)(a)(A) and (11)(b).

2. The original rules used several different terms to describe background checks: background checks, criminal background checks, criminal records checks, and criminal history checks. For clarity and consistency, we changed those terms to “criminal records checks” throughout the rules. Criminal records checks is the term that is used in the statutes that these rules implement.
3. We changed the term “information to be required,” which was never used in the rules to “fingerprint information” and used that term in the rules where appropriate.

4. The original rules used several different terms to describe fingerprint-based criminal records checks: Oregon and FBI, state and national, and state and nationwide. For clarity and consistency, we changed those terms to “state and national” criminal records checks throughout the rules.

5. We deleted the term “applicant” from the definitions, to avoid confusion. The term “applicant” was being used in the rule to refer to a subject individual who had submitted fingerprint information. But, people generally tend to think of an applicant as a person who has applied for a position. Because the rules deal with individuals who are newly hired to positions which require background checks, we felt the use of the term applicant in the rules was confusing, even with the definition explaining the actual intended meaning. For that reason, we deleted the term from the definitions and replaced the term “applicant” with “subject individual” in the places that it was used in the rules.

6. In the volunteer rules for both school districts and private schools, we deleted the term “subject individual” from the defined terms and changed the term “subject individual” to “volunteer” each time it was used in the volunteer rules.

7. We moved the location of some existing provisions in the rules for a more logical flow. For example, in 581-021-0511, we moved the language that used to appear at subsection (14), which talked about how to submit requests for criminal records checks. That language now appears as a new subsection (4). It was inserted after subsection (3), which discusses making a request for a records check to the Department.

8. We deleted “fee” as a defined term in the definitions and incorporated information about the fee for criminal records checks into 581-021-0511(5). That change is consistent with what we had already done in the volunteer rule. See 581-021-0512(3)(c).

9. In the original draft of the rules that we submitted for first read, we eliminated the attempt provision that had appeared in the original rules at 581-021-0500(10), because the rule already referred to ORS 342.143 and the attempt provision is contained in that statute. In its place, we highlighted the attempt provision for readers, by referring specifically to that provision of the statute (the first read draft referred to ORS 342.143(3)(a)(A) or (B)). But, there are other provisions in 342.143 that the reference that we used did not capture. So, we deleted the reference to 342.143(3)(a)(A) or (B) and went back to just a reference to the entire statute. See 581-021-0511(8).

10. Finally, for consistency, we added the language “or substantial equivalent in another jurisdiction or in Oregon under a different statutory name or number” to the language discussing ORS
342.143 in the volunteer rules to make those rules consistent with the employee rules, which contain that language. See 581-021-0512(4)(a)(A) and 581-045-0587(4)(a)(A).

**POLICY ISSUE OR CONCERNS**

As currently written, the Department’s fingerprint-based criminal background check rules lead to results that do not always accurately reflect an individual’s criminal history. Specifically, the rules state that individuals with dismissals as a result of a diversion or other deferred adjudication have convictions for purposes of criminal background checks, which does not reflect current Department practice based upon reporting from the Oregon State Police. Additionally, individuals receiving pardons from the Governor continue to be characterized as having convictions on their record. Finally, the existing rules treat individuals differently for convictions that have been expunged, pardoned, or dismissed as a result of diversion or other deferred adjudication, which does not lead to equitable results.

The proposed rule revisions correct issues identified with how the Department currently treats pardoned individuals and make the treatment of individuals who have a dismissal as a result of a diversion or other deferred adjudication consistent with current Department practice. There is no proposed change to the underlying standard for exclusion from working or volunteering in schools pursuant to a fingerprint-based criminal background check, nor is there any proposed change to the list of crimes that prompt exclusion, which is based in statute (ORS 342.143). Overall Department practice with respect to processing fingerprint-based criminal background checks will remain unchanged.

**EQUITY IMPACT ANALYSIS**

The proposed changes are designed to give equitable treatment to those who have taken positive steps toward clearing up their criminal record as a result of expungement, dismissal through diversion or other deferred adjudication, or pardon. The proposed revisions also make the rules more user friendly, bring consistency and clarity to the definitions, and are updated to reflect current Department practices.

The proposed changes expand and clarify the ways in which historically underserved populations who have had greater exposure to the criminal justice system—and consequently experience higher rates of criminal convictions—may remove criminal convictions from their record and become eligible for employment/volunteer opportunities in schools.

**FISCAL ANALYSIS**

The proposed changes will not have a fiscal impact on the Department. Office of Student Services staff will absorb the effect of the changes into existing FTE.
The proposed changes should not have a fiscal impact on school districts, as changes focus on Department practice in carrying out fingerprint-based criminal background checks.

**EFFECT OF A “YES” OR “NO” VOTE**

If the State Board adopts the proposed revisions, individuals who participate in diversion programs or successfully fulfill deferred adjudication or delayed entry of judgment obligations, and individuals with convictions who receive a pardon by executive order will no longer be considered to have such convictions on their criminal record for purposes of Department criminal records checks.

Additionally, adoption of the proposed revisions will update existing procedures for fingerprint-based criminal background checks with current technologies and fee collection practices.

**STAFF RECOMMENDATION**

☑ Approve  ☐ Approve next month  ☐ No recommendation at this time
*Prompted by:*  ☐ State law changes  ☐ Federal law changes  ☑ other

**ATTACHMENTS**

Attachment 1: Fingerprinting and Criminal Background Check Rules