

Memorandum

TO: David Tobis

FROM: Marty Guggenheim

DATE: January 25, 2008

RE: Legal Opinion on New York Law Regarding Employers' Responsibilities When Considering Employing or Retaining an Employee with an Indicated Child Abuse and Maltreatment Report

Pursuant to New York State law, certain employers have a duty to make formal inquiry of the Department of Social Services regarding certain prospective employees to ascertain whether prospective employee is the subject of an indicated child abuse and maltreatment report on file with the statewide central register of child abuse and maltreatment prior to permitting such person to have unsupervised contact with children as part of their employment responsibilities.

Social Services Law § 424-a (1)(b)(i) requires that all "provider agencies" (which include, among others, foster care agencies) inquire of the Department of Social Services regarding any person who is actively being considered for employment who will have the potential for regular and substantial contact with children who are cared for by the agency. This inquiry is to be made prior to permitting such person to have unsupervised contact with children. In addition, these agencies are required to make similar inquiries regarding "any person who is employed by an individual, corporation, partnership or association which provides goods or services to such agency who has the potential for regular and substantial contact with children who are cared for by the agency." Beyond these two categories of required inquiries, agencies are permitted, but not required, to inquire of the Department of Social Services about persons who are to be hired as a *consultant* or brought on as a *volunteer* by such agency who has the potential for regular and substantial contact with children who are cared for by the agency.

The key issue this Memorandum addresses is what are the responsibilities of the provider agency after being informed that the prospective employee is the subject of an indicated report and has a record being maintained by the statewide central register. Obviously, when the agency is informed that the prospective employee has no such record, the agency need do nothing further than hire the employee or retain the employee in its employ.

But what is to happen if the agency is informed that the person is in the register? May the agency nonetheless hire or retain the person? The answer is a resounding "yes." New York law never intended to bar persons whose records are maintained by the Department of Social Services from employment in any field. The sole purpose of requiring provider agencies to make inquiry is to ensure that agencies make informed decisions as employers in deciding on a case-by-case basis whom to employ.

When an employer is informed by the Department of Social Services that the person

inquired about is the subject of an indicated report of child abuse and maltreatment, Social Services Law § 424-a(2)(a) mandates that the employer “*determine on the basis of information it has available whether to retain or hire the employee, provided that if the employee is retained or hired the agency shall maintain a written record, as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate.*” (emphasis supplied).

New York law does not clarify the steps prospective employers are to take when making the individualized determination whether to hire to retain someone whose name is in the state central register, but it is manifest that the employer should discuss the events with the individual and make an informed and reasoned determination. When agencies wish to employ parent advocates, for example, and want those advocates precisely because they were themselves once “in the system,” as parents whose children were in foster care, the written justification for hiring the individual in light of the prior history is straightforward and self-evident. Rather than being an impediment to the position, it is a requirement.