

SUNY Electronic Records Guidance

Prepared by the SUNY Compliance Office and the Office of General Counsel

At SUNY, the question of whether or not it is permissible to use electronic signatures in lieu of hand-written signatures, and electronic (digital form) records in lieu of traditional paper records come up often. The issue is whether electronic records have the same legal force and effect of law, if hard-copy paper records can be converted into electronic format, and whether electronic signatures are as legally binding as hand-written ones. This guidance sheds light on these issues in the context of SUNY Policy and New York State laws and regulations.

Electronic Signatures at SUNY

Are Electronic Signatures Legal and Acceptable to use at SUNY?

Yes, they are legal, but in accordance with applicable New York State regulation, each campus must establish a process for accepting electronic signatures to ensure their validity.

What makes Electronic Signatures legal to accept and use in New York State?

State Law Regarding Electronic Signatures

The New York State Electronic Signatures and Records Act (ESRA) is the New York State Technology Law, Article 3, NY STT §§ 301-309, which authorizes the acceptance of electronic signatures in most documents. It went into effect in August of 1999, and was updated in 2002 to make New York State law consistent with the federal E-Sign law. The act provides that "signatures" made via electronic means will be as legally binding as hand-written signatures (meaning written and electronic signatures have the same validity), where statute defines an "electronic signature" as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." The ESRA law and corresponding regulation apply to anyone using or accepting electronic records and signatures in New York State. This law also formally says state and local government entities can keep records electronically.

Under the law, there are limited exceptions where electronic signatures are not considered valid. These exceptions are outlined in the following section of this document.

Exceptions to Electronic Signatures in ESRA:

There are a few notable exceptions to electronic signatures carved out in the law. An easy way to remember is that the exceptions all involve death. Specifically, they are:

- Wills;
- Trusts;
- Decisions consenting to orders not to resuscitate; and
- Powers of attorney and health care proxies, with the exception of contractual beneficiary designations.

A note with regard to real estate:

While generally negotiable instruments and other instruments of title are excluded from the provisions of ESRA, those which are electronically created, stored or transferred in a specific manner stipulated by ESRA are not excluded. As of September 23, 2012, ESRA allows the use and acceptance of electronic signatures and records with conveyances and other instruments recordable under Article Nine of the Real Property Law, and permit recording officers to electronically accept for recording or filing digitized paper documents or electronic records of real property instruments such as deeds, mortgages and notes, and accompanying documents.

A note with regard to construction law:

Pursuant to N.Y. General Construction Law § 46, a signature can be stamped if such stamped signature is placed on a document “with intent to execute or authenticate” such document. Within § 46, the term “Signature” is defined as “any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.”

What process must campuses establish to ensure the validity of electronic signatures before they may accept them?

SUNY Campuses must follow the New York State Regulations and establish a process to accept electronic signatures.

In accordance with the ESRA Regulations, SUNY State-operated campuses cannot accept electronic signatures until they have outlined a process to ensure the validity of the electronic signature. Under the NYS ESRA regulations §540.5(e), promulgated by the OFT (New York State Office of Technology Services), “Governmental entities using electronic records shall, in the absence of specific statutory or regulatory requirements, have the authority to specify the manner and format in which electronic records will be received, produced, accepted, acquired, recorded, filed, transmitted, forwarded, acknowledged and stored. For the purposes of ensuring the receipt of electronic records, governmental entities must designate the receiving device.” The regulation also states in §540.5 (d) that “Governmental entities shall employ procedures and controls designed to ensure the authenticity, integrity, security and, when appropriate, the confidentiality of electronic records.”

The key requirement in the ESRA law and the [Office of Information Technology Best Practice Guidelines on the Electronic Signatures and Records Act](#): Governmental entities must conduct and document a business analysis and risk assessment when electing to use or accept an e-signature solution, where business analysis and risk assessment means identifying and evaluating various factors relevant to the selection of an electronic signature for use or acceptance in an electronic transaction.

Such factors include, but are not limited to, relationships between parties to an electronic transaction, value of the transaction, risk of intrusion, risk of repudiation of an electronic signature, risk of fraud, functionality and convenience, business necessity and the cost of employing a particular electronic signature process.” This document spells out the business analysis and risk assessment designed to meet the ESRA requirements outlined in the regulations.

Under the NYS ESRA regulations §540.3(b), promulgated by the OFT (New York State Office of Technology Services), governmental entities can consult with CIO/OFT in its role as “Electronic Facilitator” BEFORE defining additional standards for e-signatures and records to ensure that such standards are consistent with ESRA.

Additionally, from an internal controls and procurement perspective, electronic signatures are ok if an agency has a process in place to validate that signature.

Digitization of Records

Do electronic records have the same legal force and effect as paper records?

State Law Regarding Electronic Records

The New York State Electronic Signatures and Records Act (ESRA) is the New York State Technology Law, Article 3, NY STT §§ 301-309, and specifically the regulations that correspond to the act, §540.5 Electronic records, states that (a) An electronic record used by a person shall have the same force and effect as those records not produced by electronic means. This law also formally says state and local government entities can keep records electronically.

Do we have the authority to digitize records at SUNY?

Yes, SUNY has the proper authority under the [SUNY Records Retention Policy Doc. No. 6609](#) and corresponding records schedules in the appendices to convert paper records into electronic format, and destroy the paper, so long as the electronic record is an accurate representation of the original. This authority was approved by OSC, the AG’s Office, and State Archives, and is based on the authority granted to us in State law, specifically the [NYS Arts and Cultural Affairs Law Section 57.05](#) and the [Commissioner’s Regulations 8 NYCRR Part 188](#), where we derive the authority to have our SUNY Records Retention Policy.

The [SUNY Records Retention Policy Doc. No. 6609](#) affords SUNY campuses permission to digitize all records, with very limited exceptions. These exceptions are noted directly on the SUNY records

schedule that corresponds to the type of record classification. If the SUNY Policy schedule item does not have a specific notation that paper records must be retained, then SUNY campuses can digitize and destroy the paper files. Since the SUNY policy has been approved by the Office of the State Comptroller and State Archives, we do not require pre-approval to digitize records (all other state agencies must get pre-approval from State Archives before digitization). If a SUNY campus decides to digitize records, they should not retain the original records. Instead, they should digitize the records, ensure the electronic records meet the criteria listed in the SUNY Policy regarding electronic conversion, and then dispose of the originals in a safe manner.

As such, even if an agency were to come in after the fact and ask for the original paper copies, we cannot and should not be punished for producing electronic records instead, or printed our copies of the electronic record stored into the system we are using for retention. Even with this oversight, we have been granted the authority to digitize our own records as we deem appropriate (with a few LIMITED exceptions).

Requirements for Digitization:

The [SUNY Records Retention Policy Doc. No. 6609's Introduction section](#) (available in the appendices) states the following regarding Electronic Conversion:

“Periodically, campuses or the System Administration may decide to replace official records in paper with electronic or digital copies. Most records in the SUNY Schedule have been pre-authorized for replacement in the SUNY Records Retention Schedule such that paper records which have been scanned or otherwise converted may be destroyed prior to the end of their retention period. If not pre-authorized, replacement and destruction of paper records can occur only upon approval by State Archives. Such approval requests shall be made by the SUNY Records Management Officer upon request of the campus concerned. Campuses intending to replace paper records with electronic or imaged copies are required to ensure that:

- (1) the images will accurately and completely reproduce all the information in the records being imaged;*
- (2) the imaged records will not be rendered unusable due to changing or proprietary technology before their retention and preservation requirements are met;*
- (3) the imaging system will not permit additions, deletions, or changes to the images without leaving a record of such additions, deletions, or changes; and*
- (4) designees of the State University of New York will be able to authenticate the imaged records by competent testimony or affidavit which shall include the manner or method by which tampering or degradation of the reproduction is prevented.”*

Campuses that are planning to digitize need to have a plan in place to ensure that the documents are kept electronically in a file format that will remain accessible overtime (think VHS tapes or tape players in today's age – it is hard to get the content off of a VHS tape or a tape, without the VCR or the 1980's boom box and stereo). Whatever format the campus uses, they need to be sure that the format will be good long-term, or have a plan in place for if the file format ever becomes obsolete.

Campuses should work with their IT departments when considering digitization to ensure proper file formats, and also that the campus has adequate electronic server storage space to handle the electronic data.

As of the creation of this publication, New York State Archives has said that the following formats are a best practice for digitization of records:

- PDF/A ("a" referring to the archival format) is the preferred format for textual documents or hybrid documents with text and images.
- Tagged Image File Format (TIFF), is preferred for photographic records.

Can campuses digitize and keep the paper copies also?

Campuses that take the time to digitize their records should get rid of the duplicate paper copy as soon as possible, so long as the digital copy of the record meets the requirements of [SUNY Records Retention Policy](#), and so long as the paper copies would not somehow be considered as historical documents. The SUNY Policy requires that the electronically converted record have met four elements: it is an accurate representation of original paper record, it is in usable format (usually .PDF), the records cannot be changed once converted, and they can be authenticated by employees. If the digital image meets the SUNY policy criteria, then the paper copy should be disposed of.

When campuses decide to digitize your records, but retain the original paper copies, they are increasing their burden administratively because they have doubled the amount of records they will need to sort through and hold if they receive an information request or litigation hold, and they now have the burden to maintain two sets of records. Additionally, two sets of records leads to confusion about which set can be relied on for the latest information. Additionally, two sets of records creates more risk for a breach of the information, since it is stored in two mediums, and duplicate files also increases storage and server costs.

A campus should ask themselves, what is the point of electronically scanning our records if we are going to retain the paper copies? The goal of electronic conversion is to simplify your records management process and to make the campus more time efficient at locating and maintaining records; it is not to double the amount of records that must be maintained, reviewed, stored, and protected from security breaches.

Bottom Line: If you take the time to convert your records into electronic format, so long as the electronic copies meet the criteria under the SUNY policy, campuses should destroy the duplicate paper copies.

Are there local campus policies on digitization?

It is very possible that campuses have their own local policies about what they require for certain documents being in paper format. Specifically, this question has come up in the context of Official transcripts in paper format, and transcript authentication (such as the original with a seal in paper format). Any local policy that a campus has requiring that certain documents be

kept in their paper format would be more than is required by the law and SUNY System-wide policy.

Electronic Signature and Digitization Resources

Law

NY STT §§ 301-309 Electronic Signatures and Records Act

[NY STATE TECH § 301. Short title](#)

[NY STATE TECH § 302. Definitions](#)

[NY STATE TECH § 303. Electronic facilitator](#)

[NY STATE TECH § 304. Use of electronic signatures](#)

[NY STATE TECH § 305. Use of electronic records](#)

[NY STATE TECH § 306. Admissibility into evidence](#)

[NY STATE TECH § 307. Exceptions](#)

[NY STATE TECH § 308. Personal privacy protection](#)

[NY STATE TECH § 309. Use of electronic records and signatures to be voluntary](#)

Regulation:

Title 9 NYCRR Part 540

[s 540.1 Purpose, intent and applicability.](#)

[s 540.2 Definitions.](#)

[s 540.3 Electronic facilitator.](#)

[s 540.4 Electronic signatures.](#)

[s 540.5 Electronic records.](#)

[s 540.6 Privacy and confidentiality.](#)

[s 540.7 Electronic recording of instruments affecting real property.](#)

Supplemental Materials:

[2013 Best Practice Guideline, Electronic Signatures and Records Act \(ESRA\) Guidelines,](#)

document prepared by ITS, available at

[\[https://www.its.ny.gov/sites/default/files/documents/nys-g04-001.pdf\]](https://www.its.ny.gov/sites/default/files/documents/nys-g04-001.pdf).