

In Brief

WHAT YOU DON'T KNOW CAN HURT YOU: CRIMINAL BACKGROUND CHECKS UNDER THE SCHOOL CODE

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The criminal background check requirements under Section 21.9 of the *Illinois School Code* frequently raise questions and concerns by school administrators. Questions often focus on the process for conducting criminal background checks for non-district employee independent contractors, such as food service workers, custodians, school bus drivers, and other non-employee independent contractors who have “direct, daily contact” with students. The challenge is ensuring proper background checks on individuals who are not school district employees.

Given the potential liability exposure for noncompliant background checks, we are providing a summary of criminal background checks required by Section 21.9 of the *Illinois School Code*, along with important steps in the process of conducting background checks for school district employees, contractors, student teachers, and volunteers.

The General Rules for Employees

Section 21.9 of the *Illinois School Code* requires school districts to initiate a fingerprint-based criminal background check for all applicants *before* their date of hire. The background check includes three components. School districts must:

1. Submit the applicant's identifying information to the State Police for a fingerprint-based criminal history records check of State Police and FBI records;
2. Perform a check of the Statewide Sex Offender Database; and
3. Perform a check of the Statewide Murderer and Violent Offender Against Youth Database.

Recent amendments to the *Illinois School Code* also require school districts to consider, as a “condition of employment,” the status of a person who has been issued an indicated finding of abuse or neglect of a child by the Department of Children and Family Services (DCFS).

Once the background check has been completed, the school district must provide a copy of the background check results to the applicant and notify the applicant whether they have been identified in the Statewide Sex Offender Database as a sex offender.

In addition to the initial background check, school districts must perform a check of the Statewide Sex Offender Database and the Statewide Murderer and Violent Offender Against Youth Database once for every 5 years that the applicant remains employed at the school district.

Contractors

Section 21.9 of the *Illinois School Code* also requires criminal background checks on all employees of firms holding contracts with school districts, including and not limited to food service workers, school bus drivers, other transportation employees, and any persons “who have direct, daily contact with the pupils of any school in such district.”

Section 21.9 of the *Illinois School Code* is arguably unclear on whether the school district or the contractor employer is charged with completing the criminal background check. However, we believe that given the potential liability exposure of a failure to comply, the school district should submit the criminal background check information on the contractor's employees. Practically speaking, this means the contractor should have the contractual obligation to require its employees to authorize the school district to conduct the background check. Based on this

authorization, the school district should initiate the same three-part criminal background check for employees of contracting firms who have direct daily contact with students, as is conducted for the district's own employees (described above). Specifically, the criminal background check must include a fingerprint-based records check through the State Police and FBI, a check of the Statewide Sex Offender Database and Statewide Murderer and Violent Offender Against Youth Database upon application and once every five years, and consideration of any DCFS indicated findings.

Some school districts voluntarily conduct background checks on any contractor employees who are on school property, even when those individuals do not have direct daily contact with students. School districts do indeed have the discretion to expand the scope of background checks, and in these cases should be sure to include such requirements in the agreement with the contractor. Importantly, the contractor agreement should also obligate the contractor to indemnify and defend the school district from any and all liability that may arise from the criminal background checks and from any deficiencies in the criminal background check process.

The school district should receive the results of each background check, provide a confidential copy of the record of convictions to the contractor employee, and notify the contractor employee whether he or she has been identified as a sex offender in the Statewide Sex Offender Database. Although the district should not charge the individual applicant (the contractor employee) a fee for the background check, it is permissible for the district, under the contract, to shift the cost of background checks to the contractor; the contractor may or may not account for this added cost in its pricing to the district.

Some school districts rely on their contractors' own internal background check procedures, instead of strictly following Section 21.9. While this is not the best practice, in these situations the school district should, at a minimum, ensure that its contractor agreements at least require the contractor to initiate a criminal background check in compliance with Section 10-21.9 of the *Illinois School Code* and provide the written results directly to the district. The district should then review the background check results to determine whether the assigned employees have

been convicted of any crime that would preclude their assignment to the district.

Student Teachers and Interns

The *Illinois School Code* also requires school districts to complete and review a fingerprint-based criminal background check before allowing a person to student teach. Like employees and independent contractors, the background check must include a finger-print based records check through the State Police and FBI, a check of the Statewide Sex Offender Database, a check of the Statewide Murderer and Violent Offender Against Youth Database, and consideration of any DCFS indicated findings. Once completed, the school district must provide a copy of the State Police and FBI results to the student teacher.

Volunteers

The *Illinois School Code* does not require school districts to conduct background checks for volunteers, such as parent chaperones. However, the Illinois State Board of Education (ISBE) has issued non-regulatory guidance that a school district *may* require volunteers to submit to a background check consistent with the school district's policy. When implemented by policy, ISBE recommends conducting fingerprint-based background checks in lieu of name-based checks. We agree with and support criminal background checks for volunteers whenever practicable.

Conclusion

School districts should regularly review their background check policies and procedures, and their contractor agreements and practices, to ensure compliance with current *Illinois School Code* requirements. If you have any questions about these requirements, please contact your Robbins Schwartz attorney.