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It's All about the Kids

A Primer on Criminal background Checks and Employee Contractors

by Holly Claghorn

Texas school districts have always made it a priority to identify employees and campus visitors who might be a threat to students. But confidentiality laws and other restrictions on criminal records have limited district access to vital information. The 80th Texas Legislature provided some relief to districts, enacting Senate Bill 9 (SB 9). SB 9 provides a comprehensive program to improve the exchange of information among the State Board for Educator Certification (SBEC), the Texas Education Agency (TEA), school districts, and the Texas Department of Public Safety (DPS).

Early Challenges

State and local agencies and districts have worked hard to implement SB 9. In the four short months after the bill was passed, SBEC drafted fingerprinting rules and processes and DPS developed an electronic, Web-based criminal history clearinghouse. Districts adjusted hiring practices and informed employees, volunteers, and contractors of the new requirements.

The transition was not trouble-free. Initial confusion over payment procedures and scarce appointments with DPS's fingerprinting contractor bogged down the hiring process. When the first wave of deadlines hit in January 2008, some districts reported delays of two weeks or longer for fingerprinting appointments for new hires. In addition to DPS's troubles, TEA's SB 9 computer program debut was marred by software glitches. Adjustments had to be made.

Despite these growing pains, the Texas education community rose to the challenge. As Doug Phillips, director of Investigations and Fingerprinting for SBEC, says, "It was a little bit tough getting started. We had some issues. But things seem to be falling into place. We just have to remember that the ultimate goal is school safety."

Better Data

SB 9 expanded the breadth and depth of criminal history reviews. Districts have had the ability to obtain criminal records for decades, but the access and completeness of the data were limited. Because the searches were name-based, not fingerprint-based, districts could not confirm the identity of persons they were researching. In addition, searches were limited to DPS records. If an employee or applicant were convicted in another state, a district could not access that information.

SB 9 allows districts to access national criminal history information maintained by the FBI for certain groups of workers. Not only does this provide more data, it also provides better data because FBI searches are fingerprint-based. SB 9 also converted optional criminal history reviews to mandatory reviews, thereby promoting consistency.

Finally, SB 9 created a criminal history clearinghouse for the records of persons who have worked for districts throughout the state. When it is fully operational, the clearinghouse will

provide districts instant access to the records of persons already in the database, as well as electronic updates when a person in the database is arrested, charged, or otherwise involved with the penal system.

What Is a Criminal History?

No comprehensive database exists for all of the arrests, charges, indictments, convictions, and other adjudications in the United States. Instead, the nation's criminal record system is a conglomeration of federal, state, and local databases, with some overlap and little consistency. SB 9 gives districts access to three types of criminal histories, depending on the workers' classification:

- Statewide criminal history records: information collected by DPS regarding arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions¹
- National criminal history records: criminal history records from DPS and the FBI²
- Records from private agencies: records compiled by private consumer reporting agencies³

Criminal records maintained by DPS and the FBI are confidential. No one—not a district, not a contractor, not even TEA or SBEC—may access criminal records from DPS or the FBI without specific authorization, either from the individual or provided by law.⁴ SB 9 provides that authorization, but districts must be careful to stay within that authority.

Classification-based Review

More than 30 pages in length, SB 9 is an intimidating piece of legislation. The bill sets out different procedures and deadlines for several classifications of workers. It is helpful to think of these requirements in terms of three groups:⁵

- Certified employees and substitute teachers:** Certified employees include classroom teachers, administrators, and counselors. A substitute teacher is a teacher who is on call or on a list of approved substitutes to replace a regular teacher and has no regular or guaranteed hours. A substitute teacher may be certified or noncertified.⁶ TEA also classifies substitute classroom aides under this provision.
- Student teachers and volunteers:** A student teacher is a person participating in an internship consisting of student teaching to receive a teaching certificate. A volunteer is a person who has indicated in writing an intention to serve as a volunteer for a district or shared services arrangement.⁷
- Noncertified employees and contractor employees:** Noncertified employees include administrative support staff, school bus drivers, and custodial staff.⁸ Contractor employees include consultants, therapists, contract food service personnel, and construction and maintenance workers.

Among the groups, there are important differences. But within each group, the type of criminal history that will be reviewed and the deadline for completing the review is roughly the same.

Certified employees and substitute teachers. SB 9 makes three significant changes to the criminal history review process for certified employees: It makes the review mandatory; it authorizes access to FBI records; and it requires criminal history reviews for substitute teachers.⁹

SBEC has primary responsibility for completing national, fingerprint-based criminal history reviews of all certified employees and substitute teachers.

Fingerprinting has been mandatory

| Classification | Type of Criminal History | Deadline |
|---|--|---|
| Certified employees and substitute teachers | National, fingerprint-based (FBI) | September 1, 2011 |
| Noncertified employees and contractor employees | <i>Hired on or after January 1, 2008:</i> National, fingerprint-based (FBI) <hr/> <i>Hired before January 1, 2008:</i> • Noncertified: DPS, name-based • Contractor employees: Any law enforcement or criminal justice agency or private agency | <i>Hired on or after January 1, 2008:</i> Before beginning employment <hr/> <i>Hired before January 1, 2008:</i> As soon as practicable |
| Student teachers and volunteers | DPS, name-based | Before providing services |

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for applicants for SBEC certification since 2003. SBEC’s challenge is to fingerprint persons who were certified before 2003, as well as the thousands of workers on the substitute rosters across the state. SBEC has less than four years—until September 1, 2011—to complete this monumental task.¹⁰ In the meantime, districts may continue to conduct name-based background checks on certified employees and substitute teachers.

The agency has taken a “divide and conquer” approach. SBEC will select districts in random order until all districts have been selected over the next three and one-half years. Once a district is selected, it will be notified that TEA and SBEC are about to conduct national background checks of the district’s certified educators, as well as all its substitute teachers and classroom aides. The district will be notified that

all substitute teachers and classroom aides not already in the clearinghouse must submit their information in 80 days or they will no longer be eligible to substitute for that district.¹¹

Student teachers and volunteers. SB 9 makes review of the criminal histories of student teachers and volunteers mandatory and puts primary responsibility for the reviews on districts.¹² Districts were required to conduct these reviews as to existing student teachers and volunteers by September 1, 2007.¹³ For new student teachers and volunteers, districts must conduct the reviews before the student teacher or volunteer provides any services to the district.

The definition of volunteer contains some significant exceptions. The criminal history review requirements do not apply to a parent or guardian of a student enrolled in the district, a volunteer who will be accompanied by a district employee while on campus, or a person who is volunteering for a single event on a school campus.¹⁴ Although a district is not required to obtain the criminal histories of these persons, it is still permitted to obtain their criminal histories.¹⁵

Noncertified employees and contractor employees. The requirements for noncertified employees and contractor employees depend on date of hire. Noncertified employees and contractor employees hired on or after January 1, 2008, are subject to fingerprint-based, national criminal history reviews.¹⁶ Before the person may begin work at

the district, he or she must submit fingerprints and any other required information to DPS.¹⁷

For noncertified employees hired before January 1, 2008, SB 9 requires statewide, name-based criminal history reviews.¹⁸ For contractor employees hired before January 1, 2008, the contractor may obtain the criminal history from any law enforcement or criminal justice agency, or from a private agency.¹⁹ These reviews must be conducted "as soon as practicable."²⁰ In an emergency, a district may allow a contractor employee who has not submitted to a criminal history review to enter district property if the person is accompanied by a district employee. The district may adopt rules regarding this exception.²¹

If a contractor employee is covered, the contractor, not the district, bears the burden of obtaining a national fingerprint-based criminal history check directly from DPS.

Confusion over Contractor Employees

The contractor employee provisions have been the source of much confusion. Districts have received mixed messages as to who is covered and who is responsible for obtaining the criminal histories and conducting the reviews. Some districts believed they were responsible for fingerprinting every worker who came on district property.

Concerns have been raised as to whether sports officials and judges at academic and music competitions are subject to fingerprinting. Screening of construction workers created challenges for districts and contractors working on large projects.

SB 9 does not cover all contractors. It covers only entities that contract to provide services to a district. Also, the statute does not cover all employees of covered contractors. It covers only employees who will have continuing

duties related to the contract and direct contact with students.²² SBEC is developing rules defining these terms and resolving questions about extracurricular officials and other classes of outside workers. Final rules are expected this summer.

If a contractor employee is covered, the contractor, not the district, bears the burden of obtaining a national, fingerprint-based criminal history check directly from DPS.²³ The contractor must certify to the district that it has performed the check.²⁴ The district is permitted to obtain criminal history record information regarding contractor employees from the DPS clearing-house.²⁵

Certification by Contractors

SB 9's contractor certification requirement has been another source of confusion. Contractors must certify to the district that they have obtained the criminal history information for all covered employees. Districts must

ensure that their contractors have obtained all required criminal history information on their employees.²⁶

The law does not, however, provide guidance as to the form of certification. To assist districts and contractors, TASB Legal Services has developed answers to FAQs and a form for contractor certification. The FAQs and form are available on line at tasb.org/services/legal/documents/sb9_faq_2_08.pdf.

Minimum Standards

Before SB 9, each district made a local determination as to what constituted an acceptable criminal history. SB 9, for the first time, sets minimum standards for an acceptable criminal history for a person who will work around students. A district must refuse to hire an applicant or terminate an employee if the person was convicted of one of the following offenses and, at the time of the offense, the victim was a minor or student:

Fingerprinting for Educators ... It's the Law

In 2007, the Texas Legislature passed Senate Bill 9, requiring fingerprint-based criminal background reviews for certain school employees. The legislation was enacted to ensure the safety of all children, teachers, and staff in Texas public schools.

Who is required to submit fingerprints for a criminal background check?

- All certified educators
- All substitute teachers and aides, certified or not
- Noncertified employees hired on or after January 1, 2008
- Charter school teachers and other professionals (serving in a position that would require certification if they were employed in a traditional school district)
- Contract employees hired on or after January 1, 2008, who have direct contact with students

Who is not required to submit fingerprints but must undergo a name-based background check?

- Noncertified employees hired before January 1, 2008
- Contract employees hired before January 1, 2008, who have direct contact with students
- Student teachers
- Volunteers (excluding parents and guardians, those accompanied on campus by a district employee, or individuals volunteering for a single event)

When will employees be fingerprinted?

- All new noncertified school employees must submit fingerprint information to the Department of Public Safety before starting work for a district.
- All substitute teachers must be fingerprinted by September 1, 2011.
- All active certified educators must be fingerprinted by September 1, 2011.

State law requires the dismissal of any employee convicted of certain felonies or who is a registered sex offender. For more information, visit the State Board for Educator Certification Web Site: www.sbec.state.tx.us.

Source: Texas Education Agency

- A felony under Texas Penal Code Title 5 (crimes against the person) or
- An offense requiring registration as a sex offender²⁷

The district may make an exception if the offense is more than 30 years old and the person has satisfied the terms of the conviction order.²⁸ SBEC may impose a sanction on an educator who does not discharge an employee if the educator knows or should have known, through a criminal history review, that the employee has been convicted of an offense described above.²⁹ The same standards apply to employees of contractors.³⁰

Districts can and do set higher standards, taking into account such factors:

- Number of offenses
- Degree of offense (felony or misdemeanor)
- Age at time of offense
- Date of last offense

TASB Legal Services advises districts to prepare written standards before a question arises, then to apply them consistently.

Campus Visitors

As discussed above, criminal history reviews are authorized only for contractor employees who will have continuing duties related to the contracted services and direct contact with students. Many contractor employees do not fall under this definition, including those who will visit campus only once or twice and workers whose job duties do not require student contact.

If a district does not have authority to obtain a criminal history of a worker from DPS or the FBI, it can run a background check on the worker as a campus visitor. SB 9 contains optional provisions regarding criminal history information of campus visitors. A district may:

- Require a campus visitor to show a driver's license or other photo identification
- Establish an electronic database of campus visitor information
- Verify whether a campus visitor is a sex offender, using a computerized central database maintained by DPS or another source acceptable to the district

Regardless of whether a district takes any of the above steps, the board of trustees is required to adopt a policy regarding the action to be taken by campus administration if a visitor is identified as a sex offender.³¹ In most districts, the authorization to adopt campus procedures is located at Policy GKC(LOCAL).

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Still Have Questions?

Many questions regarding SB 9 remain unanswered, and certainly more issues will arise as we work together over the next three to four years to implement the new law. Districts with questions regarding SB 9 procedures should contact SBEC or DPS.

Questions regarding interpretation of the statute and legal requirements should be directed to the district's local counsel. And, as always, districts can call the TASB Legal Line, 800.580.5345, for help getting started.★

¹Tex. Gov't Code § 411.082(2).

²Tex. Educ. Code § 22.081(2).

³Tex. Educ. Code § 22.083(a-1)(3).

⁴Tex. Gov't Code § 411.083; 42 U.S.C. § 16962.

⁵In addition, a criminal history review is required for employees of shared services arrangements (SSAs) whose duties are performed on school property or at another location where students are regularly present. Tex. Educ. Code § 22.083.

⁶19 Tex. Admin. Code § 153.1101(5).

⁷Tex. Educ. Code §§ 22.0831(a).

⁸19 Tex. Admin. Code § 153.1105.

⁹Tex. Educ. Code §§ 22.0831, .0836.

¹⁰Tex. Educ. Code §§ 22.0831(g), .0836(i).

¹¹SBEC, Frequently Asked Questions—Senate Bill 9 for Administrators, Frequently Asked Questions

– Senate Bill 9 for Administrators: www.sbec.state.tx.us/SBECOnline/fp/faq_SB9.asp.

¹²Tex. Educ. Code § 22.0835.

¹³Act of May 28, 2007, 80th Leg., R.S., S.B. 9, § 31.

¹⁴Tex. Educ. Code § 22.0835(e).

¹⁵Tex. Educ. Code § 22.0835(f).

¹⁶Tex. Educ. Code §§ 22.0833(a), 22.0834(a).

¹⁷Tex. Educ. Code §§ 22.0833(c), 22.0834(c).

¹⁸Tex. Educ. Code §§ 22.0833.

¹⁹Tex. Educ. Code § 22.0834(g).

²⁰Act of May 28, 2007, 80th Leg., R.S., S.B. 9, §§ 29, 30.

²¹Tex. Educ. Code § 22.0834(f).

²²Tex. Educ. Code § 22.0834(a).

²³Tex. Educ. Code § 22.0834(d).

²⁴Tex. Educ. Code § 22.0834(a), (d), (g).

²⁵Tex. Educ. Code § 22.0834(e).

²⁶Tex. Educ. Code § 22.085(c).

²⁷Tex. Educ. Code § 22.085(a).

²⁸Tex. Educ. Code § 22.085(b).

²⁹Tex. Educ. Code § 22.085(e).

³⁰Tex. Educ. Code § 22.085(c).

³¹Tex. Educ. Code § 38.022(d).

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