

---

WEST'S

---

# EDUCATION

---

## LAW REPORTER

---

***AN EDUCATION LAW REPORTING SERVICE WHICH FEATURES:***

- "New Case Highlights," Synopses of Cases which have been recently received by West
- "In This Issue," Synopses of Cases Appearing in this Pamphlet
- Cumulative Table of Cases Reported
- Key Topic Analysis
- Key Number Index
- COMMENTARY: "Educator Background Checks: From Law to Practice" by Joseph P. Clark and Stephen B. Thomas
- COMMENTARY: "A Step-By-Step Process § 504/ADA Eligibility Determinations: An Update" by Perry A. Zirkel
- Complete Text of Cases

---

**EDUCATION-RELATED CASES DECIDED IN:**

U.S. Supreme Court, U.S. Courts of Appeals, U.S. District Courts, and State Appellate Courts

## COMMENTARY

### EDUCATOR BACKGROUND CHECKS: FROM LAW TO PRACTICE\*

by

JOSEPH P. CLARK AND STEPHEN B. THOMAS\*\*

#### INTRODUCTION

In October 2007, the COLUMBUS DISPATCH ran a four-day series titled the "ABCs of Betrayal."<sup>1</sup> The series sounded an alarm in Ohio for stronger rules regarding background checks and licensing practices for teachers working in public and chartered nonpublic schools. Since 2000, more than 1,700 Ohio educators were disciplined for a variety of offenses ranging in severity from shoplifting to sexual battery to murder. Interestingly, of those 1,700 teachers, two-thirds somehow were able to return to the classroom.<sup>2</sup>

The *Dispatch* series identified several systemic failures that allowed teachers who committed a range of odious acts, including individuals who masturbated in public, emotionally or physically abused children, or even committed rape to remain licensed. The failures included:

- loose reporting policies, departmental confusion, and a poor national tracking system;
- local school districts handling their own problems without involving law enforcement agencies or the Ohio Department of Education; and
- the withholding of information by the Ohio Department of Education regarding disciplined employees from school district leaders, parents, and the community at large.

The "ABCs of Betrayal" newspaper articles were the impetus for speedy change in Ohio laws. Indeed, within a month of the *Dispatch* series, the governor signed into law House Bill 190, dramatically changing K-12 school employee background checks.<sup>3</sup>

The push for more deliberate job screening for teachers and other school employees is hardly unique to Ohio though, as applicants and employees throughout the country have misrepresented their criminal background histories if they would be excluded from further consideration for employment or terminated as a result. In such instances, judicial support has generally been provided. For example, the West Virginia Supreme Court of

\* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 239 Ed.Law Rep. [315] (Feb. 5, 2009).

\*\* Joseph P. Clark is Assistant Superintendent, Kent City Schools, Kent, Ohio and Stephen B. Thomas is Professor of Higher Education Administration and Student Personnel, Kent State University, Kent, Ohio.

1. Benjamin J. Marrison, Bad-teacher Series Will Anger Many, COLUMBUS DISPATCH, Oct. 14-17, 2007.

2. Jennifer Smith Richards & Jill Riepenhoff, *Rule Breakers: The ABCs of Betrayal*, COLUMBUS DISPATCH, Oct. 14, 2007.

3. Mark Niquette, Teacher Discipline Stiffened, COLUMBUS DISPATCH, Nov. 15, 2007.

Appeals upheld the state Department of Education's action when it notified a teacher that he would not be eligible for certification renewal for at least two years as a result of having lied on his renewal application.<sup>4</sup> The teacher had begun teaching in 1973. In 1977, he was convicted of two felony counts of delivery of cocaine. As a result, he lost his job and served time in prison and on probation. Later, in 1989, he wanted to resume teaching and needed to convert his provisional license to a professional license. At that time, he stated that he had never been convicted of a felony. He answered "no" again on his renewal in 1994. This misrepresentation was discovered and his license was not renewed. A similar decision was reached in Michigan in 2006 where the state appeals court approved the termination of a teacher who had failed to list a twenty-year-old conviction for aggravated robbery, which the governor had pardoned. Nonetheless, the court reasoned that the governor's pardon did not negate the fact that the teacher had been arrested and convicted of a crime, and concluded that the conviction should have been noted on his application.<sup>5</sup>

Momentum, if not legislation, calling for improvements to the way applicants and current school employees are screened for employment continues to make its way through educational and legislative circles across the country.<sup>6</sup> A 1997 murder of a high school student by a substitute custodian brought the issue to the forefront in California.<sup>7</sup> The substitute custodian had been hired despite serving eight years of an eighteen-year sentence for killing the victim of his failed robbery attempt. California state law did not require

4. *Adkins v. West Virginia Dep't of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (W. Va. 2001). See also *Grunberg v. Board of Educ. for the City Sch. Dist. of N.Y.*, No. CV-00-4124 (DGT), 2006 WL 845389, 2006 U.S. Dist. LEXIS 22424 (E.D.N.Y. Mar. 30, 2006) (granting summary judgment to the school district where a former educational evaluator failed to include on his employment record an arrest for abusive sexual contact with an underage park ranger, resulting in the payment of a fine; he claimed that he was not required to notify officials of this arrest, or of others that had been dismissed, such as masturbating in public and lewd and lascivious behavior, but the court disagreed and upheld his termination).

5. *Schied v. Lincoln Consol. Schs.*, No. 267023, 2006 WL 1789035, 2006 Mich. App. LEXIS 2099 (Mich. Ct. App. June 29, 2006). See also *Bailey v. New York City Bd. of Educ.*, 536 F.Supp.2d 259 [230 Ed.Law Rep. [200]] (E.D.N.Y. 2007) (concluding that the district had not constructively discharged the plaintiff when charges were brought against him after officials learned he had failed to include prior arrests for grand larceny, criminal bribery, and criminal solicitation, and convictions for petty larceny and possession of a weapon on his fingerprint referral form).

6. See Martha Woodall, "A Call for Tougher Checks of School Staff," THE PHILADELPHIA INQUIRER, Mar. 7, 2008, [http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21\\_T4587534146&format=GNBFI&sort=BOOLEAN&startDocNo=51&resultsUrlKey=29\\_T4587534149&cisb=22\\_T4587534148&treeMax=true&treeWidth=0&csi=247189&docNo=55](http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T4587534146&format=GNBFI&sort=BOOLEAN&startDocNo=51&resultsUrlKey=29_T4587534149&cisb=22_T4587534148&treeMax=true&treeWidth=0&csi=247189&docNo=55) (last visited on Sept. 17, 2008). But see Libby Nelson, Coaches' Criminal Past OKAY? ST. PETERSBURG TIMES (Florida), Oct. 31, 2007, [http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21\\_T4585454298&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29\\_T4585477302&cisb=22\\_T4585477301&treeMax=true&treeWidth=0&csi=11063&docNo=1](http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T4585454298&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T4585477302&cisb=22_T4585477301&treeMax=true&treeWidth=0&csi=11063&docNo=1) (last visited on Sept. 10, 2008) (supporting the continuation of employment of four coaches notwithstanding forty-five arrests between them).

7. Robert C. Johnston, *Slaying Casts Spotlight on Job Screening*, EDUCATION WEEK, May 28, 1997 at 1.

## EDUCATOR BACKGROUND CHECKS

criminal background checks for noncredentialed substitute employees at the time; moreover, state law allowed public school districts to hire convicted felons. California law has since changed in a way that would have prevented the initial hiring of the custodian.<sup>8</sup>

In Michigan, a 2006 statewide criminal background check of public school employees resulted in nearly 500 convicted felons and sex offenders being identified.<sup>9</sup> The checks were run as a result of Michigan's Student Safety Initiative, a series of laws that require Michigan school districts to obtain background checks for all employees. While most of those with felony records did not have convictions for crimes that called for automatic termination under Michigan law, eleven of the employees were fired immediately.

At the national level, a 2007 Associated Press (AP) investigation disclosed the names of 2,750 teachers whose licenses were suspended or otherwise sanctioned between 2001 and 2005 following investigations of reported sexual abuse.<sup>10</sup> The AP report noted that despite the large number of teachers who had been disciplined, a deep resistance exists towards investigating and preventing teacher abuse of students. Often teachers ignore signs that colleagues are abusing students, districts make deals with abusive teachers to allow quiet resignations to avoid bad publicity, and legislators avoid making policies with significant penalties for fear of maligning an esteemed profession.

The AP report also discussed in depth the issue of what is known in educational circles as "passing the trash." That is, some school districts have allowed teachers accused of misconduct to resign quietly and seek employment in another district. Even though several states have laws that require districts to report inappropriate, if not illegal, conduct to state departments, the enforcement of such laws is inconsistent. Thus, abusive teachers move from district to district or state to state, even if a previous district stopped the abuse in its location.

Interestingly, judicial response to trash passing has not always supported the actions of school officials, often due to the difficulty of meeting judicial standards. For example, in an Eighth Circuit case in 2001, a school district superintendent allowed Mr. Kluck, a teacher accused of molesting students, to resign quietly (rather than being fired) when he learned that the legal fees for a termination hearing would cost between \$3,000 and \$4,000.<sup>11</sup> As a result, he proposed that if the teacher were to voluntarily resign, the district would provide him with a positive letter of recommendation, remove all reprimands and investigative documents from his personnel file, and promise confidentiality. As a result, Kluck resigned at the end of the 1994 school year.

8. California Code § 45122.1(a) (2008). No person who has been convicted of a violent or serious felony may be employed by a California school district. Moreover, a California school district may not retain in employment a current classified employee who has been convicted of a violent or serious felony, and who is a temporary, substitute, or probationary employee who has not attained permanent status.

9. Lesli A. Maxwell, *Latest Michigan Background Check Seen as More Accurate*, EDUCATION WEEK, June 7, 2006, at 24.

10. Martha Irvine & Robert Tanner, *AP: Sexual Misconduct Plagues U.S. Schools*, Oct. 21, 2007, available at <http://www.msnbc.msn.com/id/21392345/> (last visited on Sept. 10, 2008).

11. *Shrum v. Kluck*, 249 F.3d 773 [153 Ed. Law Rep. [600]] (8th Cir. 2001).

when it notified  
equal for at least  
on.<sup>4</sup> The teacher  
no felony counts  
d time in prison  
ing and needed  
At that time, he  
ered "no" again  
d and his license  
n in 2006 where  
r who had failed  
which the gover-  
the governor's  
en arrested and  
ould have been  
nts to the way  
employment con-  
ircles across the  
stitute custodian  
te custodian had  
itence for killing  
did not require

"A Call for Tougher  
," THE PHILADELPHIA  
2008, <http://www.academic/results/doc/docLinkInd=true & format=GNBFI& startDocNo=51 & T4587534149 & treeMax=true & docNo=5517, 2008>). But see  
es' Criminal Past  
RG TIMES (Florida),  
<http://www.lexisnexis.sults/docview/doc/docNo=true & format=GNBFI & startDocNo=1T4585477302 & treeMax=true & docNo=1063 & docNo=10, 2008>) (supporting  
employment of four  
ig forty-five arrests

laying Casts Spotlight  
ATION WEEK, May 28,

After only a few months at his next school district, Kluck molested yet another student. The receiving school district made it clear that it would not have hired the defendant had it known of his previous conduct. For his new offense, the teacher pled guilty to Indecency with a Child. The mother of the most recent child victim filed suit claiming a violation of the student's Fourteenth Amendment liberty interests pursuant to 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972,<sup>12</sup> alleging sex discrimination by a recipient of federal financial assistance. The district court ruled, and the Eighth Circuit affirmed, that neither the superintendent of the original school district nor the district was liable for damages as the plaintiff failed to show that the administration's actions "shocked the conscience" for Section 1983 purposes, or constituted deliberate indifference for purposes of supporting a violation of Title IX.

To address related legal issues, school officials have turned to both federal and state laws for guidance. These laws are reviewed in the section below.

### FEDERAL AND STATE LAW

Two types of laws apply in related cases: those on which the victim of an offense committed by an educator, school employee, or volunteer might rely; and those enabling school officials to conduct background searches and share information. Victims often rely on Title IX, prohibiting sex discrimination, including sexual harassment; 42 U.S.C. Section 1983 based on alleged violations of liberty rights or bodily integrity premised on either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment; and/or state tort law. Schools districts and state licensing agencies are supported when conducting background checks by the No Child Left Behind Act, the Schools Safely Acquiring Faculty Excellence Act, and related state statutes.

#### Title IX

Title IX is part of the Education Amendments of 1972. It is designed to protect persons from sex discrimination. The law applies to educational institutions that receive federal financial assistance from the Department of Education. Of relevance to this discussion is its application to cases dealing with the sexual harassment of a student by a school employee.

In 1992, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that Title IX prohibited the sexual harassment of students and that damages could be awarded if determined to be appropriate.<sup>13</sup> Additionally, related standards were created in 1998 when, in *Gebser v. Lago Vista Independent School District*,<sup>14</sup> the Court concluded that to be liable the district had to have *actual notice* of the harassment and then demonstrate *deliberate indifference to ameliorating the problem*. The Court reasoned that allowing recovery of damages based on either *respondeat superior* (where the employer or master is responsible for the acts of the employee or servant) or

12. 20 U.S.C. § 1681 *et. seq.* (2008).

13. 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 [72 Ed.Law Rep. [32]] (1992).

14. 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 [125 Ed.Law Rep. [1055]] (1998).

## EDUCATOR BACKGROUND CHECKS

*constructive notice* (i.e., notice that is inferred or implied) would be inconsistent with the objective of the Act. To allow either would result in the attachment of liability even though the district had no actual knowledge of the conduct and therefore no real opportunity to take action to end the harassment. Also of relevance in hostile environment cases where school personnel are allegedly involved is the fact that, at least for younger children, the behavior does not have to be unwelcome.<sup>15</sup>

### 42 U.S.C. Section 1983

Section 1983 originally was § 1 of the Ku Klux Klan Act of 1871. That section stipulates that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate or [t]erritory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”<sup>16</sup> The term “person” is not defined in the Act. The Supreme Court has concluded, however, that local governments (e.g., boards, cities, and counties) are “persons” and therefore can be sued under Section 1983.<sup>17</sup> Private entities are not subject to liability under Section 1983 unless they are shown to have acted under *color of state law*. The only private entities related to education to qualify as state actors are state athletic associations.<sup>18</sup>

### State Tort Law

Victims at times file suit under state tort law claiming a range of intentional torts (e.g., battery, assault, intentional infliction of emotional distress, false imprisonment) or negligence. Negligence claims might include negligent hiring, where background checks are not provided, or negligent supervision of employees. Generally, to be actionable, behaviors of school employees need to occur either at school or during a school function.<sup>19</sup>

### No Child Left Behind Act

As much of an impact as No Child Left Behind (“NCLB”)<sup>20</sup> makes on the daily operations of schools across the country, it makes surprisingly limited reference to employee background checks. The NCLB Act, however, does provide liability protection for teachers, assuming good faith perform-

15. For a related discussion, see STEPHEN B. THOMAS, NELDA H. CAMBRON-McCABE, & MARTHA M. MCCARTHY, *PUBLIC SCHOOL LAW* (6th ed. 2009), at 179–182.

16. 42 U.S.C. § 1983 (2008).

17. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

18. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 [151 Ed.Law Rep. [18]] (2001) (determining that the state athletic association was entwined with state

government and therefore involved in state action).

19. See e.g., *Doe v. Massillon City Sch. Dist.*, No. 2006CA00227, 2007 WL 1651438, 2007 Ohio App. LEXIS 2610 (Ohio Ct. App. June 4, 2007) (granting immunity to school officials where two children were sexually abused by a convicted sex offender who had been hired by the district to supervise chess after school for elementary school students, as the abuse occurred off school grounds).

20. 20 U.S.C. § 6301 *et seq.* (2008).

ance<sup>21</sup> and requires that teachers be properly licensed, follow all laws and regulations pertaining to work, and not act recklessly or negligently.<sup>22</sup> Moreover, the NCLB Act also allocates money for various school grants and authorizes schools that receive grants for mentoring programs for "children with great need" to conduct background checks on the mentors.<sup>23</sup>

#### Schools Safely Acquiring Faculty Excellence Act

The Schools Safely Acquiring Faculty Excellence Act<sup>24</sup> of 2006 has had a profound impact on school safety, at least in terms of checking the background of employees. It requires the U.S. Justice Department to perform national fingerprint checks for people who will work around children upon the request of any private or public elementary or secondary school.<sup>25</sup> The Act also authorizes the charging of applicable fees for the checks.<sup>26</sup> Moreover, federal law empowers the Federal Bureau of Investigation (FBI) to exchange criminal record information with officials of state and local governments for both employees and volunteers.<sup>27</sup>

#### Applicable State Law Requiring Background Checks/Fingerprinting

Although the aforementioned federal directives require the administration of background checks on some educators, the most relevant laws regarding background checks are those emanating from state legislatures. Unfortunately, not all states have made the identification and removal of adults who pose a risk to children as high a priority as one might imagine and have promulgated policies that range markedly. As each state creates its own rules for school employee background checks, officials must identify the groups of employees that will be required to submit to background checks; determine if checks will be for pre-employment only or throughout the employee's tenure; decide whether to require state background checks, FBI checks, or both; and determine what to look for within the background check.

The National Association of State Directors of Teacher Education and Certification (NASDTEC) collects data from each state in regard to requirements for teacher licensure. As of December 2007, NASDTEC reported that twenty-three states require background checks for teacher certification; eleven require background checks for employment but not certification; three have no policy for background checks; and thirteen did not submit data.<sup>28</sup> (See Table 1.)

21. 20 U.S.C. § 6736(a)(1) (2008).

22. 20 U.S.C. § 6736(a)(4) (2008).

23. 20 U.S.C. § 7140(b)(1)(A)(ii) (2008).

24. 42 U.S.C. § 16962 *et seq.* (2008).

25. 42 U.S.C. § 16962(b) (2008).

26. 42 U.S.C. § 16962(d) (2008).

27. 42 U.S.C. § 5119(a) (2008); 28 U.S.C. § 534(a)(4) (2008).

28. National Association of State Directors of Teacher Education and Certification, <http://www.nasdtec.info/View/TopicalTables.aspx> (last visited on Sept. 10, 2008) (one needs to purchase a subscription for the NASDTEC Knowledgebase Portal at <http://www.nasdtec.info> to gain access to the topical tables).

## EDUCATOR BACKGROUND CHECKS

Table 1  
Requirements for Initial Teacher Certification and Employment

State	Disclosure of Prior Invalidation	Disclosure of Prior Dismissal	Disclosure of Prior Arrest Regarding Moral Turpitude	Disclosure of Prior Conviction	Agency Conducting Background Check	State Requirements for Fingerprinting
Alabama	SR	No	No	SR	FBI and State	Certification
Alaska	Yes	Yes	Yes	Yes	FBI and State	Certification
Arizona	Yes	No	Yes	Yes	FBI and State	Certification
Arkansas	Yes	Yes	Yes	Yes	FBI and State	Certification
California	Yes	Yes	Yes	Yes	FBI and State	Certification
Colorado	Yes	Yes	Yes	Yes	FBI and State	Certification
Connecticut	Yes	Yes	Yes	Yes	FBI and State	Employment
Delaware	Yes	Yes	Yes	Yes	State Agency	Employment
District of Columbia	DNR	DNR	DNR	DNR	DNR	DNR
Florida	Yes	No	Yes	Yes	FBI and State	Certification
Georgia	Yes	Yes	Yes	Yes	FBI or State	Employment
Hawaii	DNR	DNR	DNR	DNR	DNR	DNR
Idaho	Yes	Yes	Yes	Yes	FBI and State	Certification
Illinois	Yes	No	No	Yes	FBI and State	Employment
Indiana	Yes	Yes	No	Yes	State Agency	No State Policy
Iowa	DNR	DNR	DNR	DNR	DNR	DNR
Kansas	Yes	Yes	No	Yes	FBI and State	Certification
Kentucky	DNR	DNR	DNR	DNR	DNR	DNR
Louisiana	Yes	No	No	Yes	FBI and State	Employment
Maine	DNR	DNR	DNR	DNR	DNR	DNR
Maryland	Yes	Yes	Yes	Yes	FBI and State	Employment
Massachusetts	Yes	Yes	No	Yes	DNR	No State Policy
Michigan	No	No	Yes	Yes	State Agency	Employment
Minnesota	Yes	Yes	Yes	Yes	FBI and State	Certification
Mississippi	DNR	DNR	DNR	DNR	DNR	DNR
Missouri	SR	Yes	Yes	Yes	FBI and State	Certification
Montana	DNR	DNR	DNR	DNR	DNR	DNR
Nebraska	Yes	No	Yes	Yes	FBI and State	Certification
Nevada	Yes	Yes	Yes	Yes	FBI and State	Certification
New Hampshire	Yes	No	No	Yes	FBI and State	Employment
New Jersey	DNR	DNR	DNR	DNR	DNR	DNR
New Mexico	Yes	Yes	Yes	Yes	FBI and State	Certification
New York	Yes	Yes	Yes	Yes	FBI and State	Certification

North Carolina	DNR	DNR	DNR	DNR	DNR	DNR
North Dakota	DNR	DNR	DNR	DNR	DNR	DNR
Ohio	Yes	No	No	Yes	FBI and State	Certification
Oklahoma	Yes	No	Yes	Yes	FBI or State	DNR
Oregon	Yes	Yes	Yes	Yes	FBI and State	Certification
Pennsylvania	Yes	Yes	Yes	Yes	DNR	DNR
Rhode Island	Yes	Yes	No	Yes	State Agency	Employment
South Carolina	Yes	Yes	Yes	Yes	FBI	Certification
South Dakota	Yes	Yes	Yes	Yes	FBI and State	Employment
Tennessee	Yes	No	Yes	Yes	None	No State Policy
Texas	DNR	DNR	DNR	DNR	DNR	DNR
Utah	Yes	SR	Yes	Yes	DNR	DNR
Vermont	Yes	Yes	No	Yes	FBI and State	Certification
Virginia	Yes	No	Yes	Yes	FBI and State	Employment
Washington	Yes	Yes	Yes	Yes	FBI and State	Certification
West Virginia	Yes	Yes	Yes	Yes	FBI and State	Certification
Wisconsin	Yes	Yes	Yes	Yes	FBI and State	Certification
Wyoming	Yes	Yes	Yes	Yes	FBI and State	Certification

DNR: Did not report

SR: Similar Variation

Source: <http://www.nasdtec.info/View/TopicTables.aspx>

NASDTEC also stores the national database of information submitted by states regarding specific investigations into teacher conduct.<sup>29</sup> The NASDTEC database is searchable by state teacher licensing agencies for use when teachers licensed in one state seek licensure in another state. The fact that NASDTEC reports that thirteen states did not submit data is demonstrative of the problems written about in both the *Columbus Dispatch* and Associated Press reports. Not only are some states not reporting their requirements for licensure, but there also is a failure by some states to submit reports of teacher misconduct. Furthermore, each state that does report chooses which information it shares, resulting in a database that is incomplete and inconsistent.

Kentucky is one of the states identified on NASDTEC as not having submitted data. Kentucky statute, however, requires both state and national criminal background checks on all new certified hires and student teachers.<sup>30</sup> Certified new hires who had worked in another Kentucky district within six months of the new date of hire and had previously submitted to a state and national background check are excluded from the requirement. Classified initial hires in Kentucky are required to submit only to a state background check.<sup>31</sup> A superintendent may require an FBI check of a new classified employee, though, if he or she has been a Kentucky resident for fewer than twelve months. Certified and classified employees in Kentucky whose background checks show a record of a sex crime that qualifies as a felony or other

29. National Association of State Directors of Teacher Education and Certification, <http://www.nasdtec.org/clearinghouse/index.tpl> (last visited on Sept. 10, 2008) (this portion of the database is available only to state teacher licensing agencies—individual

school districts cannot gain access to this database).

30. Kentucky Rev. Statutes § 160.380(4)(b) (2008).

31. Kentucky Rev. Statutes § 160.380(5) (2008).

## EDUCATOR BACKGROUND CHECKS

violent physical offense are to be terminated. Interestingly, the same statutory provision permits the superintendent to employ persons convicted of sex crimes that classify as misdemeanors.<sup>32</sup>

Pennsylvania also is listed on NASDTEC as not having submitted data. Its laws stipulate that all applicants for employment, including student teachers and independent contractors, for both public and private schools, must submit to a state background check that is not more than one year old at the time of employment.<sup>33</sup> Applicants who have not lived in Pennsylvania for the preceding two years must submit to a federal background check. However, employees who do not have direct contact with students are excluded from each requirement. Applicants who have been convicted of any of several sexual, violent, or drug-related offenses in the preceding five years are prohibited from being hired.

In Michigan, all new employees of a school district who are required to hold a state certificate or permit are required to submit to a state criminal records check.<sup>34</sup> Newly hired substitute teachers also must submit to a background check, but they are not mandated to participate in additional background checks if they substitute in another Michigan district. Michigan law does not prohibit a district from hiring a convicted teacher;<sup>35</sup> however, the law allows for revocation of the teaching license if a certified employee has been convicted of any felony, including those involving moral turpitude (i.e., conduct that does not meet community standards of behavior or morality).<sup>36</sup> The educator has fifteen days from the date of receipt of notice to terminate licensure to request a hearing. If a hearing takes place, the state superintendent of public instruction must provide a written opinion within 120 days.<sup>37</sup>

Similar changes were made in Ohio. State statute now requires Bureau of Criminal Identification and Investigation (BCII) and FBI checks for all hires, including employees who do not have routine interaction with children.<sup>38</sup> School volunteers may be required to submit to the same checks at the local superintendent's discretion.<sup>39</sup> The checks must be completed on all current employees who hold permanent or eight-year certificates by September 5, 2008 and every five years thereafter. Also, classified staff, including secretaries, custodians, food service workers, and the like must obtain initial background checks. Holders of two- and five-year licenses must have their FBI and BCII checks done every time they renew their license, starting with

32. Kentucky Rev. Statutes § 160.380(3) (2008).

33. Pennsylvania Department of Education, FBI Federal Criminal History Records for Prospective Employees, <http://www.teaching.state.pa.us/teaching/cwp/view.asp?a=13 & q=123693> (last visited on Sept. 10, 2008).

34. Michigan Compiled Law § 380.1230(1) (2008). See also Information About Background Checks, [http://www.michigan.gov/mde/0,1607,7-140-5235\\_6947-16742-.00.html](http://www.michigan.gov/mde/0,1607,7-140-5235_6947-16742-.00.html) (last visited on Sept. 10, 2008).

35. Michigan Compiled Law § 380.1230(9) (2008).

36. Michigan Compiled Law § 380.1535(a) (2008).

37. Michigan Compiled Law § 380.1535(a)(1) (2008).

38. Ohio Rev. Code § 3319.39 (A)(1) (2008).

39. Ohio Department of Education, Background Check FAQ, <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODE-Detail.aspx?page=3 & TopicRelationID=1283 & ContentID=42921 & Content=53869> (last visited on Sept. 10, 2008).

their next renewal. Bus drivers are an exception and must submit to their background checks every six years, as that is the length of a bus driver's state issued license.<sup>40</sup>

Ohio statute authorizes the Ohio Board of Education to automatically revoke the license of any teacher who commits one of more than eighty listed felonies.<sup>41</sup> The crimes include the same ones that currently prevent a person from getting a teaching license in the first place.<sup>42</sup> Local administrators also are required to remove a teacher from the classroom immediately if he or she is charged with any of the disqualifying offenses.

Furthermore, Ohio law helps school districts monitor qualifications of employees by requiring the creation of a fingerprint database of all persons whom the Bureau has conducted criminal records checks for purposes of determining eligibility for employment.<sup>43</sup> This law requires that when the BCII superintendent receives information that an individual whose name is in the retained applicant fingerprint database has been arrested for, or convicted of, any offense, the superintendent must notify any participating public office that employed or licensed the individual.<sup>44</sup> Interestingly, the only population "working" for Ohio school districts that is not subject to background checks are members of local boards of education, although they may as individuals voluntarily submit if they so choose.<sup>45</sup>

#### PRACTICE

Each state adopts its own list of crimes that make a person ineligible to receive a teaching license or to be employed by a school. The lists can be exhaustive, but generally crimes dealing with violence, sexual offenses, or drug offenses will prevent a person from being licensed as a teacher or hired by a school district. Some states have tiered systems that include crimes that prevent licensure or employment permanently, and crimes that are seen as rehabilitative, allowing an individual to be licensed or hired if certain conditions are met.<sup>46</sup> Ohio's school employee screening process is among the more comprehensive and detailed nationally and is reviewed briefly below to provide an example of how state legislation can be used to address this

40. *Id.*

41. Ohio Rev. Code § 3319.31(B) (2008) and § 3319.39(B)(1) (2008).

42. Ohio Admin. Code § 3301-20-01(A)(9)-(12) (2008).

43. Ohio Rev. § 109.5721(B) (2008).

44. Ohio Rev. Code § 109.5721(C) (2008).

45. Ohio Department of Education, Background Check FAQ, <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODE-Detail.aspx?page=3> & TopicRelationID=1283 & ContentID=42921 & Content=53869 (last visited on Sept. 10, 2008).

46. For related case law, see *Black v. New York State Office of Mental Retardation and Developmental Disabilities*, 20 Misc.3d 581, 858 N.Y.S.2d 859 (Sup. Ct. N.Y. 2008) (annulling the Office's determination that the

commission of twenty misdemeanors and six felonies was an insufficient basis to deny employment; finding that the Office must consider plaintiff's efforts to rehabilitate and must show that there is a direct relationship between petitioner's convictions and the employment she was seeking; failing to provide such support would render a decision to deny employment as arbitrary and capricious); *Boatwright v. New York State Office of Mental Retardation and Developmental Disabilities*, No. 100330/07, 2007 WL 2176241, 2007 N.Y. Misc. LEXIS 3399 (Sup. Ct. N.Y. April 18, 2007) (concluding that the Office failed to consider plaintiff's "clear" rehabilitation since his commission of a Class E felony twenty-one years earlier).

## EDUCATOR BACKGROUND CHECKS

problem (i.e., the unwittingly employment of felons and sex offenders to teach, supervise, or otherwise work with or around children).

### Ohio's Three-Tier System

Ohio Administrative Code outlines a three-screen process for determining the eligibility of teachers for licensure and identifies factors to be considered by school districts prior to hiring.<sup>47</sup>

**First Tier.** The first screen for initial licensure and employment is to ascertain whether a person has committed an offense that is an absolute bar (offenses not eligible for rehabilitation) to employment. A district cannot employ, and the Ohio Department of Education cannot issue an initial teaching license to, any person who has been convicted of any of a range of serious offenses such as murder, attempted murder, burglary, arson, trafficking, and the like.<sup>48</sup>

47. Ohio Admin. Code § 3301-20-01 (2008).

See also Ohio Department of Education, How Convictions Affect Licensure, <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3> & TopicRelationID=520 & ContentID=13542 & Content=54107 (last visited on Sept. 10, 2008).

48. Offenses include the following: abduction; abortion manslaughter (taking the life of a child born by attempted abortion who is alive when removed from the uterus); aggravated arson (different than arson due to creating a risk of harm to a person or occupied structure); aggravated assault; aggravated burglary; aggravated murder; aggravated riot (disorderly conduct with four or more others with the purpose of committing a felony or crime of violence); aggravated robbery; bribery (of public officials or witnesses); burglary; compelling acceptance of objectionable materials; compelling prostitution; contaminating substance for human consumption or use or contamination with hazardous chemical, biological, or radioactive substance; spreading false report of contamination; corrupting another with drugs (forcing or deceiving another to use drugs); criminal child enticement (coaxing children under fourteen to accompany a person without parental permission); deception to obtain a dangerous drug (includes possession of blank prescriptions); deception to obtain matter harmful to juveniles (pretending to be a child's parent, furnishing fake IDs, pretending to be eighteen); displaying matter harmful to juveniles (pornographic magazines displayed openly at a convenience store, for example); disseminating matter harmful to juveniles; endangering children (only the sections dealing with

abuse, torture, excessive corporal punishment); escape (breaking out of detention, or purposely not returning to detention); extortion; felonious assault (causing harm to another's unborn, engaging in sexual conduct without disclosing one has AIDS); funding of drug or marihuana trafficking; gross sexual imposition; illegal administration or distribution of anabolic steroids; illegal assembly or possession of chemicals for the manufacture of drugs; illegal conveyance of deadly weapon or dangerous ordinance into courthouse; illegal possession or control in courthouse; illegal conveyance or possession of deadly weapon or dangerous ordinance or illegal possession of object indistinguishable from firearm in school safety zone; illegal dispensing of drug samples; illegal manufacturing of drugs or cultivation of marihuana; methamphetamine offenses; illegal possession of drug documents (blank prescription forms, forged prescriptions); illegal use of minor in nudity-oriented material or performance; illegally manufacturing or processing explosives; importuning (sexual activity with somebody under thirteen, or sex with somebody between thirteen and sixteen when the offender is eighteen or older and four or more years older than the victim); improper discharging firearm at or into habitation in a school safety zone or with intent to cause harm or panic to persons in a school building or at a school function; improperly furnishing weapons to a minor; inciting to violence; inducing panic; interference of custody; intimidation (using force or threat to disrupt duties of a public official); intimidation of attorney, victim, or witness in criminal case; involuntary manslaughter; kidnapping (holding a child under thirteen for ransom, hostage, or to

*Second Tier.* Ohio's second screen for initial licensure and employment involves checking to see if an applicant has been convicted of any of the offenses eligible for rehabilitation.<sup>49</sup> If so, the Ohio Department of Education

facilitate a crime); loitering to engage in solicitation; solicitation after a positive HIV test; making terroristic threat; murder; pandering obscenity; pandering obscenity involving a minor; pandering sexually oriented matter involving a minor (create or publish material that shows "sexual activity, masturbation, or bestiality"); perjury; permitting child abuse (allowing another to cause harm to a child in one's custody); permitting drug abuse; personating an officer; placing harmful objects in food or confection; procuring (getting a prostitute for another); promoting prostitution; prostitution, after positive HIV test; rape; reckless homicide; retaliation (against public servants or witnesses); riot; robbery; sexual battery; sexual imposition; soliciting, after positive HIV test; soliciting or providing support for acts of terrorism; tampering with drugs; terrorism; theft in office; trafficking, aggravated trafficking in drugs; trafficking in harmful intoxicants; improperly dispensing or distributing nitrous oxide; unlawful abortion; illegally manufacturing or processing explosives; unlawful possession or use of hoax weapon of mass destruction; unlawful sexual conduct with a minor (restates the importuning law regarding sex between a person over eighteen and a person between thirteen and sixteen, but adds language for various age differences between offender and victim); and voluntary manslaughter. Also included are any attempt, complicity, or conspiracy convictions or guilty pleas to any of the offenses listed above. See Ohio Admin. Code § 3301-20-01(A)(9)-(12) (2008).

49. The list of identified rehabilitative violations includes the following: abusing harmful intoxicants; aggravated menacing (causing another to believe one will cause harm to another or another's property); aggravated vehicular assault; vehicular assault; aiding escape or resistance to lawful authority; arson (note that arson does not threaten a person's safety, whereas aggravated arson does); assault; breaking and entering; carrying concealed weapons; cheating; corrupting sports (bingo is the only game mentioned specifically); conducting illegal bingo; contributing to unruliness or delinquency of a child; criminal simulation (altering objects so they appear to have greater value, retouching photographs, pirating films, and so forth); de-

frauding creditors; disrupting public services (including television, radio, public transportation, safety forces, and so forth); domestic violence; endangering children; engaging in a pattern of corrupt activity (specifies collection of an unlawful debt); failing to provide for a functionally impaired person; forging identification cards or selling or distributing forged identification cards; harassment by inmate (no prisoner shall cause another to come into contact with blood, semen, urine, feces, or another bodily substance); having weapons while under disability; illegal use of food stamps or WIC program benefits; improperly handling infectious agents (microorganisms that cause disease or death in human beings); insurance fraud; making or using slugs; medicaid fraud; menacing by stalking (includes stalking through technological means); misuse of credit cards; participating in criminal gang; partial birth feticide; passing bad checks; possession of controlled substances; possessing drug abuse instruments; possession of firearm in liquor permit premises; possession or sale of unauthorized cable television device; public indecency (exposing oneself, sexual conduct or masturbation in public); receiving stolen property; safecracking; securing writings by deception (causing another, by deception, to dispose of or encumber property); selling or donating contaminated blood; tampering with coin machines; tampering with evidence; tampering with records; telecommunications fraud; terminating or attempting to terminate human pregnancy after viability; theft; trademark counterfeiting; unauthorized use of property; computer, cable or telecommunication property (computer hacking, cable splicing, and so on); unauthorized use of a vehicle; use of unapproved drugs; dangerous drug offenses involving livestock (using unapproved drugs for livestock being raised for food); unlawful use of telecommunications device; vandalism (causing harm to an occupied structure); voyeurism; workers' compensation fraud; and any felony offense not listed previously. Moreover any attempt, complicity, or conspiracy conviction or guilty plea to any of the offenses listed above will qualify as a violation. See Ohio Admin. Code § 3301-20-01(C) (2008).

## EDUCATOR BACKGROUND CHECKS

can issue an initial license and a district can employ a person who has met the rehabilitation criteria outlined in the state's third screen. An applicant is eligible to meet the rehabilitation criteria if he was convicted of, or pled guilty to, violations such as abusing harmful intoxicants, carrying a concealed weapon, assault, domestic violence, and other behaviors considered capable of being corrected.<sup>50</sup>

**Third Tier.** Ohio's third screen involves checking to see that any applicant who was convicted of, or pled guilty to, a crime in the second screen successfully completed rehabilitation. The applicant must meet all rehabilitation criteria for each separate conviction. Furthermore, it is the applicant's duty to provide written evidence that the rehabilitation criteria are met.<sup>51</sup> However, both the Ohio Department of Education for licensure purposes, and the local school district for employment purposes, have the authority to determine whether the applicant's evidence is sufficient. *All* of the following criteria must be met for an applicant to be eligible for initial licensure and employment:

- The victim was eighteen years of age or older.
- The victim was not a student.
- If the offense was a felony, at least five years elapsed since the applicant was fully discharged from imprisonment, probation, or parole or the applicant had his criminal conviction sealed or expunged.
- If the offense was a misdemeanor, at least five years elapsed since the date of conviction, or the applicant had his criminal conviction sealed or expunged.
- The applicant has not been convicted of or pled guilty to the commission of any of the offenses listed in second screen two or more times in separate criminal convictions.
- The applicant provided written confirmation of his efforts at rehabilitation and the results of those efforts (e.g., a statement by a court, parole officer, or probation officer).
- A reasonable person would conclude that the applicant's hiring or licensure will not jeopardize the health, safety, or welfare of students. Evidence that the applicant's hiring or licensure will not pose a risk include, but are not limited to:
  - The nature and seriousness of the crime;
  - The extent of the applicant's past criminal activity;
  - The age of the applicant when the crime was committed;

50. States in addition to Ohio have more than one screening level, which at times have resulted in litigation. For example, in *St. Johns County Sch. Dist. v. O'Brien*, 973 So. 2d 535 [229 Ed.Law Rep. [996]] (Fla. Ct. App. 2007), *rehearing denied*, No. 5D06-1172, 2008 Fla. App. LEXIS 3629 (Fla. App. Feb. 5, 2008), the state appeals court was asked to decide if being screened out at the second level, without the opportunity to rehabilitate, violated Title I of the Americans with Disabilities Act (see 42 U.S.C. § 12101-12213) (2008). The individ-

uals responsible for hiring selected a person other than the plaintiff for a teaching position once they were notified that the plaintiff's criminal background check and his application did not agree (due to misrepresenting prior DUIs on his record). In rejecting plaintiff's disability claim, the court noted that he failed to meet the prima facie case in showing that the employer treated him as though disabled or that he actually qualified as disabled.

51. Ohio Admin. Code § 3301-20-01(F) (2008).

- The amount of time that has elapsed since the applicant's last criminal activity;
- The conduct and work activity of the applicant before and after the criminal activity;
- Whether the applicant has completed the terms of his probation or deferred adjudication;
- Evidence of rehabilitation;
- Whether the applicant fully disclosed the crime to the state board, the Ohio Department of Education, and the district;
- Whether employment or licensure will have a negative impact on the local education community;
- Whether employment or licensure will have a negative impact on the state-wide education community; and
- Any other factors the Ohio Board of Education, district, or superintendent considers relevant.<sup>52</sup>

In addition to the above for new hires, the district can pursue discipline and termination if a current employee is convicted of, or pleads guilty to, any of the offenses referred to in state code.

**Screenings Procedures.** The BCII background check will display only Ohio violations. BCII receives and files fingerprints, photographs, and other information pertaining to arrested felons and is the authorized central repository for all felony records for the state.<sup>53</sup> Since 1999, background check requests sent to BCII are done via the Internet using a system called WebCheck, which electronically transfers fingerprints and other data from the inquiring agency to BCII. WebCheck is a Web-enabled system and is the only system used in Ohio.<sup>54</sup>

A school employee needing a BCII check must locate an agency that has the WebCheck system. Many Ohio school districts, universities, police departments, and educational service centers maintain the system, which is purchased from Cogent. As of January 2008, a WebCheck system costs \$2,800. This initial one-time fee includes an application kit, software, finger scanner, and magnetic stripe reader, which reads information from the magnetic strip on an Ohio driver's license or ID card. The scanner and stripe reader connect via USB ports to a computer, which must be provided by the agency purchasing the service.

**Fees.** In Ohio, the cost of a state background check for each applicant or employee is \$22. The agency conducting the check with the WebCheck system will be charged \$22 and typically collects the fee from the person being screened.<sup>55</sup> Districts also have the option of continuous record monitor-

52. Ohio Admin. Code § 3301-20-01(E)-(H) (2008).

53. Ohio Rev. Code § 109.5721(B) (2008).

54. Ohio Attorney General, Civilian Background Check Information, <http://www.ag.state.oh.us/business/fingerprint> (last visited on Sept. 10, 2008).

55. Ohio Rev. Code § 109.572(A)(1) (2008) (directing the superintendent of the BCII to conduct background checks); Ohio Admin. Code § 109:5-1-01(A)(4) (2008) (setting the fee).

## EDUCATOR BACKGROUND CHECKS

ing for a \$5 per person initial charge plus a \$5 per person annual monitoring fee.<sup>56</sup>

**Scan Procedure.** Once the WebCheck system is installed on a PC, the agency or school district assigns a WebCheck administrator. The WebCheck administrator completes an online training course, which teaches the administrator how to use the hardware and software. When the administrator completes the certification course, he or she is eligible to generate background checks.<sup>57</sup>

An employee who needs a BCII check goes to the administrator's work station and submits a driver's license or ID card. The administrator logs onto the system and scans the item. Next, the administrator uses the finger scanner to capture the fingerprints of both index fingers and thumbs of the employee. The employee places each finger, one at a time, on the finger scanner. The administrator can view the image on the computer and direct the employee to move his or her finger until it is centered or to apply more or less pressure to insure a clear image. When the image is clear, the administrator presses the enter key. Employees who are missing digits or have no clear prints must submit to an FBI paper and ink background check. Nonetheless, the use of computerized digitization has expedited the process in Ohio and elsewhere.<sup>58</sup>

**Ohio State Background Check.** When the prints have been entered, they are encrypted and sent via the Internet to a server at BCII. They are then forwarded to the automated fingerprint identification system where a search is initiated. If there is no match, the system automatically returns a message to the administrator via the Internet stating that the submitted prints do not match those of any known criminal. The response time can be between two hours and two days. In the event of a match, the system sends a message stating that results will be forwarded by mail. The administrator then waits for the written report and checks to see if the crime the employee was convicted is on the list of absolute bars (resulting in the loss of licensure) or qualifies as a rehabilitative crime. Typically, the employee is removed at least temporarily, as the violation will at a minimum require proof of rehabilitation.

### FBI Background Check

An FBI identification record is a listing of certain information taken from fingerprint submissions housed by the FBI. The FBI retains these submissions in connection with arrests, federal employment, naturalization, and military service. An FBI check costs \$24 and also is paid by the employee.

56. Ohio Admin. Code § 109:5-1-03(D) (2008).

57. Ohio Attorney General, Civilian Background Check Information, <http://www.ag.state.oh.us/business/fingerprint> (last visited on Sept. 10, 2008).

58. See, e.g., Katherine Shaver, Computers Expedite Employee Screenings: Digitization by State Helps in Hiring, THE WASHINGTON POST, March 29, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032801250.html> (last visited on Sept. 17, 2008).

Until recently, FBI background checks were more time consuming and less convenient than BCII checks. They also were required of very few school employees in Ohio; thus, fewer school districts procured the technology to conduct the checks in house for their employees as they did BCII checks. Nonetheless, with the increased demand for FBI background checks in Ohio due to changes in state law, more school districts are purchasing National WebCheck, the equipment used to conduct FBI fingerprinting.<sup>59</sup>

National WebCheck includes a plain impression capture device that takes three fingerprint images: one from the four fingers of the left hand, one from the four fingers of the right hand, and one of the two thumbs. The system then segments the fingers to produce fourteen separate images, as required by the FBI. National WebCheck allows school districts across the United States to conduct fingerprint background checks from both their state systems and the FBI via the Internet. The time to conduct the checks is similar to the current state WebCheck system. However, persons whose fingerprints are unable to be read by the National WebCheck machine (generally the elderly) must submit to traditional rolled ink and paper fingerprints. Ink prints are taken of fourteen separate images: each of ten fingers individually, each thumb again, and the four nonthumbs of each hand taken together. The fingerprints are then submitted to the FBI manually. Results are returned via mail in days or weeks.

### CONCLUSION

For school employees, state and federal background checks are becoming more prevalent. Advances in technology continue to make checks easier and cheaper for school districts. While the focus in some states primarily has been on background checks for teachers (including substitutes<sup>60</sup>), other states have increased background checks for all school employees and volunteers.<sup>61</sup>

59. Complete Professional Services, LLC, <http://www.cps-corp.com/biometrics/co-gent-products/webcheck.aspx> (last visited on Sept. 10, 2008).

60. See, e.g., *A.G. v. Autauga County Bd. of Educ.*, 506 F.Supp.2d 927 [225 Ed.Law Rep. [316]] (M.D. Ala. 2007). An Alabama school district had hired a former military officer as a substitute teacher. As mandated under Alabama law, the substitute was required to submit to a criminal background check, which he passed. Nonetheless, the trial court noted that previous parental and student reports of inappropriate touching should have alerted school officials to a potential problem, but the offending teacher remained on the list of approved substitutes. Multiple new claims of molestation were filed following his subsequent employment. In denying summary judgment to the district, the court noted that a reasonable jury could find that officials received actual notice of a Title IX violation and acted with deliberate indifference to the claim.

61. See, e.g., *C.L.C. v. Minneapolis Pub. Schs.*, No. 06-CV-1161 (PJS/RLE), 2007 WL 1812899, 2007 U.S. Dist. LEXIS 44869 (D. Minn. June 21, 2007) (concluding that the failure to conduct a background check was not the cause of plaintiff's constitutional rights violation while related policy was not "highly likely" to result in child molestation; the school district's volunteer policy required background checks only of volunteers who were not supervised and a supervised volunteer molested a child); *Rew v. LaGrande Sch. Dist.*, No. CV 02-891-BR, 2004 WL 1698166, 2004 U.S. Dist. LEXIS 15264 (D. Or. July 29, 2004) (granting summary judgment for the district where a lunch buddy volunteer, who had passed a criminal background check, established a personal relationship with a student and molested him off school grounds; determining that there was no evidence that school officials acted with deliberate indifference to plaintiff's well being and finding no violation of plaintiff's due process right to be

## EDUCATOR BACKGROUND CHECKS

even those who have no contact with children. Moreover, some states are requiring the background checks not only in the application phase, but also periodically throughout the tenure of a school employee.

Although this practice will result in fewer law suits, its primary purpose is to reduce the occurrence of injury to children and staff within the school setting. But, fingerprinting alone will not be enough to make classrooms safe. Good communication is vital to keep dangerous teachers out of schools, as many violators in the past were never arrested or convicted of any crime.<sup>62</sup> They were, nonetheless, guilty of inappropriate conduct and disturbing behavior, but often remained in their current classrooms or moved on to prey on children in other districts (or in other schools within the same district), because the misconduct was never reported, background checks were inadequate or delayed,<sup>63</sup> or the investigation was covered up for fear of district embarrassment.

Legislators need to continue to create laws and policies that allow for greater scrutiny of school employee misconduct, while school officials must do their part in identifying and removing unfit employees. This will require strict compliance to due process and hearing requirements,<sup>64</sup> but where adequate documentation of unfitness exists, dismissal should not be a problem.<sup>65</sup>

free from state-imposed violations of bodily integrity).

62. See, e.g., *B.T. v. Santa Fe Pub. Schs.*, 506 F.Supp.2d 718 [225 Ed.Law Rep. [300]] (D.N.M. 2007). The trial court granted absolute immunity to two employees of the New Mexico Public Education Department (NMPED) who had failed to revoke the license of a teacher who had been accused of fondling children in one district and then moved to another district where he allegedly engaged in inappropriate touching once again. When a local newspaper printed allegations of the conduct, school officials conducted an investigation and fired the offending teacher, Dominguez. District administrators also reported Dominguez's misconduct to NMPED; officials there, however, failed to revoke his license. The court granted immunity to the defendants, who claimed that they lacked sufficient evidence to revoke the license, in part due to a confidentiality agreement the teacher and district had entered into and uncooperative local police.

63. See, e.g., *Jackson v. County of Wayne*, 217 Fed.Appx. 103 (3d Cir. 2007) (finding no 42 U.S.C. § 1983 liability where a foster parent sexually abused a child; a background check failed to identify a criminal history and the agency removed the child immediately after learning of the abuse).

64. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 [23 Ed.Law Rep. [473]] (1985) (determining that plaintiff, a public school security guard with a prior conviction for grand larceny, should have received a pre-termination hearing as required under the Fourteenth Amendment's Due Process Clause, notwithstanding proof that he had misrepresented on his job application that he had never been convicted of a felony).

65. See, e.g., *Sykes v. Richardson*, No. M2001-02097-COA-R3-CV, 2002 WL 1838156, 2002 Tenn. App. LEXIS 592 (Tenn. Ct. App. Aug. 13, 2002). Upon a tip that Sykes was involved in a possible check forgery scam, police searched the residence of the Vocational Agriculture teacher and found a marijuana pipe, a crack pipe, rolling papers, a spoon for cooking crack, and other drug paraphernalia scattered around the home he shared with his fiancé and a fifteen-year-old runaway girl. Following an appropriate hearing, the Board of Education voted to terminate Sykes, a tenured teacher. The Tennessee court and court of appeals agreed that the charges against Sykes, regardless whether he was criminally convicted, were sufficient to justify his termination as a teacher. *But see Powell v. Paine*, 221 W.Va. 458, 655 S.E.2d 204 [228 Ed.Law Rep. [934]] (W. Va. 2007). The West Virginia Supreme Court reviewed a case where

School districts that fail to meet these legal mandates, conceal wrongdoing, or "pass the trash" may be sued under Title IX of the Education Amendments of 1972, where they have actual knowledge of violations and are deliberately indifferent to related claims.<sup>66</sup> Public schools and public employees (in their individual capacities) who engage in crimes against children may be subject to suit under state tort law and 42 U.S.C. Section 1983.<sup>67</sup> Moreover, charges may be brought against those individuals who commit criminal acts. Liability and the threat of criminal prosecution will not be enough to stop the occurrence of inappropriate behaviors, however. As a result, school leaders need to make the commitment to keep students safe from the small percentage of perverse adults who were hired to serve, educate, and protect them.

Brian Powell, a teacher at Moorefield High School, was arrested for beating his son with a belt at home. His children were removed from his home and Powell was suspended from work without pay. Furthermore, his teaching license was suspended for four years. The State Superintendent of Schools affirmed the suspension, as did the lower courts. The state high court, however, found there was no clear and convincing evidence that Powell's actions would make him an unfit teacher. The action of the superintendent was found to be an unwarranted exercise of discretion, supporting the court's order that Powell's license be reinstated.

66. See, e.g., *Hansen v. Board of Trs. for Hamilton Southeastern Sch. Corp.*, 1:05-cv-670-LJM-WTL, 2007 WL 3091580, 2007 U.S. Dist. LEXIS 78097 (S.D. Ind. Oct. 19, 2007) (granting summary judgment to the school district in a Title IX and 42 U.S.C. § 1983 claim where a criminal background check had been conducted and the prior employer of the violating band director had been contacted; school officials had no actual knowledge of a sexual relationship between the band director and a high school student during the time of their involvement and were not shown to be deliberately indifferent to her abuse). But see *Bramow v. Cedar Rapids Cmty. Sch. Dist.*, 707 N.W.2d 337, No. 5-439/04-1118, 2005

Iowa App. LEXIS 1273 (Iowa Ct. App. Oct. 26, 2005) (upholding jury award of \$20,000 against the school district for its negligent hiring and inadequate supervision of a music teacher who had inappropriately touched a third-grade girl; rejecting claim by the mother that a greater award was appropriate as the district court had excluded evidence of prior criminal acts of the teacher, as such exclusions did not represent an abuse of discretion by the lower court).

67. *Hackett v. Fulton County Sch. Dist.*, 238 F.Supp.2d 1330 [173 Ed.Law Rep. [841]] (N.D. Ga. 2002) (concluding that the state actor, a public school science teacher, could be individually sued under the Fourteenth Amendment and 42 U.S.C. § 1983 for convincing a student to come to his home, disrobe, and consent to being touched as part of an experiment, participation in which was to result in provision of a scholarship; finding no district liability and noting that a background check revealed no previous misconduct on the part of the teacher—he failed to disclose that he resigned other teaching positions because of allegations of improper conduct with minor students—and that no proof had been provided that the district was deliberately indifferent to the student's claims of a violation of bodily integrity).