

Criminal History Background Checks for Public School Employment - Frequently Asked Questions

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The state Department of Elementary and Secondary Education (DESE) has detailed information regarding the obligation of school districts to perform criminal history background checks on applicants and existing employees, available online at: <http://www.doe.mass.edu/chri/>. The FAQs below provide a starting point for answering common background check questions, but you should consult with DESE and/or school counsel for guidance in any particular situation.

1. Under Massachusetts law, what are my background check obligations when hiring employees and contractors as a school district employer?

While most employers may request permission to access an applicant's Criminal Offender Record Information (CORI), school district employers must obtain an applicant's CORI if the applicant will have "direct and unmonitored contact" with children in the workplace. Practically speaking, in the school setting, this will include most employees: full-time, part-time, or substitute employees, student teachers, apprentices, or interns, and any individual who regularly provides school related transportation to children. 603 CMR 51.03(1).

Moreover, state law requires that school district employees are subject to a national fingerprint based criminal background check using the Federal Bureau of Investigation's national database through a third-party vendor MorphoTrust. It is our understanding that this nation-wide based background check process will return extensive criminal history results (if any), including any sex-related offenses.

While both of these background search obligations apply only to those employees that will have "direct and unmonitored contact with children," as discussed in greater detail below, the school district employer may also conduct these background checks on volunteers, subcontractors, and laborers. G.L. c. 71, § 38R.

2. Can I run CORI checks on current school district employees, and not just applicants for employment?

Yes, and in fact you must run a new CORI check on employees that will have direct and unmonitored contact with children at least every three years, but not more than once per year, pursuant to G.L. c. 71, § 38R. School districts must also run CORI checks on all volunteers that will have direct and unmonitored contact with children every three years but not more than once a year. However, a national background check does not need to be conducted again following the initial suitability determination for current employees. According to the Department of Early Education and Care, a fingerprint-based background check may not occur more frequently than ever three years.

3. How do these requirements apply to contractors, vendors or volunteers that work on school grounds?

As noted above, school district employers are only required to conduct CORI and federal criminal background checks on employees that “have direct and unmonitored contact with children.” Both of these background check requirements apply to “employees,” which includes transportation service providers, substitute teachers, apprentices, interns, and student teachers. G.L. c. 71, § 38R; 603 CMR 51.03.

The CORI check requirement also applies to volunteers that may have such contact with children. It does not apply to subcontractors and laborers, however, although school districts may choose to conduct CORI background checks on subcontractors and laborers that will have such contact with children. The federal background check requirement does not apply to volunteers, laborers, and subcontractors. While initially the 2013 amendments to G.L. c. 71 required school districts to conduct fingerprint-based background checks on all volunteers, laborers, and subcontractors, the law now simply permits, but does not require, fingerprint-based national background checks on these school-ground workers if they will have direct and unmonitored contact with children.

While it may not be advisable to run CORI checks for every municipal position, more positions in the school setting will likely involve direct and unmonitored contact with children than in the general municipal employment context. Accordingly, school administrators may, as a matter of policy, wish to err on the side of caution when determining whether a particular position is likely to have the potential for direct and unmonitored access to children, such that pre-employment CORI checks will be run.

4. If I am hiring someone from another district, do I need to conduct another background check?

The school district may, but is not required to, rely upon a previous suitability determination if the applicant is transferring from another Massachusetts school district, if the following conditions are met. The applicant must have: (1) received a favorable suitability determination by another Massachusetts school district within the last seven years; (2) not resided outside of Massachusetts for longer than three years since the last suitability determination was made; and (3) been continuously employed by a school district (or has gaps in school district-based employment totaling no more than two years). 603 CMR 51.06(3).

If these conditions are not met, the school district must conduct a new national, fingerprint-based criminal background check, as noted above. If these conditions are met but the school district nevertheless elects to conduct another national background check, the school district must pay the fee for the new national background check. 603 CMR 51.06(5).

5. When is the “best” time in an application process to run these background checks?

Regulations promulgated by DESE require that school districts conduct both the CORI and national fingerprint-based background checks before finalizing an offer of employment. 603 CMR 51.05(3). Therefore, a conditional offer of employment should be made pending satisfactory background check results. The school district should first conduct the CORI check. After reviewing the results of the CORI check, if those results do not preclude employment, the school district should then conduct the national, fingerprint-based background check. 603 CMR 51.05(2).

While it is advisable to obtain authorization to conduct such background checks for all applicants, we do not advise actually conducting such criminal background checks on all applicants as to limit exposure to liability. Not all applicants will be qualified or made a finalist for a given position, therefore, we recommend only running background checks on finalists or those conditionally-offered employment.

6. To whom may I disclose background check information about applicants or current employees, volunteers, subcontractors or laborers?

State statute expressly permits the school committee, superintendent, and principal or administrator of the school premises where the subject of the background check will work to access the results of the subject's background check. G.L. c. 71, § 38R. Additionally, the applicant or employee must be provided with the results of his or her background checks. 603 CMR 51.04(4). For an employee hired directly by the school committee, such as the superintendent, the chair of the school committee may review the results of the national criminal background check. 603 CMR 51.03(3). Therefore, while the school committee may need to discuss CORI as part of a hiring process, such information should not be discussed in open session. Depending on the circumstances, it may be appropriate to discuss CORI in executive session under either Purpose 1 or Purpose 7 of G.L. c. 30A, § 21(a) (the Open Meeting Law).

Additionally, DESE regulations provide that a school employer shall disclose the results of a background check to the Commissioner of Elementary and Secondary Education in a report if the employer has taken an adverse action against the employee or applicant on the basis of the background check results. This process is described in more detail in response to Question 7, below.

DESE regulations require each school district to maintain a written policy as to the means of storing and retaining such criminal history information that meets the minimum standards for the Department of Criminal Justice Information System model CORI Policy, and that complies with relevant federal rules and regulations regarding the national database information. 603 CMR 51.04. Further, the manner of dissemination must be consistent with the general rules and regulations surrounding CORI information dissemination. 803 CMR 2.13.

7. After conducting a national criminal background check on either an applicant or an existing employee, what do I do if I find the applicant/employee has a negative criminal history?

The school district retains the discretion to make suitability determinations based on individual circumstances. The school district may consider the circumstances and timing of the criminal violation and any supplemental materials provided by the applicant/employee. For instance, after review of all available information, a school district may elect to hire an applicant with a non-violent misdemeanor conviction from ten years ago, but not one with a sexual assault conviction from five years ago.

If the school district chooses to reject an applicant or to dismiss a current employee because of negative criminal history, there are several required steps.

Notification to the Applicant/Employee of a Potential Adverse Action

The school district must: (1) notify the applicant/employee of the potential adverse employment action; (2) provide the applicant/employee with a copy of the criminal history report revealing the adverse criminal information and the school district's policy relative thereto; (3) identify the specific information and reasons for the possible adverse employment action; (4) provide the applicant/employee with an opportunity to dispute the information and information as to how to correct incorrect criminal history information; and (5) document all of these steps in writing. 603 CMR 51.04(3).

Notification to the Commissioner of DESE

In addition, the school district must: (1) notify the Commissioner of DESE of that decision and the reasons therefore; (2) provide the Commissioner with a copy of the CORI or national background check; and (3) notify the applicant/employee that it has made such a report. 603 CMR 51.07(1). Further, if the school district obtains information that warrants license sanction, suspension or revocation of the individual's teaching license, such information must be reported to the Commissioner as well, regardless of whether the district ultimately decides to hire the applicant or retain the employee. 603 CMR 51.07(2).

Compliance with any Statutory and Contractual Requirements

Finally, the school district must still comply with all union contract obligations and the requirements of G.L. c. 71, §§ 42 and 42D, and G.L. c. 150E, as applicable. 603 CMR 51.04(3)(a).

Please contact Attorney Janelle M. Austin (jaustin@k-plaw.com), Attorney Michele E. Randazzo (mrandazzo@k-plaw.com) or any other attorney at the firm at 617-556-0007, with any questions concerning CORI FAQ's.

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