



Criminal Background Checks of District Employees and Volunteers Under Senate Bill 9

Senate Bill 9 (SB 9), enacted by the 80th Texas Legislature, requires school districts to review the criminal histories of school district employees and other persons who have contact with students. The following FAQs summarize the requirements of SB 9 as they relate to school district employees and volunteers. The requirements of SB 9 relating to employees of contractors are addressed in separate FAQs.

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Q. Which district employees and volunteers are subject to criminal history review?

A. All school district employees are subject to criminal history review. SB 9 requires review of the criminal histories of all certified employees, noncertified employees, student teachers, and volunteers. It is helpful to think of these requirements in terms of four groups:

- certified employees and substitute teachers,¹
- noncertified employees hired before January 1, 2008,²
- noncertified employees offered employment on or after January 1, 2008,
- student teachers and volunteers.

Tex. Educ. Code §§ 22.083-.0837.

Within each group, the type of criminal history that will be reviewed and the deadline for completing the review is roughly the same.

Q. Who is responsible for the criminal history reviews?

A. Responsibility for conducting mandatory reviews is divided between the State Board for Educator Certification (SBEC) and districts:

- SBEC is responsible for reviewing the criminal histories of certified employees and substitute teachers.
- Districts are responsible for reviewing the criminal histories of noncertified employees, student teachers, and volunteers.

Tex. Educ. Code §§ 22.083-.0837.

Q. Which type of criminal history will be reviewed?

A. The type of criminal history that will be reviewed depends on the person's classification:

- National criminal history: noncertified employees hired on or after January 1, 2008, certified employees, and substitute teachers.

¹ A *substitute teacher* is a teacher who is on call or on a list of approved substitutes to replace a regular teacher and who has no regular or guaranteed hours. A substitute teacher may be certified or noncertified. 19 Tex. Admin. Code § 153.1101(5).

² Noncertified status refers to the person, not the employment position. 19 Tex. Admin. Code § 153.1109(a)(1). Thus, a certified person assigned to a position that does not require certification is considered "certified" for purposes of SB 9.

- State criminal history: noncertified employees hired before January 1, 2008, student teachers, and volunteers.

Tex. Educ. Code §§ 22.083-.0837.

Employees for whom a national criminal history review is required must submit fingerprints in accordance with Texas Department of Public Safety (DPS) and SBEC requirements, even if they previously submitted fingerprints to the district, SBEC, or DPS for other purposes. SBEC, *Frequently Asked Questions—Senate Bill 9 for Administrators*, January 24, 2008, www.sbec.state.tx.us/SBECOnline/fp/faq_SB9.asp.

Q. When will the criminal history reviews be conducted?

A. The requirements of SB 9 will be phased in over the next four years:

- Certified employees and substitute teachers: SBEC must obtain the criminal histories of certified employees and substitute teachers by September 1, 2011. Tex. Educ. Code §§ 22.0831(g), .0836(i).
- Noncertified employees hired before January 1, 2008: A district must obtain the criminal histories of these persons “as soon as practicable.” Tex. S.B. 9 § 29, 80th Leg., R.S. (2007).
- Noncertified employees offered employment on or after January 1, 2008: these employees must submit fingerprints to DPS before they start work. 19 Tex. Admin. Code § 153.1109(d).
- Student teachers and volunteers: Districts were required to obtain criminal histories on existing student teachers and volunteers by September 1, 2007. Tex. S.B. 9 § 31, 80th Leg., R.S. (2007). New student teachers and volunteers may not perform any duties until the statutory requirements are satisfied. Tex. Educ. Code § 22.0835(d).

Q. What type of criminal history will make a person ineligible to work at a school district?

A. A district must refuse to hire or must terminate a person, as applicable, if the person was convicted of one of the following offenses *and* the victim was a minor or student at the time of the offense:

- a felony under Texas Penal Code Title 5 (crimes against the person) or
- an offense requiring registration as a sex offender.

Tex. Educ. Code § 22.085(a).

The district may make an exception if:

- the offense is more than 30 years old, and
- the person has satisfied the terms of the court order entered on conviction.

Tex. Educ. Code § 22.085(b).

SBEC may sanction 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. Tex. Educ. Code § 22.085(e).

Q. Can a district adopt stricter standards for eligibility to work at the district?

A. Yes. The standard set forth in the statute is a minimum standard. A district may impose stricter standards for its employees, student teachers, and volunteers. To ensure consistency and objectivity in decision-making, TASB Legal Services recommends that districts adopt written local standards. In adopting the standards, districts may wish to consider some of the guidelines used by Texas licensing agencies in determining whether a criminal offense relates to an occupation:

- The nature and seriousness of the crime;
- The relationship of the crime to the purpose for requiring a [criminal history review];
- The extent to which [district employment] might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
- The relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the [employment].

Tex. Occ. Code §§ 53.022, .025.

Licensing agencies are also instructed to consider:

- The extent and nature of the person's past criminal activity;
- The age of the person when the crime was committed;
- The amount of time that has elapsed since the person's last criminal activity;
- The conduct and work activity of the person before and after the criminal activity;
- Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

- Other evidence of the person' fitness, including letters of recommendation from:
 - Prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - The sheriff or chief of police in the community where the person resides; and
 - Any other person in contact with the convicted person.

Tex. Occ. Code § 53.022.

Q. Are districts required to check the criminal histories of school nurses and other licensed professionals?

- A. Yes. Nurses, psychologists, occupational therapists, and other licensed professionals are not certified by SBEC, so SBEC will not review their information. Rather, these persons fall under the rules for noncertified employees, even if their licensing agencies have conducted independent criminal history reviews. Tex. Educ. Code § 22.0833; SBEC, *Frequently Asked Questions—Senate Bill 9 for Administrators*, January 24, 2008, www.sbec.state.tx.us/SBECOnline/fp/faq_SB9.asp.

Q. What is the difference between a conviction and deferred adjudication?

- A. A conviction is a judgment of guilt in a criminal case. A person may be convicted of a crime because a jury found him or her guilty, or because the person pled guilty or no contest (“nolo contendere”). A person who has been convicted of a crime may be sentenced to prison or may be placed on “community supervision” (probation).

Deferred adjudication is placement on community supervision without conviction. A judge may suspend the criminal proceedings and place an accused offender on community supervision if the person pleads guilty or no contest and the judge finds that placement on community supervision is appropriate. Tex. Code. Crim. Pro. art. 42.12. If the offender successfully completes community supervision, the judge will dismiss the criminal charges.

A common misconception exists that deferred adjudication will not show up on a person's “record” if the person completes community supervision. This is not correct. In fact, the person's record will reflect that charges were filed, the person pled guilty or no contest, and the person received deferred adjudication. The person may, however, ask the court to “expunge”—erase—the offense from his or her record or may seek an order of nondisclosure. Because deferred adjudication requires a guilty or no contest plea, most employers treat deferred adjudication as the equivalent of a conviction.

Q. What should a district do if an applicant's or employee's criminal record indicates an arrest but no criminal charges?

- A. A district should be cautious about making employment decisions based merely on an arrest record. The Equal Employment Opportunity Commission takes the position that reliance on mere arrest records has a disparate impact on racial minorities, who are statistically more likely to be falsely arrested. *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, www.eeoc.gov/policy/docs/arrest_records.html. Accordingly, a district should contact its local counsel for assistance before refusing to hire, or terminating, an applicant or employee based on an arrest record.

Q. Who will review the criminal histories of employees of shared services arrangements?

- A. Criminal history reviews are required for any employee of a shared services arrangement (SSA) whose duties are performed on school property or at another location where students are regularly present. Both the district and the SSA are required to obtain the criminal history. The district or SSA must ensure that the person submits certain information to DPS before or immediately after the person is employed. Tex. Educ. Code § 22.0833(c).

In addition, the district and SSA are required to provide SBEC with the name of the person so that SBEC may obtain the person's criminal history. SBEC will examine the person's criminal history and notify the district or SSA if the person is not eligible for employment. Tex. Educ. Code § 22.0833(g). SBEC, the district, and the SSA may coordinate these activities to avoid unnecessary duplication of effort. Tex. Educ. Code § 22.0833(h).

Q. Is a district required to review the criminal history of every volunteer?

- A. No. The bill requires a district to review the criminal history of a volunteer, or a person who has indicated, in writing, an intention to serve as a volunteer. Tex. Educ. Code § 22.0835(a)(2). There are however three major exceptions to the definition of "volunteer":

- a parent, guardian, or grandparent of a student enrolled in the district where the person will perform the volunteer services;
- a person who will be accompanied by a district employee while on campus; and
- a person who is volunteering for a single event on a campus.

Tex. Educ. Code § 22.0835(e).

Although a district is not required to review the criminal history of these persons, it may do so if it wishes. Tex. Educ. Code § 22.0835(f).

Q. How often can a district obtain the criminal histories of employees?

- A. A district may obtain the criminal history of an employee as often as the district wishes. In the past, districts could obtain criminal history of an employee only two times each year. SB 9 removed this limit, so now a district may obtain a criminal history several times a year. Tex. Gov't Code § 411.097(b).

Q. Can a district require an employee to pay the cost of obtaining the criminal history?

- A. Yes. A district may require student teachers, volunteers, and substitute teachers to pay the costs relating to obtaining criminal histories. Tex. Educ. Code §§ 22.0835(g), .0836(f). Similarly, SBEC is required to charge fees to noncertified persons and substitute teachers for national criminal history reviews. Tex. Educ. Code § 22.0837.

If a district pays the fee for obtaining a criminal history, the district may require the individual to reimburse the district. Some districts do this through payroll deductions. This is permissible, so long as the district provides advance notice of the deduction and the deduction does not result in a nonexempt employee's receiving less than minimum wage and any overtime for the pay period. Fact Sheet # 16, *Deductions from Wages for Uniforms and Other facilities Under the Fair Labor Standards Act* (November 2007). If necessary, a district may spread the deductions over several pay periods to avoid wage and hour concerns.

Q. Which employees at a district can see the criminal history records of applicants and employees?

- A. DPS requires that criminal history records obtained through the department be maintained in strict confidentiality, away from personnel files, and in secure locations. *Security Policy for Non-Criminal Justice Agencies' Access, Use, and Dissemination of Criminal History Record Information*, www.txdps.state.tx.us/administration/crime_records/docs/sb9referenceguide.pdf (pp. 28-32). Only those employees who have been approved by DPS can view the criminal history records of applicants and employees. Thus, an administrator who has not been approved by DPS may not see the criminal history records of an applicant for a position on his or her campus. The administrator may not even be told the specific contents of the record. It is permissible, however, for the administrator to be told that the applicant was disqualified due to criminal history, so long as the underlying offense is not revealed. An exception exists for conviction and registered sex offender records listed on DPS's public Web site. That data is public information and may be shared with anyone.

Q. Can a district show an employee or applicant his or her criminal history?

- A. Yes, a district may show an individual the criminal history of that individual, but the district must be careful to avoid cases of mistaken identity. In the case of a national criminal history record, which is based on fingerprint data, the likelihood of a correct match is very high. In the case of state criminal history records, however, there is less assurance that the record the district has obtained is the record of the actual applicant. Therefore, a district should exercise extreme caution before showing a state criminal history record to the individual, especially where the individual is asserting mistaken identity.

Even if a district may show a criminal history record to a person, the district cannot provide the person with a copy of the record. It is a criminal offense for a district to provide the individual with a copy of his or her criminal history. Tex. Gov't Code § 411.085(a)(2). An individual who wishes to obtain a copy of his or her criminal history should be referred to DPS.

Q. Are criminal history records public information?

- A. Criminal histories obtained from DPS, including the names of employees who are the subject of the records, are confidential. However, summary data compiled at the local level may not be confidential, even if the requestor could use that data to identify individual employees. *See, e.g.,* Op. Tex. Att'y Gen. OR-2008-7450A (June 13, 2008). Accordingly, districts should seek legal advice before preparing summaries of criminal histories or creating new documents regarding employee criminal histories that contain information not included in the DPS reports. If a district receives a public information request relating to criminal histories and the district believes some or all of the information sought is confidential, the district must seek a ruling from the attorney general as provided by statute. *See* TASB Policy GBAA(LEGAL).

Q. Where can I find more information about SB 9?

- A. School district representatives can contact TASB Legal Services at 800-580-5345 or legal@tasb.org for guidance. For in-depth issues, districts should contact their local attorneys. For information about SB 9 and contractor employees, see the FAQs at www.tasb.org/services/legal/documents/criminal_history_con.pdf.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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