

Protecting Children Through Legislation Requiring the Screening of School Personnel

The U.S. public education system has served its citizens for more than 200 years. Parents have come to think of the education system much as they think of the family patriarch: omnipresent, guiding and nurturing, dependable, and strong. Yet, there is an element of the institution that bears closer scrutiny. Because of the necessity for educators to work closely with children in an unsupervised setting, the education field is a prime target for those who seek access to children to harm them. Although most people who work in education are dedi-

cated individuals who strive to serve children in the best possible way, a criminal element exists, as it does in every sector of our society.

In recent years, there has been much concern in the United States regarding the protection of children from persons who may harm them. Instances where children have been abused by those responsible for their care are certainly not new. The issue was brought to the forefront of public attention in 1983, when the employees and owners of Virginia McMartin Pre-School in Manhattan Beach, Calif., were



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charged with 208 incidents of child molestation (Eberle 1993). In the trial that followed, accusations were made and evidence was presented that seven caretakers, including the facility's owner, used the children in satanic rituals that involved physical, emotional, and sexual abuse (Eberle 1993). Although the trial ended in mistrial, news media coverage of the case was extensive. Through nightly accounts of the alleged horrors that took place in the facility, parents became increasingly aware of the dangers of placing trust for their children's care into the hands of others.

A Safe Environment?

Problems, however, have not been limited to day care institutions. Incidents of abuse have occurred in every situation where adults have access to children. No area of our society is immune, including public schools. School employees should be chosen for both their expertise and their desire to provide a safe, nurturing environment for students. Yet, we often read or hear about employees who are accused of child molestation and then are found to have a history of such incidents.

Examples of inappropriate student-teacher relationships are numerous:

- A male special education teacher in Madrid, N.Y., was convicted of raping three children in his classroom (Graves 1994).
- A female junior high school social studies teacher, twice named Teacher of the Year, was convicted of raping a 14-year-old boy (Graves 1994).
- A 22-year veteran female physical education teacher was convicted of sexually assaulting a teenage girl at her school (Graves 1994).
- A female music teacher was convicted of sexually abusing four girls in kindergarten through fourth grade (Graves 1994).
- A male elementary teacher who was one of the nation's best known teachers and 1986 Georgia Teacher of the Year pled guilty to fondling a 10-year-old boy (*The Atlanta Journal and Constitution* 1992).

Research in this area indicates that situations such as these are not uncommon. Wishnietsky's 1991 survey of high school graduates in North Carolina found that 17.7% of males and 82.2% of females reported sexual harassment by faculty or staff during their school years, and 13.5% of the students who responded to the survey reported that they had engaged in sexual intercourse with a teacher (Shakeshaft 1994). A 1993 study by the American Association of University Women found that 25% of females and 10% of males in grades 8 through 11 reported that they had been sexually harassed in some way during their school careers by a member of the faculty or staff (Shakeshaft 1994; Graves 1994).

No recent data are available to show how many child abuse cases result each year from abuse by school personnel. However, a 1988 study by Zakariya showed that slightly less than 0.1% of the total cases reported in 1984 involved

school personnel. Information from The National Clearinghouse on Child Abuse and Neglect Data System for the 2000 calendar year shows that approximately 879,000 children were victims of maltreatment. By applying Zakariya's findings, one might conclude that approximately 875 abuse cases involved school personnel in 2000.

Due to the many instances of student abuse by school personnel, parents and the public are looking closely at who is employed in the public school, from the superintendent of schools to the bus driver. Yet some communi-

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ties have realized the consequences of poor district hiring decisions only after discovering that their children had been victimized. Thus, many communities have lost faith in the local school district's ability to safeguard their children and are seeking to protect their children through other policies and procedures.

Looking at Liability

Although protecting children is the most compelling reason to ensure that employees will not endanger children in schools, financial considerations provide an additional incentive. Under the theory of *respondent superior* (let the superior respond for the actions of the agent), courts commonly hold employers accountable for the actions of their employees if the employer is negligent in hiring or supervising that person.

Through the late 1980s, negligent hiring cases were based on allegations that the employer became liable when an employee injured a third person while acting within the scope of his or her job description. That is, the courts considered whether the injurious act was part of the job, whether it occurred while the employee was on duty, and whether the employee was motivated to serve the employer. These criteria changed in 1986 when negligent hiring was first defined in *Fallon v. Indian Trail School* (1986). In *Fallon*, Illinois Appellate Court Judge Strouse established a precedent by stating:

Liability for negligent hiring arises... when a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed this applicant in employment where he could injure others. (p. 935)

Fallon, therefore, is the first case in which the courts placed a burden on employers to exercise reasonable care to protect their clients, employees, and others from injury caused by their employees. Thus, *Fallon* established the

Table 1. Who Must Be Investigated

		AL	FL	GA	KY	LA	MS	NC	SC	TN	TX	VA
Public Schools												
Certified Personnel	Applicants	X	X	X	X	X	X		X	X	X	X
	Current Employees	X		X		X					X	
Classified Personnel	Applicants	X	X	X	X	X	X			X		X
	Current Employees	X		X		X						
Volunteers					X							
Student Teachers			X									
Private/ Parochial Schools												
Certified Personnel	Applicants	X										X
	Current Employees	X										
Classified Personnel	Applicants	X										X
	Current Employees	X										
Volunteers												
Student Teachers												
Applicants for Certification			X						X			
Additional relative information:												
AL— 1) Required for current employees under review.												
2) Exempts church officials who are not acting in the capacity of a full-time regular classroom teacher.												
KY— Not required of current employees except non-faculty coaches and assistant coaches												
LA— Required only of persons who have or will have supervisory or disciplinary authority over children.												
SC— Required for any noncertified teacher in a charter school												
TN— 1) Required only for persons who will have proximity to schoolchildren.												
2) Not required for a retired teacher if the application is being made to the local board of education from which the teacher retired.												
3) No person may drive a school bus unless he/she has completed a CBC.												
TX— 1) Required for all employees and volunteers of a charter school												
2) Required for any employee of any agency that contracts with the public school for transportation services												

three criteria currently used in determining negligent hiring: (a) The employee had “a particular unfitness” for the position that could create a danger of harm to third persons, (b) the “particular unfitness” was known or should have been known to the employer at the time of hiring, and (c) this “particular unfitness” resulted in the claimed injury.

Court decisions in favor of victims claiming negligent hiring by school officials are numerous. In *Franklin v. Gwinnett County Public Schools* (1992), for example, the U. S. Supreme Court ruled that a damages remedy was available for an action brought to enforce Title IX after a student was sexually abused by her coach. The deciding factor in *Franklin* was the finding that a proper pre-employment investigation would have revealed the employee’s unfitness for the position as coach.

In *Mueller v. Community Consolidated School District 54* (1997), a female student alleged that she was sexually assaulted by her athletic coach in the coach’s home. The court stated that, because the district was required by state law to initiate a criminal background check before employment began, the district’s failure to comply with the procedures prescribed by law made it accountable for the outcome.

In *Doe v. Hillsboro Independent School District* (1996), a female student at Hillsboro Middle School in Texas was

assaulted and raped by a custodian with a prior criminal record. The school district had not conducted a criminal background check on the custodian as required by state law. The U.S. Court of Appeals for the Fifth Circuit ruled that the district showed “recklessness and gross negligence in its hiring procedures” (Doe 1996, 1406).

Courts are also holding church school officials responsible for the actions of their employees. The 1995 case of *Isley v. Capuchin Province* involved a former church school student who claimed that a priest had sexually molested him. The court dismissed the claim of negligent hiring against the school, saying that an inquiry into whether the church had acted properly in giving the priest access to children would require the court to interpret internal church policies and practices and, therefore, would be a violation of the First Amendment.

Seven years later, however, the result was quite different. In *Malicki v. Doe* (2002), a high school student alleged that church school officials were negligent in hiring and supervising Malicki, who had a history of inappropriate behavior with parishioners. The case was dismissed with the court concluding that the First Amendment barred consideration of the claim.

However, the Third District Court of Florida reversed the decision, stating that the issue involved tort law and

did not require investigation into religious doctrine or practice. Upon appeal, the Supreme Court of Florida affirmed the district court's decision, saying that the First Amendment was not violated because the church did not claim the sexual assault and battery were governed by religious beliefs or church practices. That is, the conduct in question was not

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part of a religious belief system. Therefore, the court concluded that the First Amendment would not provide a shield, and the church could be held liable for the actions of its employees.

Protecting Our Children

Media reports of abuse and public demands for protection of children increasingly are pressuring school officials to tighten employee-screening procedures. Both for financial and ethical reasons, public schools are aggressively seeking methods to protect children.

One commonly used method is to screen applicants during the hiring process. Yet screening methods often depend on information provided by the applicant, and dependence on this information is risky. Inaccuracies and falsifications of information on employment applications often include false reasons for leaving a position, jobs never held, and the amount of education attained (Barada 1994; Seidler

1990). A 1993 study by *Small Business Report* found that about one-third of Americans deliberately falsify information submitted on resumes, and Rigdon in 1992 found that almost one-third of 200 randomly selected resumes for positions at Equifax, Inc. contained inaccurate information.

In 1991, the Port Authority of New York and New Jersey conducted a study to determine whether falsifying information on job resumes was a major concern. The group ran a help-wanted ad for an electrician with mastery of the Sontag Connector, a device that does not exist. Of the 170 applicants who responded, one-third claimed they were Sontag experts (McGarvey 1993).

It has been observed that we live in a society that closely checks the backgrounds of those who handle money but is not so careful regarding those who work with children. Society wants schools to provide safe, nurturing environments, and schools have a moral and ethical duty to employ only those individuals who will contribute to that environment. Due to the many instances where school districts have not screened employees appropriately, public pressure is causing lawmakers to attempt to provide greater protection through legislation mandating criminal background checks for those who work in schools. The degree of protection provided by these laws, however, depends on the quality of the laws.

This author has examined current legislation to provide information regarding the laws that govern criminal background checks of school personnel in states belonging to the Southern Association of Colleges and Schools (SACS) (2003). The findings of this study are as follows:

1. The first legislation related to conducting criminal background checks on school employees was enacted in Louisiana in 1986, the same year the courts defined negligent hiring in *Fallon*.
2. Ten of the 11 SACS states require criminal background checks on some school personnel.

Table 2. Whether The Law Gives Permission To Investigate Others

		AL	FL	GA	KY	LA	MS	NC	SC	TN	TX	VA
Public Schools												
Certified Personnel	Applicants								X			
	Current Employees		X						X		X	
Classified Personnel	Applicants								X			
	Current Employees								X		X	
Volunteers					X						X	
Student Teachers			X									
Private/ Parochial Schools												
Certified Personnel	Applicants				X	X						
	Current Employees					X					X	
Classified Personnel	Applicants					X						
	Current Employees					X					X	
Volunteers						X					X	
Student Teachers					X							
Applicants for Certification												

Table 3. Other Issues

	AL	FL	GA	KY	LA	MS	NC	SC	TN	TX	VA
Fingerprints are required	X	X	X	X	X	X	X	X	X		X
There are penalties to the agency for noncompliance with this law	X				X						
The state investigating agency is required to respond	X		X*		X		X				X
The criminal background check request must be submitted to the FBI	X	X	X	X	X	X	X	X			X
Permission from the applicant or current employee is required	X				X		X		X		
Employment is allowed prior to the receipt of the criminal background check	X	X	X	X	X		X				
Restrictions are placed on employment due to a criminal background		X		X	X	X	X	X			
There is provision to appeal restrictions on employment	X				X	X	X	X			
The law provides for confidentiality of the criminal background record	X	X			X	X	X				X
Who is responsible for the cost of the criminal background check											
Applicant or employee	X	X	X**			X		X	X		X
Local unit of Education			X**		X		X				

*GA - Statute states that it is the duty of each law enforcement agency in this state to fingerprint persons required to be fingerprinted. No other Georgia agencies are required to respond.

**GA – Statute states that the cost may be borne by either the local unit of education or the person under review.

NC – Notations in the column of North Carolina are based on provisions that *allow* these actions rather than provisions that *require* them.

3. Of the 10 states that require background checks:
 - a. Nine require investigation of certified applicants at the time of initial employment;
 - b. Eight require investigation of applicants for classified positions;
 - c. Three require investigation of current certified employees;
 - d. Three require investigation of current classified employees;
 - e. Two require investigation before state certification is granted;
 - f. One requires investigation of volunteers; and
 - g. One requires investigation of student teachers.
4. North Carolina does not require criminal background checks on any employee. However, legislation requires that local units of education establish a policy regarding whether and under what conditions such investigations will occur.
5. Of the 10 states that require criminal background checks on school employees:
 - a. Nine require the use of fingerprints.
 - b. Eight require that the background check be conducted through the FBI.
 - c. Six require that the applicant or employee pay for the background check; one requires that the employing agency pay; and three do not have provisions stipulating who pays for the investigation.
 - d. Five allow a person to be employed pending receipt of the criminal background report. Georgia limits employment to 200 days. The other four states do not have a time limit.
 - e. Five provide information that limits or prohibits employment based on findings of a criminal background. Of these states, three list specific crimes that would prohibit the applicant or employee from employment; one prohibits employment of any person who has been convicted of a felony or Class A misdemeanor; and one prohibits employment of those with a history of moral turpitude and those who do not have a clear FBI check. Five states do not have provisions that limit employment.
 - f. Five have statutes that provide for confidentiality of the criminal background record.
 - g. Four have statutes with provisions allowing persons to appeal a denial of employment based on a criminal background record.
 - h. Three have statutes requiring that the person being investigated give written permission for the investigation.
 - i. Three have statutes that require state law enforcement agencies to respond to a request for a criminal background check from a school agency. Georgia’s law also requires that the local law enforcement agency fingerprint the person, although it does not require any further response from law enforcement personnel.
 - j. Two statutes include penalties for noncompliance. There clearly is a need for effective legislation to provide guidance to local units of education regarding who should

and who should not work with children. However, as the study of SACS states shows, significant variations exist regarding criminal background checks on school personnel. Some states are very thorough, mandating conditions under which personnel are screened, how the screening must be done, and how to use the results of the investigation. Other state statutes are very general, and only one state requires screening.

This study determined that:

- Three states require background checks on all employees but not volunteers or student teachers. Other states only require background checks on certified employees and new hires. No state requires that all of the people who work with children in school systems be investigated.
- All but two SACS states require a national background check. One state does not require fingerprints, allowing school districts to use only information supplied by the applicant. Without a national background check or fingerprints to verify an applicant's identity, these states may risk an incomplete report and, thereby, put children at risk.
- Only four states require law enforcement personnel to respond to a request for a criminal background check. They do not, however, place time restrictions on the response.
- School systems that follow the specifically required provisions of state law may still place children at risk. For instance, Georgia requires that all personnel be screened, but it does not mandate how the information should be used. Only five states specify conditions under which a person should be denied access to children. Without clear guidelines regarding who may and who may not work with children, school districts must continue to exercise discretionary authority over hiring and retention of employees in this matter. Such discretionary authority does not provide consistency across school districts and places children at risk if the school administration does not use good judgment in making decisions.
- Only two states provide for penalties for noncompliance with background check requirements, and those sanctions are relatively weak.
- Five states allow an employee to work with children pending the receipt of the background check. Only Georgia limits this time (200 days).
- In considering the rights of the individual, statutes do not always provide for confidentiality of the criminal background check report or a process to appeal the report's contents. Only five state statutes contain a provision ensuring confidentiality, and only four allow for an appeal if the criminal background report results in a decision to dismiss or not to hire the individual.

Based on the findings of this study, education policy makers may want to consider the following provisions to better ensure that state policy produces the desired results—prohibiting access to children by those who should not be allowed that access. Until such policies are in place, how-

ever, school district officials can ensure that local policies keep children safe by considering the same features.

- Everyone with access to children should be investigated, including employees, volunteers, substitute teachers, student teachers, and employees of agencies who contract with the school to provide student services.
- Fingerprints should be used in an investigation.
- A criminal background check should be requested through both state and national law databases.

There clearly is a need for effective legislation to provide guidance to local units of education . . .

- Schools that do not comply with the law should be penalized, and penalties should be serious enough to provide a sufficient incentive for compliance.
- Individuals should not be allowed to work with children until their criminal background checks are completed.
- State law enforcement agencies should be required to complete the criminal background check in a timely manner. Lawmakers, through consultation with law enforcement agencies, should set the timeline so that schools can complete the required check in a reasonable period of time.
- Clear guidelines should be established to regulate who can and who cannot be given access to children based on criminal background. Guidelines should list specific crimes that would prohibit such access.
- Regulations should allow for an appeal if employment is denied based on criminal background. Statutes should list circumstances to be considered in such an appeal.
- To protect the rights of all persons, statutes should ensure confidentiality of the criminal background record. Criminal background checks for school personnel will not stop child abuse in schools. No system can tell us definitively whether a person will become a pedophile or commit some other crime against a child. A criminal background check can, however, tell us if a person has committed such crimes before and can ensure that previous offenders do not get a chance to become repeat offenders by gaining access to children in public schools. ■

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