

Background Checks in Independent Schools

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Independent schools strive each day to create a safe and nurturing environment for their students to learn and grow. To further this mission, schools should establish and consistently follow a process for conducting background and reference checks for prospective employees — and potentially for long-term contractors and volunteers. Schools should check state law for any background and reference check requirements for educators that may apply to private schools and the process to obtain such records, but be aware your state may not currently have clear requirements.

Even if your state does not require private schools to conduct background checks, it is strongly recommended. Remember, if you utilize an outside entity instead of a government law enforcement agency to conduct background checks (i.e., consumer reports) or investigations (i.e., investigative consumer reports), disclosure and consent requirements under the [Fair Credit Reporting Act](#) apply. Ultimately, whether you conduct these checks in-house or hire an outside firm, it helps to understand the different types of background and reference checks and the benefits and limitations therein.

Criminal Background Checks

There are several types of criminal background checks, but none of them are 100% comprehensive since no single criminal database covers the entire country. However, the [FBI background check](#) is considered the most complete criminal database. It is fingerprint based and contains arrest and conviction records for federal crimes and information from state criminal databases. However, the FBI does [rely](#) on states to submit updated records, including the disposition of cases, so the information is only as good as the state databases upon which the FBI draws. The FBI also operates the [National Crime Prevention and Privacy Compact](#), which 27 states have signed on to, and that allows the sharing of state criminal

records. As an employer, you may be required to submit the background check request through a state agency (such as the state police or courts), so confirm the appropriate procedures in your state.

Additionally, there are state and local background check systems. State criminal background checks only cover crimes committed within that individual state. States differ on whether they conduct fingerprint-based checks, name-based checks, or both, and whether they include arrests and convictions, or only convictions. Schools should consider conducting state criminal background checks for each state the applicant has lived in for a set number of years in the past. Like the FBI background check, requests for state-level background checks frequently go through state agencies, such as the state police or courts. Local county-based background checks may also be available.

Lastly, there are registries that collect information focused specifically on sex and child abuse/neglect cases. The U.S. Department of Justice (DOJ) operates the national sex offender public website ([NSOPW](#)), which links to state-provided information. NSOPW allows you to search nationwide or within an individual jurisdiction, including by address, city/town, or county. However, the information is provided and hosted by each state, not the federal government, and search ability may be limited by the quantity and quality of information each jurisdiction provides. DOJ recommends you verify search results by visiting the public registry website of the state in question. Keep in mind, not all offenders have registered appropriately, and many sex crimes go unreported or charges are not pursued, so this important check is not 100% indicative of an applicant's history.

Most states also maintain a [central database](#) of child abuse and neglect investigation records. States have varying laws regarding maintenance and confidentiality of these records, but nearly [30 states plus the District of Columbia](#) require or allow this registry to be used to check persons applying to work as child care or youth care providers. Again, these records are not always a complete picture as information is often limited to substantiated allegations. Remember, when running a name-based check, there is the risk of false positives or misidentification.

Other Background Checks

Even if private school educators are not required to be certified or licensed in your state, you should consider checking the jurisdictions where an applicant has previously taught to see if they have faced any disciplinary action or lost a license. These offenses may or may not have risen to the level of criminal

conduct and may not appear in other searches that only detail criminal arrests or convictions. To help fill this gap, the National Association of State Directors of Teacher Education and Certification has created a nationwide [clearinghouse](#) that provides information on educators who have had their certificates or licenses annulled, denied, suspended, revoked, or invalidated. Individual private schools may now apply for access to this clearinghouse by paying a membership fee along with a subscription fee based on the number of full-time teachers at the school. Again, information in the clearinghouse is based on what each jurisdiction provides, false positives are possible, and information should be investigated and followed up with the relevant state authorities.

Additionally, credit history reports can provide information about a candidate's financial history and may prove particularly useful for positions with monetary responsibility within the school. Credit history reports are generally obtained through one of the three reporting agencies (Equifax, TransUnion, and Experian). Fair Credit Reporting Act obligations apply.

Motor vehicle records provide another source of potential information. While federal and state law outline what information the DMV keeps, how long information is kept, and how information may be released, often employers can obtain a prospective employee's driving [history](#). A motor vehicle check may prove useful for employees who will have significant driving responsibilities at the school.

Lastly, schools may wish to conduct a general search online, through a search engine or social media platforms. Schools should set clear and consistent standards for how this search will be conducted, how to avoid using information that may be protected by civil rights law, and how the applicant will be allowed to refute negative information. The internet may be forever, but it is not always accurate, and schools should act with caution in this area.

Legal Considerations

When it comes to the hiring process, there are many legal issues to consider. For example, Title VII protects against discrimination in employment based on race, color, religion, sex, or national origin, and states and cities may have additional protected classes. In the last several years, advocates have argued that overly restrictive policies barring those with criminal histories disproportionately harm minority communities and social justice efforts. The federal government and many states and municipalities have agreed. At the same time, schools face specific challenges in fulfilling their primary obligation to ensure

the safety of the children in their care while maintaining their commitment to nondiscriminatory employment practices.

In 2012, the Equal Opportunity Employment Commission (EEOC) issued [guidance](#) to help employers understand how to utilize arrest and conviction records in employment decisions without running afoul of Title VII. The EEOC makes it clear that while it does not violate the law to obtain criminal history information, there are two main ways employers can get into trouble:

1. by treating applicants with the same criminal records differently based on a protected characteristic (disparate treatment discrimination); or
2. by treating applicants with similar criminal histories equally, but still disproportionately excluding individuals with a protected characteristic without showing that the employer's actions are related to the job and consistent with business necessity (disparate impact discrimination).

In the guidance, the EEOC outlines three factors relevant to determining whether a policy of excluding certain candidates is job related and consistent with business necessity: the nature and gravity of the offense or conduct; the amount of time that has passed since the offense or conduct and/or completion of a sentence; and the nature of the job sought by the applicant. Additionally, the EEOC notes the different weight that ought to be given to arrests as opposed to convictions; although an arrest may justify further inquiry into whether the underlying conduct makes an applicant unfit for a position. If an employer uncovers a conviction, the EEOC recommends that the employer conduct an individualized assessment to determine if that individual should be excluded from the job position in question. Note that a court in Texas, which has a law categorically banning felons from certain state jobs, recently issued an [injunction](#) barring the EEOC from enforcing this guidance because the government did not follow notice and comment rulemaking procedures. While this ruling only covers Texas, it may lead to further changes in guidance from the EEOC in the future.

Beyond the federal guidance, schools must also be cognizant that cities and states continue to pass "[ban the box](#)" laws, which limit when or how criminal history can be considered and used in the hiring process. The purpose of these laws is for employers to learn more about a potential employee and move questions about criminal history and background checks until later in the hiring process, such as after a conditional offer has been made. While some states have limited these policies to government employees or contractors, as of February 2018, 10 states (California, Connecticut, Hawaii, Illinois,

Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont) and 17 cities have extended limitations or exclusions of conviction history questions from the initial job applications to private employers. Some of these laws also require employers to consider the EEOC factors listed above and conduct an individualized analysis before refusing employment.

When it comes to “ban the box,” schools should evaluate how these laws may apply in their state and locally, and what exceptions may exist for schools or positions that work with children. In fact, many states require public schools to conduct background and criminal history checks prior to the final offer of employment. While most states do not require background checks for private schools, some do. For example, [Pennsylvania](#) requires all applicants for employment in public and private schools, employees of independent contractors doing business with public and private schools, and student teacher candidates to undergo a background check if they will have direct contact with students. In Maine, private school educators must complete a criminal history records check, which includes fingerprinting. Even in states where background checks for private school educators are not required, schools should take seriously the safety risks involved with individuals working closely with children and establish a comprehensive and consistent background check process that is in line with federal, state, and local legal obligations.

Resources:

- NAIS Advisory, [NAIS Independent School Guide to Hiring](#) (Linda Johnson, 2015)
This comprehensive advisory steers independent schools through the hiring process, including job descriptions, interviews, conditional offers and background checks, contracts and offer letters, and new hire orientation. This advisory includes sample questions, forms, and polices for each step in the hiring journey.
- NAIS Advisory, [Beyond Criminal Checks: Online Background Searches](#) (Jackie Ford)
This advisory highlights how schools can utilize online and social media searches without running afoul of privacy and antidiscrimination protections.
- NAIS Advisory, [Avoiding Hiring Liability: Conducting Background Checks and Complying with the FCRA, An Overview for Independent Schools](#) (Caryn Pass and Heather Broadwater, 2005)
This advisory provides a detailed overview of the Fair Credit Report Act, employer obligations, and employee rights.
- Society for Human Resource Management, [Conducting Background Investigations and Reference Checks](#) (2016)
This resource page includes comprehensive information on why background checks are important, how to conduct a background check/investigation or choose a third-party vendor, how to evaluate the results, legal considerations, and sample forms and policies.

- National Employment Law Project, [Ban the Box](#) (2017)
This advisory explains the contours of state and local ban the box and fair chance policies.
- [National Association of Professional Background Screeners](#)
The National Association of Professional Background Screeners provides accreditation for consumer reporting agencies and information for employers on choosing a third-party screener and utilizing background check information.
- United Educators Independent School News, [Background Checks at Independent Schools](#) (2006)
This advisory highlights the importance of background checks at independent schools, provides an overview of the types of background checks available, discusses the role of contractors and volunteers in the school setting, analyzes how to choose a background check company, and issues guidance for schools in developing hiring policies.
- American Camp Association, [Criminal Background Checks: Background Information and Guidance for Camps](#) (2015)
While this advisory is directed toward summer camps, all youth-serving organizations, including schools, can benefit from this overview of background checks and questions to ask when determining what checks and policies your institution will put in place.