

TOPIC:
STUDENT CRIMINAL BACKGROUND CHECKS

INTRODUCTION:

Many colleges and universities are determining whether, when, and how to conduct criminal background checks on some or all of their applicants and students. In some cases, state law, an affiliation agreement, or an external entity requires institutions to perform these checks. Where there are no such requirements, however, determining whether to conduct student criminal background checks involves a discussion of institutional, legal, and policy concerns.

This NACUANOTE reviews circumstances under which student criminal background checks may be required. In addition, the NOTE discusses whether and when to conduct criminal background checks in the absence of a requirement, the various types of background checks an institution may elect to conduct, the nature and handling of information that may be derived from background checks, and the benefits and risks of conducting criminal background checks on students.

DISCUSSION:

I. Is the Institution Required to Conduct Criminal Background Checks on Applicants and Students?

For purposes of this NOTE, the term “criminal background check” refers to a formal review of official state, local, and/or federal law enforcement records. Requirements to conduct student criminal background checks can arise from state law, agreements with affiliated clinical or other training sites, and potentially from the rules of external agencies.

State Law

Where state law requires an institution to conduct student criminal background checks – most commonly for those involved in student teaching and certain licensed health care professions – the breadth and depth of the requirement is based on the language and scope of the legislation [\[1\]](#). Counsel should thoroughly review their state law, as some statutes may not have been written to specifically cover students or created with students in mind [\[2\]](#). A careful examination also will identify whether the law places the responsibility for conducting the criminal background checks squarely on the institution, or on the training site.

Affiliation Agreements

Many institutions have affiliation agreements with organizations acting as clinical or other applied learning sites for student internships. In many states, statutory law directs affiliates with whom the institution contracts to perform criminal background checks on their personnel, including “volunteers,” which in turn, may include student trainees [\[3\]](#). In addition, many affiliate policies require criminal background checks on those students proposed for clinical, practicum, or internship training, as well as other experience at the affiliate’s training site.

Affiliates bound by state law to conduct criminal background checks on student interns hosted at their site will not escape this obligation by including in the affiliation agreement a requirement that the institution perform the checks [4]. The affiliation agreement should specifically address this point. In addition, counsel should consider including a statement in the agreement that it will not indemnify the affiliate for any claims associated with the affiliate's failure to perform the criminal background checks itself, even if the institution also is conducting the checks [5].

External Entities

Training affiliates may assert that an external entity requires them to conduct or obtain criminal background checks on students. When faced with such an assertion by an affiliate, it is important to review the pertinent policy, law, or regulation that is the purported source of the mandate. Two such external policies are noted below.

Joint Commission on Accreditation of Healthcare Organizations (JCAHO). [JCAHO](#) is a non-profit organization responsible for the accreditation of healthcare programs and organizations [6]. Despite the assertions or misapprehensions of some affiliate health care organizations, [JCAHO](#) standards currently do not independently require healthcare organizations to conduct criminal background checks on staff, volunteers, or students in order for a healthcare organization to attain accreditation. Only where law, regulation, or organizational policy requires such checks on staff, students, or volunteers does [JCAHO](#) expect them to be conducted by the health care organization in compliance with that law, regulation, or policy [7].

Association of American Medical Colleges (AAMC). [AAMC](#) is a non-profit organization responsible for providing medical education, research, and patient care on behalf of medical schools, teaching hospitals, and academic medical societies. Currently, [AAMC](#) does not require criminal background checks on medical school applicants by its member institutions. In Summer 2005, however, the [AAMC](#) Executive Council endorsed the use of criminal background checks and recommended that "medical schools require criminal background checks on all accepted applicants [8]." As a result, some medical schools have begun developing criminal background check policies.

Other Entities. There are many other organizations, associations, accrediting bodies, and regulatory agencies to which a requirement to conduct criminal background checks on students may be ascribed. In each instance, counsel should obtain and examine the specific language of the requirement and assess the feasibility of subjecting the institution to that requirement, along with the consequences of not doing so.

II. What Legal and Policy Issues Should Counsel and Administrators Consider When Determining Whether to Conduct Criminal Background Checks on Applicants and Students?

Where state law, an agreement, or another entity does not require an institution to conduct student criminal background checks, the institution nonetheless may wish to consider conducting such checks on some or all applicants and students as a matter of institutional policy. While there currently are no definitive guidelines as to when criminal background checks are advisable, various considerations are listed below.

Why Conduct a Criminal Background Check?

The possible objectives of a student criminal background check policy could include:

- To provide safe student residence halls. By screening for sex offenders and students with disqualifying assault or drug- or alcohol-related convictions, an institution may learn of information it determines should preclude a student from living in the residence halls. If an institution chooses to screen for such offenses, it should consider whether it would conduct checks only on residence hall applicants or all students.
- To exclude students with disqualifying criminal convictions from access to various academic programs. Many institutional academic programs, such as teacher education and health sciences

programs, require externship experience and eventual licensure. As a result of these requirements, a student with a disqualifying criminal conviction may not be able to participate in the externship experience and/or eventual licensure. If an institution wishes to limit entry into its programs to students who are eligible for licensure, it must accurately apply the standards of the relevant licensing agencies.

- To provide a safer campus environment. The institution has an interest in protecting the campus community from those students it anticipates may cause harm to faculty, staff, or other students in their person or their property. A criminal background check may elicit information that the institution can use to protect these constituents.

These objectives will need to be weighed against the benefits, costs, and risks of conducting criminal background checks, which are summarized below.

When to Conduct the Criminal Background Check?

In addition to the criminal history questions presented on many institutional admission applications, an institution may wish to conduct a criminal background check either prior to or after a student's admission to the institution or academic program. Policy concerns related to both are described below.

Prior to Admission. Conducting a criminal background check prior to admission raises several issues, one of which is when, during the admission process, is the most beneficial time to perform the check [9]. An institution may want to delay the check until an admission decision is made, but prior to applicant notification of that decision [10]. This reduces the number of background checks the institution needs to perform and the resultant cost, paper work, and administrative follow up. If the institution receives an affirmative criminal background check response, it may want to notify the applicant of the result and provide him or her with an opportunity to correct or clarify items identified in his or her background before making a final admission decision [11].

After Admission. Conducting a criminal background check after admission raises the potential need to remove a person from the institution or a particular academic program. The institution will have to determine whether the decision to revoke a student's admission is reasonable, and then be sure to follow institutional procedures for such revocations [12].

For the student, an institutional decision to revoke admission may require a redirection of his or her educational and career goals. Thus, the longer a criminal background check is delayed, the more invested, personally and financially, in the institution and/or the academic program a student becomes. This may increase the likelihood of a dispute or even litigation should the student be disqualified from the institution or program.

The length of time a student is affiliated with an institution or academic program may necessitate a second or even third criminal background check. In one state, the check for healthcare employees is valid for only two years, after which time another check must be performed for continuation of employment [13].

What Type of Criminal Background Check May Be Conducted?

When deciding whether to conduct a student criminal background check, the institution will need to determine the appropriate scope of the check.

State Background Checks. A review of state criminal records is likely to yield only convictions that occurred within that state. Thus, for an out-of-state applicant or student, an in-state criminal background check may not be sufficient. At a minimum, the institution may want to require the applicant or student to submit criminal background check results from all other states where he or she resided [14].

Federal Bureau of Investigation. If there is an applicable statutory authorization, the institution may choose to request an FBI check, which covers criminal conduct throughout the United States [15]. These checks are

more accurate, but are also intrusive (requiring fingerprinting) and costly, and it may take longer to receive the results.

Interpol. If the institution has a number of international students, it may need to solicit an international agency, such as Interpol, to conduct the criminal background checks [\[16\]](#).

Who Performs the Background Checks and Who Assumes the Costs?

As part of the decision-making process, the institution should consider who among the parties involved will perform the criminal background check and who will assume the cost. Possibilities include:

Affiliated Training Sites. Training sites may perform the background checks, or, to off-load the expense and administrative burden of doing so, may require that the affiliating educational institution perform the checks. When entering into an affiliation agreement, counsel should contemplate their institution's own willingness to perform the checks based on the following considerations: the extent of the background checks required, the financial and operational costs involved, and the requirements and availability of other training sites [\[17\]](#). Whatever is negotiated, the affiliation agreement should clearly delineate which party will perform the criminal background check.

The Student. The institution may wish to place the burden of performing the criminal background check on the student or applicant [\[18\]](#). The institution should specify the scope and method of the background check and require that the results be sent directly to the institution from the pertinent law enforcement agency to ensure record integrity [\[19\]](#).

The Institution. A larger institution may be able to perform a criminal background check itself with authorization from the appropriate state law enforcement agency, if the state agency is willing to authorize or deputize someone within the institution to do this. Such an arrangement could prove to be more efficient and cost-effective, and provide the institution with greater control over the records generated by the checking process.

Outside Agency. The institution may choose to hire an outside agency to conduct the criminal background checks. While this approach relieves the institution of tracking the paperwork for the applicants and/or students, it may involve significant costs. Thus, a cost analysis should be part of the institutional decision-making process.

III. Information Derived from Criminal Background Checks

Once the decision is made to conduct student criminal background checks and the institution is in possession of the information, administrators must assess the accuracy of the information provided, determine disqualifying convictions, and resolve how the information should be maintained. The following should be considered.

Accuracy of Information

Criminal background check results may not be accurate or complete. According to a Christian Science Monitor article, "[a] private firm given a list of 120 people known to be on probation found criminal records for only 56 of them." The FBI found only 87 of the 120 criminal records [\[20\]](#). Given today's mobile and global society, it may not be possible to obtain complete criminal background information on an individual apart from his or her own complete and honest disclosure. Conversely, students should be given the opportunity to explain or correct information collected from the background check that they allege is incorrect or outdated.

Disqualifying Convictions

A criminal background check can elicit many types of criminal convictions over varying time periods. Counsel and administrators will need to determine which convictions disqualify an applicant and/or student from the institution or academic program. The following issues should be considered.

- Some states specifically identify convictions that preclude a person's employment with access to certain vulnerable individuals (e.g., children or the elderly). An institution might use its state's list of disqualifying convictions as a model to create its own such list to fit its individual circumstances or those of a particular academic program [21].
- Where a student is identified with a disqualifying conviction, the institution will need to determine if the student should be permitted to remain enrolled in the institution or program, or whether, as a result of a programmatic disqualification, the student may apply for a different field of study.
- Many states have enacted periods after which a conviction is no longer considered disqualifying. The institution will need to determine if it wants to establish similar time frames for its admissions and programmatic policies [22].

Storage and Disclosure of Information Derived from a Criminal Background Check

Of particular importance to institutions of higher education is how to maintain the information derived from a criminal background check to protect a student's privacy from unwanted disclosure. The following are suggestions for counsel and administrators.

Separate Locations. Given the sensitive nature of criminal background check information, it is imperative to place limits on who has access to the information. Counsel should advise administrators to store the information in a location separate from a student's academic record, such that those with access to the student's academic record are not permitted automatic access to his or her possible criminal record.

Strict Guidelines for Disclosure. Only a limited number of individuals should be allowed to have access to criminal background check information, and it should be strictly on a need-to-know basis. Generally, such records should not be available to individuals whose tasks involve evaluating the student's performance because of the potential prejudicial nature of the information [23]. Moreover, under the Family Educational Rights and Privacy Act (FERPA) [24], such records may not be shared with students, faculty, or others generally, but can be disclosed to and used by "school officials" for legitimate educational or security purposes [25].

The institution may wish to notify the student before disclosing the information. If the student has a disqualifying conviction in his or her criminal background, the institution could offer the student the option to proceed with the disclosure, change the proposed training site, or possibly leave the program or institution.

IV. What Are the Benefits and Risks Associated with Conducting Criminal Background Checks on Students?

While the benefits and risks involved in conducting criminal background checks on students necessarily will vary from institution to institution based on state law, affiliation agreement, or other entity or institutional culture and policies, some general considerations are offered below.

Benefits

- Precluding the enrollment of an applicant to the institution, or the assignment of a student to a particular training site, may prevent harm to another individual. It also may protect the reputation of the institution by avoiding any negative publicity that could follow such an incident.
- Students found to have disqualifying criminal convictions will be prohibited from occupying spaces that otherwise could go to students with full eligibility for academic or training programs requiring externships and/or eventual licensure.
- Conducting criminal background checks may provide the institution with a defense to subsequent claims of negligent admission or placement, breach of duty to protect or provide a safe environment, or other causes of action. The institution may be able to assert that, by conducting the criminal background checks, it exercised reasonable care to prevent the harm [26].

Risks

- Performing criminal background checks exposes the institution to liability for negligently performing the task and thereby facilitating the injury of a third party by a student who was not properly screened or precluded from having access to the injured person. Having assumed the duty to perform the checks, in cases where no such duty existed, may expose the institution to liability for negligently performing or failing to perform that duty [27]. Similarly, the institution may face claims and criticism for failing to warn others of a potentially dangerous student.
- The use of criminal background checks may unfairly impact minorities. While most of the discussion in this area of law relates to employee criminal background checks, some of the same arguments could be made in the student context [28].
- Obtaining a criminal background check response which reflects no convictions may create a false sense of security, given the questions surrounding the accuracy and completeness of the background checks, their limited scope, chance for errors, and variation of offenses by states [29].

As with all institutional policy decisions, the benefits and risks to the campus community must be weighed against each other. Counsel can assist administrators to determine what policies will best serve their institution.

CONCLUSION:

The decision to conduct criminal background checks on students is complex. For some institutions, statutory law or another entity may require that they be performed. Administrators, however, may still have to determine who actually performs the background checks. In the absence of any requirement, administrators should consider the numerous factors that influence whether and when to conduct criminal background checks, the various types of background checks an institution may elect to conduct, and the nature and handling of information that may be derived from background checks. Counsel can play an important role in assisting administrators in making these determinations and going forward.

FOOTNOTES

RESOURCES FOR COUNSEL:

NACUA Resources:

- [The University of Montana Employee Criminal Background Check Policy: Legal Issues](#), David Aronofsky, Holly March, Megan Morris and Katie Bell, NACUA Annual Conference, 2005
- [Checking New Hires at the Door: Criminal and Other Background Check Issues](#), Karen A. Treber, NACUA Annual Conference, 2005.
- [Criminal Misconduct by Employees: Best Practices for Preventing and Deterring Criminal Conduct](#), Toi Y. Carter, NACUA Annual Conference 2004.
- [Strategies: Dealing with the Campus Sexual Offender](#), Rick D. Johnson , NACUA Annual Conference 2002.
- [Use of Criminal Convictions in College Admissions](#), Derek Langhauser, NACUA Annual Conference 2000.
- [NACUA Background Checks Resources and Links](#)

Additional Resources:

- [Association of American Medical Colleges](#)
- Fried, Gil B., *Illegal Moves Off-the-Field: University Liability for Illegal Acts of Student-Athletes*, 7 Seton Hall J. Sport L., 69 (1997).
- [Joint Commission on Accreditation of Healthcare Organizations](#)
- Langhauser, Derek, Commentary, *Use of Criminal Convictions in College Admissions*, 154 Ed. Law Rep. 733 (2001).
- [LexisNexis Express Screening](#) (paid service).
- McCauley, Mary, *Background Checks Rile Professors*, Christian Science Monitor 11 (Aug. 5, 2004).
- Parent, Christopher M., *Personal Fouls: How Sexual Assault by Ball Players is Exposing Universities to Title IX Liability*, 13 Fordham Intell. Prop. Media & Ent. L. J. 617 (2003).
- Stokes, Jerome W.D. & Allen W. Groves, *Rescinding Offers of Admission When Prior Criminality is Revealed*, 105 Ed. Law Rep. 855 (1996).
- Sweeney, Thomas N., *Closing the Campus Gates: Keeping Criminals Away From the University – The Story of Student Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 Seton Hall J. Sport L. 226 (1999).
- [University of North Florida Judicial Committee Request Letter](#) – sent to students who disclose a criminal history.
- Westlaw Public Records Database – Criminal Public Records (paid service) – searchable by state.

College and University Student Criminal Background Check Policies:

Health Professions

- [Ohio State University – College of Medicine and Public Health](#)
- [University of Tennessee Health Science Center – UTHSC Students](#)
- [University of Washington – School of Nursing](#)

Education Professions

- [Fort Hays State University](#)
- [University of Texas, San Antonio](#)

In General

- [Fairleigh Dickinson University](#) – specifically includes Resident Assistants

- [Indiana University](#)
- [University of Texas Model Policy](#)
- [University of Wisconsin-Milwaukee](#) – Procedures for Compliance with Wisconsin Caregiver Law

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