

BILL ANALYSIS

Senate Research Center

S.B. 1471
By: Bettencourt
Education
5/23/2023
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Texas Education Agency's access to national criminal history record information (CHRI) is Public Law 92-544. Per the FBI, private entities cannot have access to national CHRI with Public Law 92-544, therefore private schools cannot have access since they are not regulated by a governmental entity.

Private schools may have access to the National Child Protection Act (NCPA) to receive national criminal history record information. However, the Texas Education Agency (TEA) will be unable to create subscriptions for individuals who were fingerprinted by a private school with NCPA since the FBI does not allow the commingling of statutes.

However, the amendment to the Texas Government Code, Section 411.0901, listing the new population will allow TEA to fingerprint applicants and employees of private schools to create subscriptions if the statute is revised to meet the requirements of Public Law 92-544. The statute will need to prevent the dissemination of national CHRI and reference Government Code Section 411.087 to submit fingerprints.

Also, the Texas Education Code, Section 22.0825(b), allows TEA to create subscriptions for former employees. Access to national CHRI for Public Law 92-544 does not allow access to an individual who is no longer affiliated with an agency. Access to CHRI and receiving event notifications in the clearinghouse who are no longer with an agency goes against public policy. Per the Department of Public Safety of Texas (DPS) legal team regarding public policy, a statute for CHRI cannot be written and/or used in a way that is discriminatory or that violates public policies related to the privacy or public use of official records.

The Texas Government Code statute or any statute will require the following for national CHRI pursuant to Public Law 92-544:

- a. The statute must exist as a result of a legislative enactment;
- b. It must require the fingerprinting of applicants who are to be subjected to a national criminal history background check;
- c. It must, expressly ("submit to the FBI") or by implication ("submit for a national check"), authorize the use of FBI records for the screening of applicants;
- d. It must identify the specific category(ies) of licensees/employees falling within its purview, thereby avoiding overbreadth;
- e. It must not be against public policy; and
- f. It may not authorize receipt of CHRI by a private entity.

TEA and DPS have raised some concerns that the bill will need some changes to conform with federal law (The National Child Protection Act or NCPA) regarding access to the DPS clearinghouse. I will have a committee substitute that provides:

- Specific authority for private schools to obtain criminal history records for employees under NCPA.
- Authority for TEA to facilitate the process (through automation)
 - The bill would not require TEA to adjudicate or review the information, but TEA may provide support and guidance to private schools.
- Updated language in both proposed statutes to reference a "qualified school contractor."

- Additional applicability criteria, in which a private school must "offer a course of instruction for students in Texas in one or more grades from pre-kindergarten through grade 12."
- This language is added to ensure that TEA would only be required to facilitate fingerprinting for Texas private schools offering K-12 services.
- Please note, the proposed statutes do not apply to non-accredited private schools that are listed in NCES. However, there is an applicability reference to NCES schools in S.B. 1849 / H.B. 4236 (Interagency Reportable Conduct Search Engine). Private schools will have the option to fingerprint their employees and subscribe to results in the DPS clearinghouse.
- Private schools would utilize TEA's existing systems to enroll employees for fingerprinting.
- To do this, TEA would need to create enhancements to the system.
- Private schools would not be subject to TEA's determinations about employability (which pertain to public schools).
- Constraints
- Authorized entities may obtain access to national criminal history under public law or NCPA authority, but not under both.
- TEA and public schools currently obtain access to criminal history results under Public Law 92-544.
- Private schools do not qualify for access under Public Law 92-544, but likely will qualify under NCPA.
- If private schools were to obtain authority to view criminal history results under NCPA, TEA cannot receive and/or review the results.

S.B. 1471 amends current law relating to access by the Texas Education Agency and private schools to certain criminal history records.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Department of Public Safety of the State of Texas in SECTION 2 (Section 22.08361, Education Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 22.0825(b), Education Code, as follows:

(b) Provides that the Texas Education Agency (TEA) is required to subscribe to the criminal history clearinghouse as provided by Section 411.0845 (Criminal History Clearinghouse), Government Code, and is authorized to obtain from any law enforcement or criminal justice agency all criminal history record information and all records contained in any closed criminal investigation file that relate to a specific applicant for employment or current or former employee of certain entities, including a private school that is accredited by an accrediting agency that is a member of the Texas Private School Accreditation Commission.

SECTION 2. Amends Subchapter C, Chapter 22, Education Code, by adding Section 22.08361, as follows:

Sec. 22.08361. NATIONAL CRIMINAL HISTORY RECORD INFORMATION REVIEW OF CERTAIN PRIVATE SCHOOL EMPLOYEES. (a) Defines "qualified private school."

(b) Provides that this section applies to a person who is an employee of or an applicant for employment at a qualified private school.

(c) Authorizes a qualified private school to require a person to whom this section applies to submit to a national criminal history record information review under this section before being employed by the school.

(d) Authorizes a qualified private school, before or immediately after securing the services of a person to whom this section applies, to submit or require the person to whom this section applies to submit to the Department of Public Safety of the State of Texas (DPS) information that is required by DPS for obtaining national criminal history record information, which is authorized to include fingerprints and photographs.

(e) Requires DPS, on receipt of the information under Subsection (c), to obtain the person's national criminal history record information and report the results through the criminal history clearinghouse as provided by Section 411.0845, Government Code.

(f) Authorizes each qualified private school to obtain all criminal history record information that relates to a person to whom this section applies through the criminal history clearinghouse as provided by Section 411.0845, Government Code, and to subscribe to the criminal history record information of the person.

(g) Authorizes a qualified private school to require a person to pay any fees related to obtaining criminal history record information under this section.

(h) Requires a qualified private school, if the school requires a person to whom this section applies to submit to a national criminal history record information review, to provide TEA with the name and information described by Subsection (d). Requires TEA to facilitate the submission of information to DPS to allow the school to obtain all criminal history record information that relates to the person to whom this section applies through the criminal history clearinghouse as provided by Section 411.0845, Government Code.

(i) Authorizes DPS, in coordination with the commissioner of education, to adopt rules as necessary to implement this section.

SECTION 3. Amends Subchapter F, Chapter 411, Government Code, by adding Section 411.0972, as follows:

Sec. 411.0972. ACCESS TO CRIMINAL HISTORY RECORD INFORMATION: QUALIFIED PRIVATE SCHOOLS. (a) Defines "qualified private school."

(b) Requires DPS, on request by a private school, to determine whether the school is eligible under the National Child Protection Act of 1993 (34 U.S.C. Section 40102) to obtain criminal history record information that relates to an employee or an applicant for employment.

(c) Authorizes a qualified private school to obtain state criminal history record information from DPS.

(d) Provides that criminal history record information obtained by a qualified private school in the original form or any subsequent form, except as provided by Subsection (f):

(1) is prohibited from being released to any person except the person who is the subject of the information;

(2) is not subject to disclosure as provided by Chapter 552 (Public Information); and

(3) is required to be destroyed by the school after the information is used for the authorized purpose.

(e) Authorizes a qualified private school to obtain criminal history record information from the Federal Bureau of Investigation identification division in

accordance with Section 411.087 (Access to Criminal History Record Information Maintained by Federal Bureau of Investigation or Local Criminal Justice Agency).

(f) Prohibits criminal history record information obtained from the Federal Bureau of Investigation from being released or disclosed except on court order.

SECTION 4. Effective date: upon passage or September 1, 2023.