



When Can (and Should) A School Require A Student To Undergo A Medical Evaluation?

By Myra Creighton (Atlanta)

A ninth grade student is sitting in your office because he said “wouldn’t it be nice if you died tomorrow” to another student. And you learned that days prior to the comment, the same student had punched the student to whom he made the comment. Your first inclination is to require the student to submit to a psychiatric evaluation. But should you do so? Teachers and school administrations frequently take a holistic view of dealing with students. Such an approach at times may be inconsistent with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (for schools receiving federal funding).

When Does the Law Permit an Evaluation?

Both Title III of the ADA, as well as the Rehabilitation Act, restrict a school’s ability to require students to provide medical information or to submit to independent medical examinations. Generally, such inquiries or examinations must be related to the student’s performance or participation at school, a request for accommodation, or a direct threat situation. For example, a school may require a student who requests an extra hour to take an examination because he has Attention Deficit Disorder or dyslexia to submit medical documentation showing that he has a “disability,” meaning that his impairment substantially limits him in a major life activity. The school has no obligation to provide the accommodation unless the student is disabled.

Second, a school may require a medical examination to ensure that a student is fit to participate in school athletics. And finally, a school may require a student to submit to a medical examination when there is objective evidence that a student is a direct threat to himself or to others.

A student is a direct threat if he poses a significant risk of immediate harm to himself or to others. For example, a student athlete with a diagnosed heart condition may be a direct threat to himself if he engages in certain school athletic activities. A school may make a medical inquiry to that student’s doctor on this issue or require the student to submit to a medical examination.

What About Threats of Violence?

When a student makes threats of violence, the school’s first inclination may be to address the matter from a medical perspective rather than a

disciplinary matter. But generally, the school should deal with the situation as a disciplinary matter for several reasons. First, a student threat most likely will become fuel for gossip and eventually parents will hear about it. Assuming that a medical examination reveals that the student has a mental disability, and requires treatment, other parents may be uncomfortable when this student eventually returns to school at a later point in time, and his return may generate controversy.

There is no need for the school to establish that a student engaging in misconduct has a mental disability, especially when such knowledge does not excuse the misconduct, but may require the school to accommodate the disability, e.g., time off for treatment. Further, in such a situation, the

school has created an incentive for the parents to obtain a second opinion or find a way to excuse clearly unacceptable behavior. If the second opinion contradicts the first opinion and indicates the student is not impaired/disabled or is not a direct threat, the school runs the risk that the parents will claim that the school perceived that their child was disabled if the school acts on the first opinion.

Because the threat is blatant misconduct, it should be addressed as such. If the school desires, it can always put a student to a treatment or expulsion election under the terms of a “last chance agreement.” Of course, in order to do so, whatever misconduct the student engaged in would have to be conduct that would permit the school to expel the student under the school handbook or the school contract. The school can then include terms in the last chance agreement that will require that the student (parents) prove that the student is

receiving ongoing therapy or treatment in accordance with the recommendations of the student’s outside provider. Moreover, the school can condition the student’s continued enrollment on the student not engaging in any other misconduct for a period of time, regardless of the severity of the misconduct.

Other Considerations

Another issue that arises periodically is whether a student who tries (or threatens) to commit suicide is a direct threat to himself or to others. Although there are no cases under Title III of the ADA (governing the school’s relationship with its students), under Title I of the ADA (governing employment), the Equal Employment Opportunity Commission takes the position that such an individual is not a direct threat to others. Therefore,

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Does Your School Make the Grade in Conducting Background Checks?

By Suzanne Bogdan and David Gobeo (Fort Lauderdale)

You've just admitted an adorable 5 year-old child to Kindergarten. The next day, you receive an anonymous message that the child's mother is on the state's sex-offender website. You check and confirm that the information is correct. How should a school handle this situation? Must you act? Is it enough to eliminate the parent from campus? What about the inevitable sleepover? Must you notify the school community of the parent's background?

As discussed below, there are no easy answers to these issues. The problem that schools face with more frequency today is how to determine which persons should be allowed to be on the school's campus, whether as an employee, contractor, or parent. In addition to complying with various state laws and accrediting guidelines that typically address employees and contractors, schools must increasingly ask: Should we require more information about our parents? If so, under what circumstances? And if we don't, what are the consequences?

Requirements and Trends for Conducting Criminal Background Checks

Most private schools today conduct fingerprint background checks on applicants, with employees being re-checked on a rolling basis. The reasons are clear: not only do schools want to hire the most qualified candidates for positions, they must also consider the safety of the children they are educating.

Although most states have statutory guidelines specifying the hiring processes for *public* school employees, very few states address hiring issues for *private* schools. Therefore, private schools are guided both by their accrediting entity (many of which require fingerprint checks as a condition of hiring) or general common law principles pertaining to negligence. There are two general ways under a negligence theory that a school could be held liable for failing to conduct a criminal background check on employees.

Under the first theory, because the private school industry generally has established the conducting of criminal background checks as a standard in the hiring practice, a school that does not comply could be viewed as negligent if someone is injured by a school employee who has a criminal background.

Under the second theory, an employer generally has a duty to investigate a prospective (or current) employee when it knows of facts that would lead a reasonably prudent person to investigate that person. In other words, if the school becomes aware that an employee may have engaged in child abuse, domestic abuse, battery, or some other offense, it would have a duty to investigate such person before allowing or continuing to allow that person to interact with children.

What About Other Persons on Campus?

Contractors

In addition to employee background checks, certain states, such as Massachusetts and Florida, require that contractors on school grounds be subject to criminal background checks. For example, Florida's Jessica Lunsford Act requires any contractor working on a public school campus when children are present, to undergo "level 2" screening, which includes fingerprinting and a criminal background check. Persons who have been found through fingerprint processing to have been convicted of a crime involving sexual misconduct, kidnapping, child abuse, and any offenses requiring registration as a sexual offender may not be employed or provide services, nor can they hold any position requiring direct contact with students. The Act requires that the employee may not be found guilty,



regardless of adjudication, or entered a plea of guilty or no contest, for certain offenses.

Even though this law (and many other similar laws) does not apply to private schools, private schools generally should conduct criminal background checks of contractors anyway. You do not want to have to explain to a parent why you allowed someone on your campus that you did not ensure was safe, especially when the cost can be passed on to the contractor.

If you choose to have these criminal background checks, you should require that the contractor use your authorized agency and that you receive a copy of the report to analyze it directly. You do not want to rely on the contractor's judgment that its employees are fit to be on your campus. Separately, once you have required the criminal checks, you need to ensure that you have a clearance or entry process whereby only those persons listed on the "cleared" list get through your campus gate.

Finally, when you consider who fits within the category of "contractor," think broadly. In addition to the traditional construction contract, you should also include those SAT tutors you allow on campus; the speech therapists that visit periodically; the companies that sell books, uniforms, and other items to your students, and any other non-employee that you allow to be on campus, whether the school receives a financial benefit or not.

Parents/Volunteers

As the Kindergarten question posed above demonstrates, it is not just employees and contractors that may present a risk of harm to your students. Many of the parents within your community may have criminal backgrounds as well. Most schools do not require parents, as a condition of their child's admission, to be vetted criminally, but should they? Parents are certainly on campus frequently. They mill around in the morning and after school; they attend school functions; they volunteer in classroom activities, on field trips, in the lunch room, and the list goes on. Is it enough for the school to conduct a criminal background check only when the parent decides to volunteer for an overnight activity?

Most schools do not conduct any type of assessment on parents unless and until something about the parent puts the school on notice of a potentially troublesome background. But a school could require a parent to complete a criminal background questionnaire as a condition of enrolling their children in the school. The questions asked could be similar to those asked on an employment application. The downside, of course, is that parents may be offended by the questions or you may find out more information than you wanted to know. Also, if you find out something and

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then choose to ignore it, the school could be negligent if the parent later acts in a way that could have been foreshadowed by the criminal background information.

In the event that you are placed on notice of a problem with a particular parent, such as the anonymous comment that a parent has a criminal background, the answers on how to address the issue are not easy. Depending on the information you have received, such as the allegation that a parent is a sex offender, you may be able to obtain confirmation of the parent's status for free, simply by checking your state's sex offender website.

If you determine that the parent is a sex offender, then you should take steps to address that parent directly by advising that the parent may not be associated with the school in any way (no dropping off, picking up, or visiting the school for any purpose) and that all communications must be by phone, email, or letter, with some other family member being designated as the person to physically come to the school as needed.

But the question remains whether or not you have a duty to communicate the status to the rest of the school community. Certainly, the school's parent community would believe you should communicate the information. How would other parents feel if they found out that Parent X was a sex offender, the school knew it, and the school did not tell parents so that they could avoid the potential of harm to their children from offsite activities? Or, what if the parent was not a sex offender, but had some other criminal conviction in their background that the school determined made the parent unfit to participate in school activities?

Although the school likely does not have a duty to warn parents of other parents' criminal backgrounds, whether the school wants to do so is an issue that should be handled carefully, with advice from your lawyer. The school certainly does not want to end up in a lawsuit by the parent because the school misunderstood the circumstances, invaded the parent's privacy, or otherwise defamed him or her.

What Information Should Preclude Involvement with the School?

Although uniformity is normally encouraged in hiring decisions, the variations in types and severity of criminal convictions lends criminal background checks more toward a case-by-case analysis. Therefore, schools must decide when a criminal conviction provides a legitimate business reason for denying or terminating someone's employment or association with the school.

In judging what constitutes a reasonable business reason, schools should rely on the following factors: 1) the job-relatedness of the conviction; 2) the number of convictions; 3) the proximity in time of the convictions to the application; 4) the nature and severity of the conviction; and 5) any evidence of rehabilitation. Clearly, any type of conviction that evidences harm or cruelty toward children, the elderly, domestic abuse, battery, assault, drug offenses, offenses reflecting dishonesty (theft, embezzlement, etc.), or other similar unacceptable behavior would likely eliminate the individual from consideration.

Further, any dishonesty in answering the questions on an application can be grounds for not hiring the individual or for terminating someone already hired, as long as the school treats similar circumstances in the same way. For this reason, it's important to have as broad a criminal history question on the application as your state will allow. In Florida, for example, employers may ask whether the applicant has ever been convicted of a crime, pled guilty, no contest, or *nolo contendere*,

had adjudication withheld, or has criminal charges currently pending. Employers in Florida may even ask whether the individual has ever been a defendant in an intentional tort action, such as for battery, false imprisonment, invasion of privacy, and other similar actions that would reflect potential unfitness for employment.

Specific Procedures

Remember that if you are using a third-party agency to obtain the criminal background check, the school must comply with the requirements of the Fair Credit Reporting Act (FCRA). Among other things, this federal law requires that the individual provide consent for the background check (called a "consumer report") and that the individual receive prior notice and a statement of their rights when an employer is considering making an adverse decision based on the results of the consumer report. This gives the individual a chance to correct any problems that may be on their criminal background record. Once the employer makes a final decision, it should give the individual notice of this decision in writing.

Separately from FCRA compliance, schools need to understand what the criminal background report actually says. It is extremely important that you make decisions with a clear understanding of the information. For the most part, you should be assessing convictions, not arrests. This is because minorities are typically arrested at higher rates in our society. If you base a decision on arrests only, you may be inadvertently discriminating against someone on the basis of race or national origin. If you see a problematic pattern of arrests, however, work with your counsel to determine whether the information is sufficient for you to make a negative decision.

Criminal background checks generally include legal terms and abbreviations which can be difficult to decipher. Some terms are clear to most people, such as "Plea - Not Guilty" or "Plea - Guilty." On the other hand, other abbreviations are more difficult, such as "NOL PRS," meaning *nolle prosequi*, which is a term that means the charges were abandoned by the prosecution. In addition, some reports will reflect the arrest but will not indicate what the final disposition was. In such case, the school needs to ask for information from the individual or the criminal background agency to understand the final outcome.

Some states, including Florida, have a specific provision that allows courts to withhold adjudication after the imposition of probation without a conviction. This practice typically requires a first time offender to pay fines and complete a term of probation in exchange for a withholding of adjudication. Accordingly, there is no adjudication of guilt in this situation.

A prospective employee or school volunteer who has had adjudication withheld can properly deny having been convicted of a crime on a job application. Luckily, convictions for certain offenses, such as for child abuse, may not be withheld. Some state and federal governmental agencies do not recognize the concept of adjudication withheld, meaning that they will treat a plea or judgment, even if the report reflects "adjudication withheld," as a conviction. Additionally, some school board administrative regulations now disqualify volunteers due to "prior conduct," regardless of whether there was a conviction.

The Bottom Line

In any of these types of circumstances, if you are going to make a decision regarding an applicant, employee, parent, contractor, or volunteer based on the results of the criminal background search, you need to ensure that you understand what the report actually says and that your decision and process complies with the requirements of both federal law (if you are using an agency) and the state law where the school conducts business.

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this is not a situation where the school should send the student for a medical evaluation without advice from counsel.

But once a student who has attempted or threatened suicide seeks to return to school, the school may require a statement from the student's doctor that indicates that the student is fit to return to school, that the student is able to handle the pressure that being in school presents for the student, and outlines any accommodations the student may require.

Moreover, if teachers observe conduct or performance issues that set off alarms or concerns, they first should talk to school administrators about



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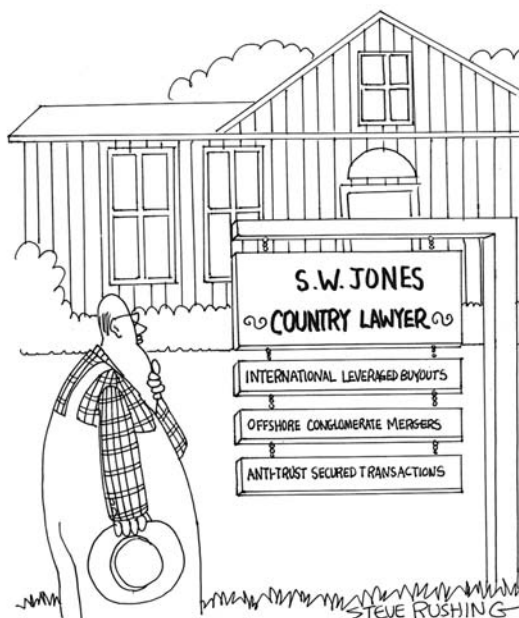
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their concerns and develop a unified approach to addressing the issue with the student's parents. Teachers should not suggest to a parent that their child needs psychological counseling, treatment, etc. on their own initiative or "diagnose" the student with a particular disability or impairment. Parents are not always ready to hear this information from educators and will frequently "punish" those persons who first disclose the concern. For this reason, we recommend that these types of issues be brought to the attention of the guidance counselor and the teacher's department head so that the school can assess the appropriate method for communicating any such concerns to parents.

Conclusion

In summary, although schools want to do what is best for the student, they should be cognizant of the restrictions the ADA and the Rehabilitation Act impose on medical examinations and inquiries. Performance and misconduct issues are just that and should be treated in accordance with the school's disciplinary procedures, not as a psychiatric issue.

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