

The Independent Schools' Guide To CORI Checks In Massachusetts

By: Sara Goldsmith Schwartz¹ and Arabela Thomas²

Schwartz Hannum PC

May 9, 2012

Recent events involving schools and other non-profit organizations have highlighted the need to conduct Criminal Offender Record Information (“CORI”) checks and Sex Offender Registry Information (“SORI”) checks on individuals who have access to children. Many schools and organizations hurried to evaluate their own practices and procedures surrounding background checks after the news broke earlier this year that the New England Conservatory had engaged a videographer, who was a registered sex offender, to videotape the Youth Philharmonic Orchestra’s performances, rehearsals, and classes. While schools were evaluating their practices and procedures surrounding background checks, it became clear that additional guidance was needed regarding CORI checks.

This article is intended to provide independent schools with information and best practices for CORI checks. Part I will describe the CORI requirements generally applicable to independent schools in Massachusetts. Part II will describe the key recent statutory changes to the CORI law. Part III will describe the current best practices for conducting CORI checks, and Part IV will highlight the limitations of CORI checks and additional ways to protect students.

I. Brief Overview Of CORI

Under Massachusetts law, all schools are required to conduct CORI checks for current and prospective employees and volunteers, who may have direct and unmonitored contact with children, including any individuals who regularly provide school-related transportation to children. M.G.L. c. 71, § 38R. Schools must obtain CORI for such employees and volunteers not less than every three (3) years, but can obtain it more frequently during the employees’ and volunteers’ term of service. *See id.* Schools are required to obtain CORI of employees of taxicab companies that have contracted with the schools to provide transportation to students under M.G.L. c. 71, § 7A, the section of state law under which the State Treasurer provides funds to towns for reimbursement of expenses incurred by schools for student transportation, if such individuals may have direct and unmonitored contact with students. M.G.L. c. 6, § 172I. Under Massachusetts law, schools are permitted to obtain CORI for any subcontractor or laborer

¹ Sara Goldsmith Schwartz is the President and Managing Partner of Schwartz Hannum PC, where she represents dozens of independent schools, colleges and universities with respect to the myriad issues that arise each day for school administrators, such as: student and employee disciplinary matters, internal grievances and investigations, risk management, regulatory compliance, and governance matters.

² Arabela Thomas is an associate at Schwartz Hannum PC, where she represents educational institutions in connection with employee investigations, data security compliance and response to data breaches, employment agreements and offer letters, and a variety of other legal matters that arise at educational institutions.

commissioned by an accredited private school to “perform work on school grounds, and who may have direct and unmonitored contact with children.” M.G.L. c. 71, §38R.

Whether a volunteer, employee or a contractor may have “direct and unmonitored contact with children,” can be a difficult question to answer. While there is no case law in Massachusetts defining the phrase, in a 2007 advisory memorandum, the Commissioner of the Massachusetts Department of Education encouraged schools to use the following definition:

"Direct and unmonitored contact with children" means contact with a child when no other CORI cleared employee of the school or district is present. A person having only the potential for incidental unsupervised contact with children in commonly used areas of the school grounds, such as hallways, shall not be considered to have the potential for direct and unmonitored contact with children. These excluded areas do not include bathrooms and other isolated areas (not commonly utilized and separated by sight or sound from other staff) that are accessible to students.³

The advisory memorandum further stated that, as a practical matter, schools may conduct CORI checks on all school employees “if there is the potential that such employees will have individual contact with students.” Moreover, the memorandum advised that “[i]n consultation with their legal counsel, schools must assess their staffing needs and their volunteer and transportation programs in order to determine which positions to check.”

In addition to the CORI requirements discussed above, depending on the school’s operations, it may be subject to additional background check requirements. It is important to carefully assess all background check requirements that may potentially apply to a school’s operations. For example, schools with programs licensed and/or funded by the Department of Early Education and Care (the “EEC”) are required to perform a CORI check and a DSS Background Record Check on all job and volunteer applicants for positions with potential for unsupervised contact with children, and review information obtained as a result of such checks using the standards established by the EEC. 606 CMR 14.01 *et seq.* Similarly, if a school operates a recreational camp for children, it must obtain all available CORI and juvenile data for all employees and volunteers prior to their employment or volunteer service, and if a prospective staff member is from another state or country, where practicable, the school operating the camp must also obtain from the applicant’s country or state criminal information system, local chief of police, or other local authority, a criminal record check or its recognized equivalent. M.G.L. c. 6, § 172G; 105 CMR 430.090.⁴

³ Advisory On CORI Law: Mandatory Criminal Record (CORI) Checks, May 7, 2007, *available at* <http://www.doe.mass.edu/lawsregs/advisory/cori.html>.

⁴ For more information regarding the background check requirements for recreational camps, please see 105 CMR 430.090, available at <http://www.mass.gov/eohhs/docs/dph/regs/105cmr430.rtf>.

While the focus of this article is CORI checks, we also recommend that schools regularly conduct SORI checks on all prospective and current employees, volunteers and contractors. The Sex Offender Registry Board (“SORB”) only reveals detailed SORI on its public website regarding sex offenders who are classified as “high risk” or “Level 3.” Additional SORI (including information regarding Level 2 offenders) is available by visiting the local police departments or by submitting a written request to the SORB. *See* M.G.L. c. 6, § 178J, 803 CMR 1.28-1.30. Moreover, the Dru Sjodin National Sex Offender Public Website (<http://www.nsopw.gov/>) allows users to submit a single query to search the information made publicly available by the sex offender registry boards and agencies from across the country. Please note, however, that the information available on the Dru Sjodin National Sex Offender Public Website is limited to the information disclosed online by the relevant state entities and varies in the level of detail.

II. The CORI Reform Law

a. Recent Statutory Changes

In 2010, Governor Patrick signed into law Chapter 256 of the Acts of 2010 (the “CORI Reform Law”). A portion of the CORI Reform Law prohibiting most employers from inquiring about criminal history on initial job applications went into effect on November 4, 2010⁵, but the vast majority of the statutory changes went into effect on May 4, 2012. The following are the key recent statutory changes that affect schools:

- Requirement To Provide Criminal Record. Before (i) questioning an applicant regarding his or her criminal history or (ii) making an adverse decision based on an applicant’s criminal history, in connection with any decision regarding employment, volunteer opportunities, housing or licensing, a school must provide the applicant with his or her criminal history record, regardless of the source of such record. M.G.L. c. 6, § 172(c).
- Criminal Background Check Policy. Schools that annually conduct five (5) or more criminal background investigations per year must maintain a written CORI policy. The policy must, at a minimum, require schools to: (i) notify any applicant of the potential adverse decision based on CORI; (ii) provide a

⁵ Employers in Massachusetts may request certain information about an applicant’s criminal history on the initial job application, only if (i) the applicant is applying for a position for which any federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction for a criminal offense; or (ii) the employer or an affiliate of the employer is subject to an obligation imposed by federal or state law or regulation not to employ individuals in one or more positions who have been convicted of certain offenses. M.G.L. c. 151B, § 4(9½). For example, programs licensed and/or funded by the Department of Early Education and Care are still permitted to, and in fact, are required to, collect certain information regarding applicants’ criminal history on applications for employment. 606 CMR 14.06(1). Moreover, applicants to such programs are subject to disqualification requirements established by the Department of Early Education and Care. *Id.* at 14.10. Please contact Sara Goldsmith Schwartz for more information regarding compliance options with respect to job applications and criminal inquiries.

copy of CORI and the policy to the applicant; and (iii) provide information concerning the process for correcting a criminal record. M.G.L. c. 6, § 171A.

- Method Of Accessing CORI Records. Schools should be able to obtain CORI records through a special website known as “iCORI,” which was developed by the Department of Criminal Justice Information Services (the “DCJIS”) and was unveiled on May 7, 2012. M.G.L. c. 6, § 172(a).
- Acknowledgement Form. Schools must obtain a signed acknowledgement form from the subject of the criminal history check, authorizing the school to obtain and examine the individual’s CORI, and such a form must be retained for a minimum of one year following the date of the CORI request. M.G.L. c. 6, § 172(c).
- Secondary Dissemination Log. Schools may share CORI results only in the following circumstances: upon request by the subject of the CORI check, with certain government entities, and with those individuals within the school who have a “need to know” the contents of the CORI to protect children. Furthermore, schools must maintain a secondary dissemination log for a period of one year following the dissemination of a subject’s CORI. The secondary dissemination log must include the following information: (i) the subject’s name; (ii) the subject’s date of birth; (iii) date of the dissemination; (iv) name of the person to whom it was disseminated; and (v) the reason for the dissemination. The secondary dissemination log may be audited by the DCJIS. M.G.L. c. 6, § 172(f).
- Record Retention. Schools may not maintain for more than 7 years a copy, electronic or otherwise, of a CORI obtained from DCJIS, to be calculated as follows: (i) from the last date of employment, volunteer service or residency, or (ii) from the date of the final decision of the school regarding the applicant. *Id.*

The CORI Reform Law gives the DCJIS the authority to conduct audits to ensure that employers, including schools, are maintaining acknowledgement forms and secondary dissemination logs in accordance with the statute. Schools that unlawfully obtain or disseminate CORI records are subject to fines of up to \$50,000 for each violation. Individuals, including human resources professionals and business officers, are personally subject to fines of up to \$5,000, and potential imprisonment of up to one year, for certain violations of the CORI statute.

b. Proposed CORI Regulations

In addition to the statutory changes which went into effect on May 4, 2012, the DCJIS, the agency responsible for administering and enforcing the CORI law in Massachusetts, recently issued proposed regulations regarding the CORI Reform Law.

The DCJIS accepted written comments regarding the proposed regulations until April 10, 2012 and is expected to issue final regulations in the near future.

If adopted, the proposed regulations would impose a number of significant obligations on schools. For example, the proposed regulations specify that before taking an adverse action on an application for employment based on the applicant's CORI, an employer (including a school) shall:

- (1) comply with applicable federal and state laws and regulations;
- (2) notify the *employment applicant* in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse employment action;
- (3) provide a copy of the *employment applicant's* CORI to the *employment applicant*;
- (4) provide a copy of the employer's CORI Policy, if applicable;
- (5) identify the information in the *employment applicant's* CORI that is the basis for the potential adverse action;
- (6) provide the *employment applicant* with the opportunity to dispute the accuracy of the information contained in the CORI;
- (7) provide the *employment applicant* with a copy of *DCJIS* information regarding the process for correcting CORI; and
- (8) document all steps taken to comply with these requirements.

Proposed 803 CMR 2.17 (*emphasis provided in the original*).

The proposed regulations also contain nearly identical requirements for those employers that obtain criminal history information from a source other than DCJIS, and contain detailed requirements that employers must comply with if using consumer reporting agencies to request CORI for an applicant. Proposed 803 CMR 2.18, 2.21. While the proposed regulations contain a number of significant new requirements, they have not been finalized yet and may be revised based on the written comments submitted to DCJIS.⁶

IV. Current Best Practices For CORI Checks By Independent Schools

First, we recommend that all schools assess, with the assistance of legal counsel, all of the background check requirements to which they may be subject, and implement a formal, written background check policy in compliance with the CORI Reform Law.

Second, we recommend that schools perform CORI checks on all prospective and current permanent and temporary employees and volunteers who *may* have direct and unmonitored contact with children. If it is unclear as to whether an employee or a volunteer may have direct and unmonitored contact with children, we recommend consulting with counsel to assess the potential applicability of the law with respect to the employee or volunteer. If there is a likelihood that an employee or a volunteer may have unsupervised contact with children in

⁶ If you would like to receive our e-alert when the final regulations are issued by the DCJIS, please e-mail Sara Goldsmith Schwartz at schwartz@shpclaw.com.

isolated areas such as bathrooms or locker rooms, we highly recommend checking the employee's and/or volunteer's CORI. Similarly, if parent volunteers are being used as chaperones or drivers for field or athletic trips, we recommend conducting CORI checks on all such parent volunteers, because the potential for unmonitored contact in those situations is increased.

While schools are generally only required to conduct CORI checks every three (3) years on employees and volunteers, we recommend conducting them on an annual basis to ensure that the school has current criminal record information for all employees and volunteers.

Third, we recommend that schools: (1) create a list of all of the contractors that perform work on school grounds, and (2) carefully assess the likelihood of direct and unmonitored contact between such contractors and students, and the frequency with which such individuals perform work on campus. We highly recommend performing an initial CORI check on all contractors and sub-contractors performing work on school grounds that *may* have direct and unmonitored contact with students, and then periodically rechecking CORI for those contractors that continue to perform work on school grounds.

If conducting a CORI check on all such contractors is not feasible due to budgetary or other constraints, we highly recommend taking practical steps to limit the potential for unmonitored contact between students and contractors. Examples of potential practical steps could include: ensuring that all contractors are required to register as visitors when performing work at the school; to the extent possible, restricting contractors to designated areas of the campus where they would not have access to students; shifting hours of work by contractors so that the majority of the work is performed when students are not at school; and requiring contractors to use designated entrances.

Practical steps for preventing unmonitored contact between students and contractors may be particularly effective with certain types of contractors who only occasionally visit campus and the likelihood of them having direct and unmonitored contact with students is fairly low. For example, outside speakers visiting the school for a single day who are accompanied around the school by a faculty or staff member who has been CORI checked, and outside contractors such as plumbers, painters, milk or food delivery drivers, landscapers, construction workers and pest control personnel whose presence on campus might be limited to certain times and certain designated areas.

In all written agreements with contractors, we recommend requiring contractors to agree that any individuals who will come onto the school's campus have successfully and satisfactorily completed CORI and SORI checks. It is important to note that relying on contractors to complete CORI and SORI checks on their employees and subcontractors is not the preferred way of conducting CORI and SORI checks, because in most instances, contractors will not have access to the same level of detail about an individual's CORI as a school would, and contractors may not use the school's criteria when assessing information obtained through CORI and SORI checks. Relying on CORI and SORI checks performed by contractors might be effective for certain groups of contractors, such as outside organizations primarily engaged in providing

activities or programs to children, because such organizations are required to obtain CORI for all employees, volunteers, vendors and contractors, and are more likely to use stringent criteria for screening out individuals with a dangerous past. An example of such contractors are outside sports officials and referees who may have already had their CORI and SORI checked, if they are employed by or serving as a volunteer or contractor for a youth organization.

While having well-drafted agreements with contractors and taking practical steps to limit the potential for unmonitored contact between a contractor and a student may help schools reduce the number of CORI checks they have to perform, we highly recommend regularly conducting CORI checks on those contractors who have direct and unmonitored contact with children. Such contractors include outside professionals and teachers who come to campus for group sessions with students without the presence of school staff, even if such lessons are for short periods of time. Examples: SAT instructors, driving instructors, and drug and alcohol awareness educators. Similarly, certain categories of contractors have such a high likelihood of direct and unmonitored contact with children, that we highly recommend conducting CORI checks on them. Examples of such contractors include: outside security personnel, outside cleaning staff, and outside kitchen and cafeteria workers.

Fourth, we recommend obtaining CORI of employees of taxicab companies that have contracted with the school to provide transportation to students under M.G.L. c. 71, § 7A, if such employees may have direct and unmonitored contact with students. Even if the school does not receive state or town funding for student transportation, we generally recommend conducting CORI checks on all individuals who provide transportation to students, because the likelihood of direct and unmonitored contact between such individuals and students is so high.

Finally, we recommend that all employment, volunteer and housing decisions made on the basis of CORI are made in a consistent, non-discriminatory manner. In this regard, we recommend that, in consultation with counsel, schools create a formal policy for assessing information obtained through CORI and other sources. Such a policy should, among other topics, address the list of crimes with respect to which a conviction will result in mandatory disqualification, presumptive disqualification, and discretionary disqualification from a position at the school. The school's formal policy for assessing information obtained through CORI and other sources should be consistent with the guidance recently issued by the Equal Employment Opportunity Commission.⁷ Schwartz Hannum PC offers background check compliance packages which include the CORI policy and guidelines for assessing the CORI and SORI that schools receive.

V. Limitations Of CORI Checks

The CORI records received from DCJIS are limited to criminal record information from Massachusetts. Independent schools in Massachusetts are generally not required to obtain criminal history information from other states or countries. However, obtaining criminal record

⁷ EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, April 25, 2012, *available at*: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

information from other states and/or countries can be essential to ensuring that the school's employees, volunteers and contractors are not dangerous criminals. As a result, independent schools may want to consider engaging a reputable consumer reporting agency to conduct national background checks on prospective and current employees, volunteers and contractors. If relying on a consumer reporting agency to conduct national background checks, it is important to ensure that the school or the agency is still checking CORI and obtaining all of the CORI information made available to schools by DCJIS, and not just the CORI information that may be available to the public. Furthermore, schools obtaining information through consumer reporting agencies, should ensure that they are in compliance with the federal Fair Credit Reporting Act ("FCRA") and applicable state laws.

Schools that do not want to rely on consumer reporting agencies, due to cost or other considerations, can assess whether prospective or current employees, volunteers, and contractors have lived or worked out of state or in another country, and request criminal history information from the designated agency or department responsible for criminal records in that particular location.⁸ Such checks may not be as comprehensive as checks conducted by consumer reporting agencies. For instance, if a school is unaware of all of the locations in which the prospective or current employee, volunteer or contractor has lived or worked, it is highly unlikely that the school will obtain the criminal history information from the relevant agencies or departments in those locations.

* * * * *

For an assessment of criminal background check requirements applicable to your school, please e-mail Sara Goldsmith Schwartz at schwartz@shpclaw.com.

⁸ The contact information for other states' agencies and/or departments responsible for criminal records may be available at: <http://www.mass.gov/eopss/crime-prev-personal-sfty/bkgd-check/cori/request-rec/requesting-out-of-state-criminal-records.html>.