

**LETTER OPINION
2008-L-06**

May 12, 2008

Dr. Wayne G. Sanstead
Superintendent of Public Instruction
600 East Boulevard Avenue
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your letter inquiring whether N.D.C.C. § 12-60-24 requires that public and nonpublic schools request criminal history record checks; allows criminal history record checks on current as well as prospective school employees; and allows criminal history record checks on school volunteers, student teachers and other non-paid positions. For the reasons indicated below, it is my opinion that section 12-60-24 permits, but does not require, public and nonpublic schools to request certain criminal history record checks; that criminal history record checks may be requested for both current and prospective employees; and that criminal history record checks may be requested for persons in nonpaid positions who have unsupervised contact with students.

ANALYSIS

Government agencies are authorized to request the Bureau of Criminal Investigation ("BCI") to provide a statewide and nationwide criminal history record check, including any response from the Federal Bureau of Investigation ("FBI") that may lawfully be provided, if authority for the request is provided under N.D.C.C. § 12-60-24(2). Paragraphs¹ x and y of section 12-60-24(2) address public and nonpublic schools:

2. The bureau of criminal investigation shall provide to each agency, official, or entity listed in this subsection who has requested a statewide and nationwide criminal history record check, the response of the federal bureau of investigation and any statewide criminal history record information that may lawfully be made available under this chapter:

¹ These provisions are subdivisions according to the Legislative Council's drafting manual, but they have been referred to as paragraphs in legislative discussions and in discussions with agencies during implementation. Therefore, for convenience I will refer to them as paragraphs.

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- x. The governing board of a public school or, for a nonpublic school, the superintendent of public instruction, for employees designated by the governing board or nonpublic school. The governing board or the nonpublic school is responsible for paying the costs associated with obtaining a background check.
 - y. The governing board of a public school or, for a nonpublic school, the superintendent of public instruction, for a final applicant seeking employment with the school or otherwise providing services to the school, if that individual has unsupervised contact with the students. For purposes of this subdivision, "unsupervised contact" with students means being in proximity to one or more students, on school grounds or at school functions, outside the presence of an individual who has been subject to a criminal background check. The governing board or the nonpublic school is responsible for paying the costs associated with obtaining a background check.²

Your first question is whether schools are required to request criminal history background checks under section 12-60-24. Paragraphs x and y must be read together with the initial sentence in subsection 2 of section 12-60-24. That sentence requires the BCI to provide statewide and nationwide criminal history background checks to each of the listed governmental agencies, officials or entities that request the checks. Each of the listed paragraphs sets out the entities that may make this request, and subsequently receive the statewide and nationwide criminal history records. Many of the listed paragraphs also limit the circumstances under which the request is allowed to be made. Further, paragraph x does not mandate that the schools specified within the statute request a criminal history record check. It explicitly leaves the decision on which employee to designate for such a request within the school's discretion. Therefore, it is my opinion that N.D.C.C. § 12-60-24 permits, but does not require, public and nonpublic schools to request criminal history record checks.

There is a latent ambiguity, however, when paragraphs x and y are read together with N.D.C.C. § 15.1-06-06(5).³ Each public and nonpublic school must be approved by the Superintendent of Public Instruction under N.D.C.C. § 15.1-06-06. The Superintendent

² N.D.C.C. § 12-60-24(2)(x), (y).

³ "[S]tatutes that are clear and unambiguous when read separately may contain a latent ambiguity when read together and applied to a particular set of facts." Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992).

may not approve a school unless it has “conducted⁴ all criminal history record checks required by section 12-60-24.”⁵ When section 15.1-06-06 is read alone, it implies that criminal history record checks are “required” by paragraphs x and y.⁶ But when paragraphs x and y of section 12-60-24(2) are read alone, they do not require that a school request criminal history background checks. They only provide authorization for a school to make a request for the checks to be performed. When read together, either statute must have something added to it, or taken out of it, to fit with the other statute. “A practical reading of the ‘letter of the law’ leads to the absurd conclusion that each of the two [laws] . . . cancels out the other.”⁷

The primary purpose of statutory construction is to ascertain the Legislature’s intent.⁸ When statutes are ambiguous, we may consider extrinsic aids or evidence to determine legislative intent.⁹ “That evidence may include legislative history, the object of the statute and the consequences of a particular construction.”¹⁰

The legislative history contains a general discussion, over the course of several committee meetings, of whether agencies or entities should be mandated to request criminal history background checks. This history does not contain any clear, unequivocal statement that may fairly and conclusively demonstrate an intent to compel schools to request background checks.¹¹ Instead, there were statements that could support either that record checks were mandatory or were not going to be mandated.

It is, however, clear that S.B. No. 2260, 2007 N.D. Leg., the source of the ambiguous language, required the listed agencies to request criminal history record checks. This mandatory language was removed from the bill. As introduced, the bill provided:

⁴ A school is not authorized to conduct a criminal history record check, but may request that one be conducted by the Bureau of Criminal Investigation. See N.D.C.C. § 12-60-24.

⁵ N.D.C.C. § 15.1-06-06(5).

⁶ The word “required” is a mandatory term, meaning “[t]o have as a requisite; need . . . [t]o call for as fitting; demand . . . [t]o impose an obligation on; compel [or,] . . . [t]o command, order.” The American Heritage Dictionary 1050 (2d coll. ed. 1991).

⁷ State ex rel. Moug v. N.D. Auto. Assigned Claims Plan, 322 N.W.2d 245, 247 (N.D. 1982).

⁸ Leet v. City of Minot, 721 N.W.2d 398, 404 (N.D. 2006).

⁹ N.D.C.C. § 1-02-39.

¹⁰ Kroh, 487 N.W.2d at 308.

¹¹ See Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993) (“Random statements by legislative committee members, while possibly useful if they are consistent with the statutory language and other legislative history, are of little value in fixing legislative intent.”).

The agencies, officials, and entities named in subsection 2 shall require each applicant, employee, or petitioner for adoption or name change to consent to a statewide and nationwide criminal history record check¹²

Amendments adopted by the House Appropriations Committee¹³ and confirmed by the conference committee¹⁴ changed the above language to read:

~~The agencies and entities named in subsection 2 shall require each~~ Each applicant, employee, or petitioner for adoption ~~to~~ or name change who is subject to a criminal history record check under subsection 2 shall consent to a statewide and nationwide criminal history record check

The removal of clear mandatory language implies that the Legislature did not intend that the entities listed in subsection 2 would be required to request criminal history record checks.

Paragraphs x and y were passed in the same bill as the language requiring a school to obtain criminal history background checks in N.D.C.C. § 15.1-06-06(5).¹⁵ Section 15.1-06-06(5) prohibits the Superintendent from approving a school unless the school has requested all criminal history background checks “required by section 12-60-24.” But, as explained above, section 12-60-24 only contains a grant of permission for schools to request background checks and subsequently receive the criminal history records, and is not a requirement. It can therefore be argued that a school which does not request any background checks will not be in violation of N.D.C.C. § 15.1-06-06(5) because no background checks are “required by section 12-60-24.” A court could consider that the Legislature would not have intended the consequence that a school would be disapproved based on these equivocal and ambiguous statutes. Therefore, it is my opinion that a court would not uphold a determination by the Superintendent to disapprove a school based upon a failure to request background checks that are authorized, but not required, by section 12-60-24.

This inconsistency between these statutes would best be clarified by legislative action. In the meantime, it is up to local school officials whether requiring criminal background checks best serves their students.

¹² S.B. No. 2260, § 4, as introduced.

¹³ Proposed Amendments to Senate Bill 2260 Adopted by the House Appropriations Committee, March 21, 2007.

¹⁴ Senate Bill No. 2260 with Conference Committee Amendments.

¹⁵ S.B. 2260, 2007 N.D. Sess. Laws ch. 115, §§ 4, 5. Language that became paragraphs x and y was adopted by the same committee amendment as the language in section 15.1-06-06(5). See Proposed Amendments to Senate Bill 2260 Adopted by the House Judiciary Committee, March 12, 2007.

You next ask whether section 12-60-24 permits criminal history record checks to be requested for “existing or current employees,” or if it is limited to prospective employees only. Paragraph x specifies that “[t]he governing board of a public school, or, for a nonpublic school, the superintendent of public instruction,” is authorized to request that criminal history record checks be conducted on “employees designated by the governing board or nonpublic school.”¹⁶ The plain language of this statute is clear. The school is permitted to request statewide and nationwide criminal history record checks on individuals who are employees of the school as of August 1, 2007, the effective date of this legislation, and thereafter. There is no relationship to date of hiring,¹⁷ only to status of employment as of August 1, 2007, and thereafter.¹⁸ The plain language of paragraph y applies to “a final applicant seeking employment with the school,” meaning prospective employees. Thus, by the plain language of these two subdivisions, current and prospective employees may be required by the school to submit to nationwide and statewide criminal history record checks.

Finally, you ask whether “either Paragraph X or Y refer to school volunteers or student teachers or other non-paid positions?” Paragraph x refers to “employees designated by the governing board or nonpublic school.” (Emphasis added.) The word “employee” is defined as meaning “[a] person who works for another in return for financial or other compensation.”¹⁹ The plain language of paragraph x precludes its application to non-paid positions. But paragraph y states:

[A] final applicant seeking employment with the school or otherwise providing services to the school, if that individual has unsupervised contact with the students. For purposes of this subdivision, “unsupervised contact” with students means being in proximity to one or more students, on school grounds or at school functions, outside the presence of an individual who has been subject to a criminal background check.²⁰

The wording “final applicant seeking employment with the school or otherwise providing services to the school” is vague in that the first part clearly addresses a prospective employee, but the second part seemingly addresses any other “final applicant” providing

¹⁶ N.D.C.C. § 12-60-24(2)(x).

¹⁷ For example, if the Legislature had intended to prevent persons already employed from having to undergo background checks, then language to grandfather them would have been used, such as that regarding PERS employees in N.D.C.C. § 12-60-24(2)(j).

¹⁸ A law is not retroactive simply because it draws upon antecedent facts for its operation. Matter of Estate of Thompson, 586 N.W.2d 847, 852 (N.D. 1998).

¹⁹ The American Heritage Dictionary 450 (2d coll. ed. 1991).

²⁰ N.D.C.C. § 12-60-24(2)(y) (Supp. 2007).

services to the school, but not, apparently, as an employee of the school.²¹ This second part applies to non-paid positions, but the wording implies that these non-paid positions are subject to an application process in which individuals become “final applicants” for the non-paid position.

As noted above, the primary purpose of statutory construction is to ascertain the Legislature’s intent.²² And if a statute is ambiguous, the statutory rules of construction permit the use of extraneous sources, including the legislative history, to determine legislative intent.²³ The language in S.B. No. 2260, 2007 N.D. Leg., as introduced, and which is now codified as paragraph y, initially read “employees or individuals seeking employment with the district, student teachers, or individuals otherwise providing services to the district, if those employees or individuals have unsupervised contact with students, . . .” The Legislature changed the language from “individuals seeking employment” to “final applicant for employment” in order to limit the number of persons who could be subjected to criminal history record checks under this law to those who were in serious contention for the job, rather than the hiring school incurring costs for checks on all applicants.²⁴ The Legislature further restricted the number of persons who could be subjected to a check under this law to those who would have “unsupervised contact with students.”

Clear statements in the legislative record show the specific intent for the phrase “a final applicant seeking employment. . . or otherwise providing services to the school, . . .” was to limit its scope only to persons who were to be approved for unsupervised contact with students instead of all persons who applied.²⁵ “Final applicant” was not defined, but even if this term relates to the persons otherwise providing services, there is no requirement for any specific application process. A simple request to volunteer and permission from a person responsible on behalf of the school would suffice to make the person a “final

²¹ The word “otherwise” means to do so in a different manner, another way, or contrarily. Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245, 254 (N.D. 1960). Therefore, otherwise providing services to the school means, in this context, other than as an employee.

²² Leet, 721 N.W.2d at 404.

²³ N.D.C.C. § 1-02-39; Leet, 721 N.W.2d at 404.

²⁴ Hearing on S.B. 2260 Before the House Comm. on Appropriations, 2007 N.D. Leg. (Mar. 21) (Testimony of Rep. Carlson and Rep. Glassheim) (Representative Glassheim stated “each applicant, for a specific position, would be required to get a check and . . . I wanted to narrow it down to finalists so that . . . those . . . finalists would have to receive the background check before being hired.”).

²⁵ The statements concerning this issue were directly related to an amendment made to the bill, which increases reliance upon this legislative history in comparison to less reliable general discussions. See Little v. Tracy, 497 N.W.2d at 705.

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applicant.” Thus, it is my opinion that paragraph y is properly applied to volunteers who are expected to have unsupervised contact with the students.

Therefore, it is my opinion that N.D.C.C. § 12-60-24 permits, but does not require, public and nonpublic schools to request criminal history background checks; that it authorizes public schools and, for nonpublic schools, the Superintendent of the Department of Public Instruction, to request criminal history record checks on both current and prospective employees; and that it permits public and nonpublic schools to request criminal history record checks on volunteers or other non-paid positions who have unsupervised contact with students.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁶

²⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).