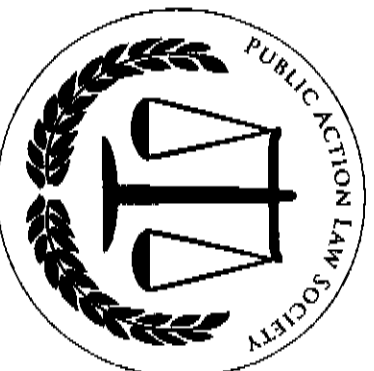


University of Memphis Cecil C. Humphreys School of Law
Alternative Spring Break 2011



Background Checks for School Volunteers: Compliance and Best Practices

prepared for Literacy Mid-South

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SCOPE OF THE PROJECT

Literacy Mid-South (“LMS”) asked our Alternative Spring Break Non-Profit Advocacy team to examine best practices in the area of screening and selecting volunteers for its Academy Tutoring Project. Primarily, LMS wished for information about the use of fingerprint background checks, handling of the information received in those reports, evaluative criteria for assessing those volunteers with potentially questionable indications in their background checks, and best practices in handling the review and rejection process with regard to volunteer applications and background check information.

Because as law students we are only able to give legal information, not legal advice, all of the information contained herein, including appendices, handouts, and sample forms, will have to be reviewed by LMS attorneys prior to implementation of any recommendation or suggestion contained in therein. The following report should not be relied upon without independent review by an attorney.

RESEARCH AND PROPOSALS

1. Fair Credit Reporting Act

The Fair Credit Reporting Act (“FCRA”), a federal statute, provides some guidelines on who can obtain a criminal background check and for what purposes, as well as restrictions on how the information can be used.

Consumer reporting agencies include, by definition, governmental agencies which provide background checks on individuals.¹ Employers are permitted to use consumer reporting

¹ See 15 U.S.C.A. §1681a (b) (including governmental agencies within definition of “person” for purposes of FCRA) and (f) (defining consumer reporting agencies).

agencies to seek background checks as part of the employment, hiring and retention process.² Even though the Act does not make entirely clear whether “employment” includes volunteer workers for a nonprofit,³ examining compliance with FCRA is consistent with best practices.

§ 1681m of the FCRA provides the requirements for an employer who takes adverse action against an applicant based on information contained in the background check. Adverse action includes not offering a position for which the applicant was considered. The applicant must be provided with notice of the adverse action.⁴ Additionally, organizations must provide the applicant with a legal notice that gives the contact information for the consumer reporting agency and informs the applicant that the agency did not make the hiring decision and cannot provide the specific reasons why the applicant was rejected.⁵ The law only requires that an applicant be provided with notice of the applicant’s ability to receive a free copy of the report from the agency within sixty (60) days, along with notice of the right to dispute the contents with the agency.⁶ The employer is under no obligation to provide a copy of the report directly to the applicant, although such disclosure to the applicant following adverse action appears to be permitted by FCRA.⁷ Because employers must certify the purposes for which a report will be

² FCRA does not define “employment” or provide any guidance on whether “employment” for purposes of the Act must be paid employment, or includes volunteers. The later rules of decision have not interpreted this question.

³ “Employment” appears to include unpaid employment as a volunteer, inasmuch as related state and federal laws contemplate that background checks will be available to volunteer agencies seeking to screen volunteer workers without conflicting with FCRA. See, e.g., TENN. CODE ANN. § 37-1-414(a)(2) (permitting nonprofits hiring volunteers to require, among other options, a FBI/TBI background check).

⁴ Notice may be oral, written, or electronic. 15 U.S.C.A. §1361m (a)(1).

⁵ 15 U.S.C.A. § 1681 m (a)(2). This subsection provides the precise language LMS may wish to use on their forms and is appended hereto as an Appendix. This notification may also be made by Metro City Schools as part of their requests for the background checks used by LMS.

⁶ 15 U.S.C.A. § 1681m (a)(3).

⁷ 15 U.S.C.A. § 1681e (c).

used when requesting the report from the consumer reporting agency, and certify that the report will be used for no other purpose, sharing the report with third parties is not advised.⁸ Employers are under a duty to maintain reasonable procedures to ensure compliance with FCRA requirements.⁹

The TBI takes a position which appears to contradict the FCRA with respect to employers disclosing reports or the contents of reports to applicants. In a phone interview with Ms. Bobby Jackovitch at the Tennessee Bureau of Investigation, Ms. Jackovitch stated that employers *should not* disclose the contents of the report to the applicant, nor provide them a copy. Ms. Jackovitch stated that the only disclosure (other than the legally required notices of how to dispute the contents of the report) which should be made by the employer to the applicant is what charge the applicant is being rejected for, if rejected. According to Jackovitch, an employer should not “read the rap sheet” of the applicant to the applicant. Upon request, Ms. Jackovitch did not provide specific Tennessee law supporting this policy, which appears to directly contradict the discretionary provisions of FCRA. Ms. Jackovitch can be reached at the Nashville offices of the Tennessee Bureau of Investigation at (615) 744-4274. It appears that other community organizations such as Memphis City Schools and CASA comply with the TBI’s policy against sharing these reports with applicants or third parties.

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§ 1681e (a). This provision exists to ensure that reports are only used for permissible purposes under the Act. While there might be a way to develop a procedure such that LMS notifies the agency of potential third party disclosure relative to volunteer employment, and verifies that the third party requesting such information from LMS is doing so for permissible employment screening purposes under the Act, this is a complicated area of potential liability for LMS. A better practice to consider might be to encourage volunteers who need checks for two different employers to request their own free copy within sixty days, and bring it to LMS or to the other employer sealed in the government envelope in which it is mailed, rather than paying for a second check. However, this potential avenue would need to be more thoroughly

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1681m (c) (“A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.”)

2. What kind of background check is needed?

From our research, we have determined that Literacy Mid-South likely falls under the "youth service institution" standard of screening requirements, which is a separate standard than that mandated for Memphis City Schools. However, in accordance with best practices and to conform with MCS policy, Literacy Mid-South volunteers must submit to background checks including fingerprinting because they are present on school property and are working in close proximity to children.

Memphis City Schools are required by state law to conduct federal background checks with fingerprinting.¹⁰ Local boards of education and any child care program must require any person applying for a position requiring proximity to school children to (1) agree to the release of all investigative records for verification of application data and (2) supply a fingerprint sample and submit to a background check.¹¹ State law requires that a local board of education or "any child care program" conduct this process for anyone seeking "teaching or child care positions." Literacy Mid-South does not appear to meet the definition of "child care program" under the Tennessee statute,¹² distinguishing it from the legal requirements imposed on Memphis City Schools.

¹⁰ TENN. CODE ANN. § 49-5-413(a)

¹¹ See TENN. CODE ANN. § 49-5-413(a)

¹² "Child care" is defined as "the provision of supervision, protection and, at a minimum, the basic needs of a child or children" for three or more hours a day, but less than twenty-four hours a day. A "child care program" is any place or facility operated by a child care provider. We have established that the tutors at Literacy Mid-South spend roughly an hour a day with the children they are teaching. By this criterion, Literacy Mid-South does not appear to meet the standards of a "child care program" under Tennessee law. TENN. CODE ANN. § 49-1-1102(2)

The standard that most likely applies to an organization like LMS is that of a charitable or educational youth service institution. LMS (as a charitable and educational youth service institution) may require a person who applies to work with children as a volunteer to do "one or more" of the following:

- (1) agree to the release of investigative records for purposes of verifying the disclosure of any criminal violations disclosed on an application,
- (2) supply fingerprint samples and submit to a background check by both the Tennessee Bureau of Investigation and the Federal Bureau of Investigation, and/or
- (3) attend "a comprehensive youth protection training program that includes adult training on recognition, disclosure, reporting and prevention of abuse" and submit references and records related to their character, education, and employment history.¹³

Tennessee law appears to afford LMS the discretion to require a volunteer do any or all of the three options listed above as the minimum legal requirement for youth-service volunteers. Nonprofit organizations not working as child care agencies, instead of conducting background checks and fingerprint screens, may elect to instead put volunteers through a youth training program before working with students or agree to the release of investigative records in order to comply with the legal standard for youth-service volunteers working with children.

The Tennessee Bureau of Investigation also recommends that volunteers working with children be fingerprinted before being permitted to volunteer, in order to comply with the Volunteers for Children Act. The Volunteers for Children Act allows organizations and

¹³ TENN. CODE ANN. § 37-1-414(a)

businesses dealing with children to use national fingerprint-based criminal history checks to screen volunteers working with children.¹⁴

Literacy Mid-South is sending its volunteers to a school, to work in close proximity to children. The charter schools working with the Academy Tutoring Project are governed by the local board of education. Under Tennessee law, a local board of education is obligated to order a fingerprint-based background check on any person seeking a position "requiring proximity to school children".¹⁵ This includes Literacy Mid-South, whose volunteers enter school property in order to work one-on-one with the students. Memphis City Schools, in setting up best practices for its in-school volunteers, classifies people doing the same type of work done by LMS volunteers as "unmonitored volunteers," who require the highest level of screening, including the fingerprint background check.¹⁶ Further, LMS' insurer has advised LMS that they find it easier to insure the organization when its volunteer screening matches the practices set forth by Memphis City Schools. As Memphis City School has defined volunteers doing this type of work as volunteers who must be fingerprinted as well as having a criminal background check, and best practices appear to be to conduct the fingerprint background check, LMS may wish to continue using this rigorous background check procedure to remain compliant with the wishes of its insurer and community standards among nonprofits working with children in schools.

Because LMS expressed to us that the cost factor of using this process influences the effectiveness and scope of this program, in the "Further Questions" section following this report,

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Volunteers for Children Act, Public Law 105-251

¹⁵

TENN. CODE ANN. § 49-5-413

¹⁶ See Memphis City Schools Policy No. 4.501 ("School Volunteers") at p. 4 (listing examples of unmonitored volunteers as "one-to-one tutors and/or mentors at school" and listing the requirement of background checks including fingerprinting.)

we have made some suggestions for further consideration regarding funding for the fingerprint background checks.

3. What are the criteria for rejection of a volunteer based on a criminal background check?

Federal and state law prescribe minimum legal requirements for exclusion from access to children for sexual offenses and failure to disclose prior offenses. Federal law allows states to develop their own criteria for when prospective volunteers will be prohibited from contact with children.¹⁷ In Tennessee, persons applying for any "position requiring proximity to children" must be disqualified if their background check indicates that they have been convicted of any sexual offense.¹⁸ Sexual offenses include sexual battery, rape, prostitution, sexual exploitation of a minor, false imprisonment of a minor, kidnapping of a minor, indecent exposure, solicitation of a minor, attempt of any sexual offense, and aiding in the commission by another of any sexual offense.¹⁹

In addition, any person who knowingly fails to disclose on their application any misdemeanor or felony committed in any state will be automatically disqualified from being accepted, if their background check shows a conviction that they failed to disclose.²⁰ **Such knowing failure to disclose is also a Class A misdemeanor that must be reported to the district attorney's office.**²¹

¹⁷

See 42 U.S.C.A. § 5119a(a)(1) (National Child Protection Act).

¹⁸ TENN. CODE ANN. § 49-5-413(d)(3)(B). Investigation of applicants for teaching or child care positions.

¹⁹ TENN. CODE ANN. § 40-39-202(2)(A)(i)-(xvii). Definitions.

²⁰ TENN. CODE ANN. § 49-5-406(a)(2)(A). Employment; applications; crimes and offenses.

²¹ *Id.*

Outside of these specific offenses, there are no further statutory requirements for the exclusion of volunteers from positions requiring proximity to children. A local board of education in Tennessee is obligated to exclude sex offenders and anyone who fails to disclose a conviction on their application from positions involving contact with school children, but any restrictions beyond that are up to the discretion of the school board and affiliated youth-service organizations.

Discretionary bases for exclusion from access to children are thus a question of best practices. In the context of a set of laws giving wide authority to school boards to accept or exclude volunteer applicants at their discretion, Literacy Mid-South should coordinate their rejection criteria with the legal requirements imposed on Memphis City Schools. The following is a short survey of best practices by other nonprofits working closely with children in Tennessee.

Background check rejection is largely at Literacy Mid-South's discretion. State law requires that a volunteer on school property that has contact with school children may not have any sexual offense or violent sexual offense in their criminal history.²² The Tennessee Bureau of Investigation suggests that Literacy Mid-South follow the criteria of Memphis City Schools, since volunteers will be working on school property. The criteria of Memphis City Schools are below, as well as organizations similar to Literacy Mid-South.

Criteria: Memphis City Schools

Memphis City Schools does not allow a volunteer background check with any discrepancies involving any felony charges or crimes against a minor. Its policy statement on

²² TENN. CODE ANN. § 49-5-413(d)(3)(C)(i)

volunteer activities further recommends mandatory ineligibility for “[p]rospective volunteers who have pending charges or have been convicted of child abuse/neglect . . . of selling drugs to or of committing any criminal offense involving a minor;” in addition to the list of sexual offenses for which Tennessee law mandates ineligibility. Memphis City Schools allows consideration of individual circumstances before rejecting a volunteer based on commission of offenses other than those discussed, providing a framework for what officials should be involved in the consideration of an applicant whose background check is questionable. It also requires its volunteers to immediately report any arrests or convictions occurring during their time as a volunteer or face disqualification.

We were unable to contact Memphis City Schools directly regarding further criteria or to discuss its discretionary review process. We understand that further questions regarding their criteria may be directed to Ms. Mary Airheart Brown at (901) 416-7600.

Criteria: Court Appointed Special Advocates (CASA):

CASA has zero tolerance for all registered sex offenders, all convictions of crimes against children and all convictions of violent acts. This zero tolerance policy also applies to family members. If the potential volunteer has a family member who has been convicted of a sexual offense then the potential volunteer cannot work with CASA. Also, any persons with pending charges for child abuse and neglect, sexual assault, and violent acts offenses will be considered only after resolution of such charges. CASA will also not consider any applicants that have had felony convictions involving a motor vehicle in the last ten years. Any other offense is considered on a case by case basis.

Criteria: Mentor

Mentor does not allow any volunteer to have a criminal record showing any felony, any lesser crime involving a sexual element, any lesser crime involving cruelty to animals, any lesser crime involving controlled substances (including DUIs), any lesser crime involving threat of force against a person, and any crime against a minor in general. Mentor could not be reached for further comment on its provided materials during the pendency of this project by telephone. Persons with further questions should contact them at (703) 224-2200.

4. How to handle a rejection.

When rejecting a potential volunteer, you do not need to disclose to the person whose background check has been run any specific statement from the background check.

We suggest that you respond in the following manner when rejecting a volunteer:

“We appreciate your interest in our organization, however we will be unable to offer you a position as a volunteer with our organization at this time.”

If the potential volunteer inquires about the reasons why they are not allowed to volunteer you do not have to give the potential volunteer a reason. You do not have to give them a copy of their background check. It is not your job to interpret the background check for them, nor is it your job to tell them what exactly on the background check you are rejecting them for. The Tennessee Bureau of Investigation refers to this as a “green or red light” method, where you are simply accepting or rejecting a volunteer. The Memphis City School Board and CASA also follow the accept/reject method. We have provided a draft of a potential acknowledgement form regarding the application and background check process in the Appendix to this report.

5. How long do I keep a background check on file?

How long you keep the background check on file for the rejected volunteer appears to be discretionary, although organizations should keep background checks on all current volunteers in their files. All background check information should be kept in a locked file cabinet, as

recommended by Memphis City Schools and the Tennessee Bureau of Investigation. Background checks may be updated as often as Literacy Mid-South desires, as there is no set time limit for background check renewal. The standard for updating background checks is usually one year, because this is when most companies update their files in general. CASA keeps the background check for ten (10) years. Memphis City Schools keeps the background check for five (5) years.

6. Can background checks be disclosed to third parties?

Background checks should never be disclosed to any third parties, even with the express consent of the party investigated. Federal law allows for the sharing of these background checks between Literacy Mid-South and Memphis City Schools because of their relationship.²³ However, other disclosures are not advisable. Best practices tend toward strict confidentiality, in which reports stay confidential and are only seen by the screening officials of Literacy Mid-South and Memphis City Schools.

The following hypothetical situations are provided for illustration purposes and to answer all questions addressed to us as part of this project:

Parental Requests

If a parent requests to see the background check of the volunteer working with their child, LMS may wish to advise the parent that “Federal law and Tennessee Bureau of Investigation policy dictate that we cannot disclose the contents of the volunteer’s background check to you.” If a parent would like to discuss the issue further, LMS may inquire into why the parent feels

²³ Within provision of this section defining term “employment purposes” when used in connection with a consumer report as referring to a report “used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee;” phrase “as an employee” modifies only the word “retention;” and thus term “employment purposes” is not restricted to situation in which information is sought by an actual or prospective employer. Hoke v. Retail Credit Corp., 521 F.2d 1079 (1975).

uncomfortable with that volunteer. If the parent's concerns can be addressed by disclosing LMS policy regarding mandatory volunteer exclusion criteria, it may help to discuss with the parent what categories LMS enforces for exclusion of volunteer applicants from work in schools. Community standards indicate that background check results are not shown to the parents of children with whom a volunteer is working; no state or federal law requires disclosure to parents.

Future Employer Requests

If a volunteer (whether rejected or accepted) requests that their background check be sent to another entity, LMS may wish to refuse. Even though the volunteer may argue that a submitting to second background check in short period of time is not necessary, the federal law and Tennessee Bureau of Investigation policy indicate that the volunteer must have the second check performed, because of concerns that the original may not be released by the original requesting agency as well as the fact that additional information may appear on a later background check. We recommend informing the volunteer, future employer, or other requesting agency that you are not allowed to release the background check and a second background check is necessary.

CONCLUSION

While further attorney review of our research is necessary, it is apparent that LMS's current procedure for conducting background checks meets or exceeds the requirements imposed by state and federal law, as well as conforming to the practices of similarly situated community organizations. Following this report, the Appendix contains a list of further questions which LMS decision makers and attorneys may wish to consider and explore further with future law school volunteer researchers, as well as in intra- and inter-organizational conversations. We, the Alternative Spring Break Non-Profit Advocacy team for Literacy Mid-South, appreciate the

opportunity to have worked on this project and welcome your comments and suggestions on our report.

BACKGROUND DISCLOSURE STATEMENT OF UNDERSTANDING

Thank you for applying to be a volunteer for the Literacy Mid-South ("LMS") Academy Tutoring Project. LMS values our community volunteers as the lifeblood of our programs. Please read and sign the following statement explaining the application process along with your application.

I understand that the Academy Tutoring Project works in and with public and state-funded schools in the Memphis area. I understand that LMS maintains high standards regarding selection of volunteer tutors, in order to ensure the safety of all children participating in the program.

I understand that as part of the application process, I am subject to a TBI/FBI criminal background check including fingerprinting. I understand that LMS will maintain a high standard of confidentiality with respect to my application materials, as required by law. Within [X] weeks of my application, LMS will receive and review my criminal background check. If no problems appear in my background check and my application is accepted, I will be notified that I have been accepted as an Academy Tutoring Project volunteer.

If LMS has questions regarding the contents of my background check, I grant permission for an LMS employee to contact me for further information. I understand that I may refuse to provide any further information requested, and that such refusal may result in LMS rejecting, at its sole discretion, my application as an Academy Tutoring Project volunteer.

If LMS does not retain me as a volunteer due to the contents of my background check, I will be notified that my application has been rejected. Where required by law, LMS will provide me with the reason(s) for its decision, as well as legal notices regarding my rights to access a copy of the background check provided by TBI/FBI and to dispute its contents with those agencies. I understand that LMS reserves all rights to limit the information it gives me regarding reasons for rejecting my application to disclosures required by applicable law. I understand that LMS will not respond to requests for further information regarding rejection of my application.

I understand that LMS is not responsible for the contents of a background check and that LMS cannot and will not dispute or assist me in disputing the contents of any background check. In the event that I successfully dispute incorrect information on a background check that previously resulted in my rejection as an Academy Tutoring Project volunteer, I understand that I may request re-consideration of my application once the background check information is corrected by TBI or FBI. LMS may, in its sole discretion, grant re-consideration of my application, but may require me to cover the costs of a second background check reflecting the updated information. I understand that grant of my application for reconsideration does not affect LMS's unlimited discretion to reject any applicant for any lawful reason.

I understand that LMS will not share the results of my background check with any third party. I also understand that LMS will not disclose to me in full detail the contents or results of this background check. I understand that a background check conducted pursuant to this application is the property of LMS to be held for their records. I further understand that LMS at its sole and complete discretion may accept or decline any application, without providing me any reasons for their decision except where required by applicable law.

Applicant Name _____

Date _____

THIS SAMPLE FORM WAS CREATED AS AN ILLUSTRATIVE EXAMPLE BY A LAW STUDENT.
THIS SAMPLE SHOULD NOT BE USED UNTIL REVIEWED BY A LICENSED TENNESSEE ATTORNEY.

APPENDIX

1. Further Questions and Recommendations

- ☞ Examine best practices at a variety of organizations, with particular focus on their criteria in discretionary cases, who requires fingerprints, and how other people handle charges that do not result in convictions. Use contacts at Memphis City Schools to ask persons specified as part of the discretionary decision process about their criteria, and how they have handled borderline cases in the past.
- ☞ The federal statute and the TBI policy regarding disclosure of background check information to applicants appear to be at odds. What are the reasons for and ramifications of this discrepancy?
- ☞ LMS is concerned about potential disparate impact effects if applicants are excluded too often for misdemeanor crimes not related to or involving children or violence. In what ways can best practices avoid this? Potential future research would include what misdemeanor non-violent crimes show disproportionate conviction rates across protected classes (nationally and in Memphis), an evaluation of how these categories relate to a person's character and fitness to serve as a tutor to children, and whether providing rehabilitated individuals with a prior conviction for a given type of crime with an opportunity to volunteer would actually benefit children in the tutoring program from a mentoring standpoint. Further study would also need to go into the process of compiling and interpreting information regarding rejection of applicants based on prior criminal history (similar to the reports already compiled by LMS regarding active volunteers) to ensure that LMS is meeting its goals of ensuring the safety and well-being of the children it helps, while not posing any issues of disparate impact through its screening processes.
- ☞ Do LMS's application forms need other revisions? How do permission and waiver forms for volunteer tutors who are legal minors, which must be completed by a parent or guardian, need to differ from the forms used for adult tutors? How can our application forms do all the work they need to do, while still being readily comprehensible and accessible?

2. Appendix of Law

Note: All policies and procedures provided by other community organizations and discussed in the preceding report are on file with LMS.

U.S. FEDERAL LAW

15 USCA 1681. Fair Credit Reporting Act.

15 U.S.C.A. § 1681a. Definitions; rules of construction.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(f) The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C.A. § 1681e. Compliance procedures.

(a) Identify and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

....

(c) Disclosure of consumer reports by users allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

§1681m. Requirements on users of consumer reports.

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall--

- (1) provide oral, written, or electronic notice of the adverse action to the consumer;
- (2) provide to the consumer orally, in writing, or electronically--

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

- (3) provide to the consumer an oral, written, or electronic notice of the consumer's right--

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

....

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

42 U.S.C.A. § 5119. Reporting Child Abuse Crime Information.

42 U.S.C.A. § 5119a. Background checks

(a) In general

(1) A State may have in effect procedures (established by State statute or regulation) that require qualified entities designated by the State to contact an authorized agency of the State to request a nationwide background check for the purpose of determining whether a provider has been convicted of a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.

TENNESSEE STATE LAW

T. C. A. § 37-1-414. Persons working with children; investigation of criminal records and other background checks; releases, training.

(a) A religious, charitable, scientific, educational, athletic or youth service institution or organization may require any person, who applies to work with children as a volunteer or as a paid employee, to do one (1) or more of the following:

(1) Agree to the release of all investigative records to such religious, charitable, scientific, educational, athletic, or youth service institution or organization for examination for the purpose of verifying the accuracy of criminal violation information contained on an application to work for such institution or organization;

(2) Supply fingerprint samples and submit to a criminal history records check to be conducted by the Tennessee bureau of investigation and the federal bureau of investigation; or

(3) Attend a comprehensive youth protection training program that includes adult training on recognition, disclosure, reporting and prevention of abuse and submit to character, employment, education and reference checks.

(b) Any costs incurred by the Tennessee bureau of investigation or the federal bureau of investigation in conducting such investigation of applicants shall be paid by the religious, charitable, scientific, educational, or athletic institution or organization requesting such investigation and information. Payment of such costs are to be made in accordance with the provisions of § 38-6-103.

T.C.A. § 40-39-202. Definitions.

(20) "Sexual offense" means:

(A) The commission of any act that, on or after November 1, 1989, constitutes the criminal offense of:

(i) Sexual battery, under § 39-13-505;

- (ii) Statutory rape, under § 39-13-506, if the defendant has one (1) or more prior convictions for mitigated statutory rape under § 39-13-506(a), statutory rape under § 39-13-506(b) or aggravated statutory rape under § 39-13-506(c);
- (iii) Aggravated prostitution, under § 39-13-516, provided the offense occurred prior to July 1, 2010;
- (iv) Sexual exploitation of a minor, under § 39-17-1003;
- (v) False imprisonment where the victim is a minor, under § 39-13-302, except when committed by a parent of the minor;
- (vi) Kidnapping, where the victim is a minor, under § 39-13-303, except when committed by a parent of the minor;
- (vii) Indecent exposure, under § 39-13-511, upon a third or subsequent conviction;
- (viii) Solicitation of a minor, under § 39-13-528 when the offense is classified as a Class D felony, Class E felony or a misdemeanor;
- (ix) Spousal sexual battery, for those committing the offense prior to June 18, 2005, under former § 39-13-507;
- (x) Attempt, under § 39-12-101, to commit any of the offenses enumerated in this subdivision (20)(A);
- (xi) Solicitation, under § 39-12-102, to commit any of the offenses enumerated in this subdivision (20)(A);
- (xii) Conspiracy, under § 39-12-103, to commit any of the offenses enumerated in this subdivision (20)(A);
- (xiii) Criminal responsibility, under § 39-11-402 (2), to commit any of the offenses enumerated in this subdivision (20)(A);
- (xiv) Facilitating the commission, under § 39-11-403, to commit any of the offenses enumerated in this subdivision (20)(A);
- (xv) Being an accessory after the fact, under § 39-11-411, to commit any of the offenses enumerated in this subdivision (20)(A);
- (xvi) Aggravated statutory rape, under § 39-13-506(c); or
- (xvii) Soliciting sexual exploitation of a minor--exploitation of a minor by electronic means, under § 39-13-529; or

(B) The commission of any act, that prior to November 1, 1989, constituted the criminal offense of:

- (i) Sexual battery, under § 39-2-607 [repealed];
- (ii) Statutory rape, under § 39-2-605 [repealed], only if the facts of the conviction satisfy the definition of aggravated statutory rape;
- (iii) Assault with intent to commit rape or attempt to commit sexual battery, under § 39-2-608 [repealed];
- (iv) Incest, under § 39-4-306 [repealed];
- (v) Use of a minor for obscene purposes, under § 39-6-1137 [repealed];
- (vi) Promotion of performance including sexual conduct by a minor, under § 39-6-1138 [repealed];
- (vii) Criminal sexual conduct in the first degree, under § 39-3-703 [repealed];
- (viii) Criminal sexual conduct in the second degree, under § 39-3-704 [repealed];
- (ix) Criminal sexual conduct in the third degree, under § 39-3-705 [repealed];
- (x) Kidnapping where the victim is a minor, under § 39-2-303 [repealed], except when committed by a parent of the minor;
- (xi) Solicitation, under § 39-1-401 [repealed] or § 39-118(b) [repealed], to commit any of the offenses enumerated in this subdivision (20)(B);
- (xii) Attempt, under § 39-1-501 [repealed], § 39-605 [repealed], or § 39-606 [repealed], to commit any of the offenses enumerated in this subdivision (20)(B);
- (xiii) Conspiracy, under § 39-1-601 [repealed] or § 39-1104 [repealed], to commit any of the offenses enumerated in this subdivision (20)(B); or
- (xiv) Accessory before or after the fact, or aider and abettor, under title 39, chapter 1, part 3 [repealed], to any of the offenses enumerated in this subdivision (20)(B);

T.C.A. § 49-5-406. Employment; applications; crimes and offenses.

(a)(2)(A) Knowingly falsifying information required by subdivision (a)(1) shall be sufficient grounds for termination of employment and shall also constitute a Class A misdemeanor that must be reported to the district attorney general for prosecution.

T. C. A. § 49-5-413. Investigation of applicants for teaching or child care positions.

(a) In addition to the requirements of § 49-5-406, a local board of education or any child care program, as defined in § 49-1-1102, shall require any person applying for a position as a teacher and any person applying for any other position requiring proximity to school children or to children in a child care program to:

- (1) Agree to the release of all investigative records to the board or child care program for examination for the purpose of verifying the accuracy of criminal violation information as required by § 49-5-406(a)(1)(A); and
- (2) Supply a fingerprint sample and submit to a criminal history records check to be conducted by the Tennessee bureau of investigation.

....

(d)(3)(B) No employer, or employee of the employer, to whom this subsection (d) applies shall come in direct contact with school children or to children in a child care program or enter the grounds of a school or child care center when children are present if the criminal history records check indicates that the employer or employee has been convicted of an offense that, if committed on or after July 1, 2007, is classified as a sexual offense or a violent sexual offense as defined in § 40-39-202.

(C)(i) If an employee is convicted of an offense that, if committed on or after July 1, 2007, is a sexual offense or a violent sexual offense as defined in § 40-39-202, after the employer has conducted a criminal history records check on the employee, the employee shall notify the employer of the conviction within seven (7) days from the date of conviction.

(ii) An employee commits a Class A misdemeanor, punishable by fine only, who knowingly fails to disclose to the employer within the required seven (7) days that the employee has been convicted of an offense specified in subdivision (d)(3)(C)(i).

PALS/LMS PRESENTATION SUMMARY

Federal Law Requirements (Elizabeth McClellan)

- Fair Credit Reporting Act (FCRA) governs background checks for employment purposes
 - including nonprofit volunteers
 - allows states to develop their own statutes on rejection criteria
- FCRA requires employers to give legal notice to applicants upon adverse action
 - adverse action includes rejection for volunteer position
 - FCRA restricts consumer reporting agencies from prohibiting release of background checks to rejected applicants by employer
 - TBI is a consumer reporting agency under FCRA
 - potential conflict with stated TBI policy prohibiting release of background checks
 - Is LMS permitted to show a rejected applicant a copy of his or her background check?

State Law Requirements (Sarah Atkinson)

- Two standards of background check requirements
 - the "youth-service institution" (Title 37. Juveniles)
 - the "local board of education" (Title 49. Education)
- Under TN law, MCS is a local board of education
 - MANDATORY fingerprint-based background checks for any position "requiring proximity to children" (includes volunteers)
 - standard also applies to "child-care programs" (3+ hours daily of on-site, basic-needs child care)
 - applicant pays for first background check, may be reimbursed by employer
- LMS/Academy Tutoring Project is a youth-service institution (YSI)
 - Any person who "applies to work with children as a volunteer" through YSI must satisfy one or more of three criteria:
 1. fill out an application self-disclosing prior criminal violations and agree to the release of investigative records (referrals, name-based search)
 2. submit to a fingerprint-based background check by both TBI and FBI
 3. attend "a comprehensive youth protection training program" and submit references, education and employment records
 - at least one option is required for compliance
 - nonprofit YSI may choose to require all three
- TBI recommends fingerprint-based background checks for all volunteers working with children
- Further Questions: Cost of fingerprint-based background checks

Rejection Criteria (Chris Martin)

- ❑ National Child Protection Act allows states to develop their own "red flag" rules on volunteers working with children
- ❑ In TN, a person applying for position "requiring proximity to children" is disqualified for two offenses
 1. sexual offenses
 2. knowing falsification of or failure to disclose criminal violations in application forms
- ❑ Further precautions are discretionary
 - MCS red flags: discrepancies as to felony charges, crimes against a minor, charges pending, child/abuse/neglect, selling drugs to a minor
 - CASA red flags: crimes against minors, all violent offenses (from applicant OR applicant's live-in family members), felonies involving a motor vehicle, charges pending
 - MENTOR red flags: any felony, sexual misconduct, animal cruelty, drug abuse, threat of force, any crime against a minor

Rejection Procedure (Tami Harmon)

- ❑ Suggested turn-down language
- ❑ TBI recommends "green or red light" method, accept or reject without statement of specific reasons
 - MCS and CASA use accept/reject method
 - NO LEGAL REQUIREMENT to provide statement of specific reasons for rejection or copy of background check
- ❑ Not required to retain background checks on rejected volunteers
 - CASA retains for 10 years
 - MCS retains for 5 years
 - TBI recommends records be kept locked in designated filing cabinet
- ❑ Best practices discourage sharing background checks with third parties
 - favor strict confidentiality
 - do not disclose to parents, even with volunteer's consent
 - do not disclose to future employers, even at volunteer's request

Further Questions (Open Discussion)

- ❑ More best practices inquiries on fingerprinting and charges, arrests without convictions
- ❑ TBI/FCRA discrepancy?
- ❑ disparate impacts of rigorous rejection criteria