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FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 883

(Senator King, *et al.*)

Education, Energy, and the Environment

Ways and Means

Education - Virtual Tutoring Services - Background Checks and Fingerprinting

This bill requires a local board of education, nonpublic school, or contracting agency that has contracted with a virtual tutoring service to require the virtual tutoring service to conduct a criminal history records check for any individual working for or contracting with a virtual tutoring service who interacts with minors. A criminal history records check completed by a virtual tutoring service may satisfy the requirement for a check regarding an employee's history of sexual abuse or sexual misconduct. A volunteer for a virtual tutoring service is only required to pay the mandatory processing fees required by the Federal Bureau of Investigation (FBI) for a national criminal history records check. **The bill takes effect July 1, 2024.**

Fiscal Summary

State Effect: The bill likely cannot be implemented as drafted because, under federal law, private employers may not request and receive national criminal history background checks directly from the FBI, as discussed below.

Local Effect: The bill likely cannot be implemented as drafted, as described above, which may negatively affect local school systems' ability to contract with virtual tutoring services. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: "Virtual tutoring service" is defined as an entity that enters into a contract with a local board of education or nonpublic school to provide live, virtual, video-based tutoring to students.

Current Law:

Criminal Justice Information System Central Repository

The Criminal Justice Information System Central Repository (CJIS-CR) is established by the Criminal Procedure Article, §§ 10-213 *et seq.*, within the Department of Public Safety and Correctional Services (DPSCS) to collect, manage, and disseminate Maryland criminal history records checks for criminal justice and noncriminal justice (*e.g.*, employment and licensing) purposes. For national records' checks, CJIS-CR collects the fee and submits the requests for national information to the FBI electronically.

Pursuant to provisions in the Family Law Article, in general, employees and employers who work in specified facilities and who care for or supervise children (or have access to children who are cared for or supervised in the facility) are required to apply to DPSCS for a national and State criminal history records checks. Among the facilities requiring records' checks are child care centers, family child care homes, schools, foster care homes, and recreation centers that primarily serve minors.

Furthermore, each employee of a child care center that is required to be licensed or to hold a letter of compliance must apply to the Department of Human Services (DHS), on or before the first day of actual employment, for a child abuse and neglect clearance. DHS may prohibit the operator of a child care center that is required to be licensed or to hold a letter of compliance from employing an individual who:

- has received a conviction, a probation before judgment disposition, a not criminally responsible disposition, or a pending charge for any crime or attempted crime enumerated in specified regulations; or
- has been identified as responsible for child abuse or neglect.

Similarly, the operator of a child care center that is required to be licensed or to hold a letter of compliance must immediately notify DHS if an *employee* reports a conviction, a probation before judgment disposition, a not criminally responsible disposition, or a pending charge for any crime or attempted crime enumerated in specified regulations.

Federal Law

There are no specific federal requirements for virtual tutoring service agencies; however, there are existing federal requirements regarding child protective services background checkers for child serving agencies. For instance, the Child Abuse Prevention and Treatment Act assigns certain responsibilities to the federal government, particularly relating to data collection and technical assistance. It also authorizes funding to public

agencies and nonprofit organizations that undertake activities to prevent, assess, investigate, prosecute, and treat child abuse and neglect. Additionally, the federal Adam Walsh Child Protection and Safety Act (Walsh Act) is designed to safeguard the public, particularly children, from violent sex offenders. Enacted in 2006, the Walsh Act establishes a more comprehensive and nationalized system for the registration of sex offenders.

Hiring Prohibition

A local board of education may not knowingly hire or retain any individual who has been convicted of specified crimes, including crimes of violence and child sexual abuse. Further, a local school system contract must provide that a contractor or subcontractor for the local school system may not knowingly assign an employee to work on school premises with direct, unsupervised, and uncontrolled access to children, if the employee has been convicted of such crimes.

Child Sexual Abuse Prevention

Hiring Requirements and Procedures

A county board (including Baltimore City), nonpublic school, and a contracting agency must require an applicant for a position involving direct contact with minors to provide specified information, including the contact information of all former employers in which the applicant was employed in a position that involved contact with minors and a written authorization that consents to the release of records relating to child sexual abuse or sexual misconduct. An application must also provide a written statement of whether the applicant (1) has been the subject of a child sexual abuse or sexual misconduct investigation by specified entities, unless the investigation resulted in specified findings; (2) has ever been disciplined, discharged, nonrenewed, or asked to resign from employment, or has ever resigned from or otherwise separated from employment while such allegations were pending or under investigation, or due to an adjudication or findings of such actions; or (3) has ever had a license, professional license, or certificate suspended, surrendered, or revoked in connection with child sexual abuse or sexual misconduct allegations.

Before hiring an applicant, a county board, nonpublic school, or contracting agency must conduct a review of the employment history of the applicant by contacting the employers listed by the applicant and requesting specified information, including answers to the questions regarding the circumstances specified above. A county board, nonpublic school, or contracting agency must also request a report from the Maryland State Department of Education (MSDE) regarding the applicant's eligibility for employment or certification status to determine whether the applicant (1) holds a valid and active certification appropriate for the position and is otherwise eligible for employment and (2) has been the

subject of professional discipline related to child sexual abuse or sexual misconduct. If there is a lapse or suspension in MSDE's use of a system or database to check the eligibility for employment or certification status of an applicant, MSDE must notify a county board, nonpublic school, or contracting agency within 48 hours of the lapse or decision to suspend the use of the system or database.

An employer must, no later than 20 days after receiving a request for information, send to the county board, nonpublic school, or contracting agency the information requested on the form prescribed by MSDE. If the information includes an affirmative response to the child sexual abuse or sexual misconduct questions and the entity makes a determination to further consider the applicant for employment, it must request that the former employer provide additional information, including all records related to child sexual abuse or misconduct. An employer receiving such a request must provide the additional information within 60 days to (1) the requesting county board, nonpublic school, or contracting agency and (2) the applicant who is under consideration for employment.

For substitute employees, the employment history review must be done before the employee's initial hiring or placement on the approved substitute employee list of the county board, nonpublic school, or contracting agency. The review remains valid as long as the substitute employee continues to be employed by the same county board or remains on the approved substitute employee list of the nonpublic school or contracting agency. A substitute employee seeking to be added to the substitute employee list of another county board, nonpublic school, or contracting agency must undergo a new employment history review. Any other entity furnishing substitute staffing services to a school entity must comply with the requirements.

For employees of a contracting agency, the employment history review must be performed either at the time of the initial hiring or before the assignment of the employee to perform work for a school entity in a position involving direct contact with minors. The review remains valid as long as the employee remains employed by the same contracting agency.

Before assigning an employee to perform work for a school entity in a position involving direct contact with minors, a contracting agency must inform the school of any instances known to the contracting agency involving child sexual abuse or sexual misconduct, as specified. If the school objects to the assignment after being informed of such instances, the contracting agency may not assign the employee to perform work for the school in a position involving direct contact with minors.

Information and Records – Requirements and Authorized Use

A contracting agency must maintain records documenting employment history reviews for all employees and, on request, must provide a school entity to which an employee is assigned access to the pertinent records.

Information and records about an applicant received by a county board, nonpublic school, or contracting agency pursuant to these requirements are not a public record for the purposes of the Maryland Public Information Act. An entity receiving such information and records may (1) use them for the purpose of evaluating the applicant's fitness to be hired or for continued employment and (2) report the information to other specified entities, including MSDE or child protective service agencies, as appropriate.

Authorized Discipline and Civil Penalties

An applicant who provides false information or willfully fails to disclose material information as required must be subject to discipline up to and including termination or denial of employment and may be subject to professional discipline in accordance with MSDE regulations. The willful failure of an employer or former employer to respond to or provide the information and records requested pursuant to these requirements may result in civil penalties or professional discipline, if appropriate. An employer or former employer may not be held liable for failure to respond to a request for information if (1) the laws of the state in which the employer or former employer is located prohibit the release of the information or records requested or (2) the disclosure of the information and records requested is restricted by the terms of a contract entered into on or before June 30, 2019.

MSDE may initiate disciplinary action before a hearing officer in accordance with regulations against an applicant, an employee, a contracting agency, or a school administrator for willful violations of the requirements. MSDE may adopt regulations establishing procedures relating to disciplinary proceedings and the assessment of penalties in accordance with the requirements.

Miscellaneous Provisions

A county board, nonpublic school, or contracting agency may not enter into any contract or agreement, including collective bargaining agreements and employment contracts, that have specified consequences, including having the effect of suppressing information relating to an investigation or disciplinary action in response to a report of suspected child sexual abuse or sexual misconduct by a current or former employee. A provision executed, amended, or entered into on or after July 1, 2019, that is contrary to these prohibitions is void and unenforceable.

This may not be construed to (1) prevent a prospective employer from conducting further investigations of prospective employees, requesting applicants to provide additional background information, or requesting that an employer or a former employer provide

more information; (2) relieve a county board, nonpublic school, contracting agency, or any other mandated reporter of its legal responsibility to report suspected incidents of child sexual abuse or sexual misconduct in accordance with State law or MSDE's reporting requirements; or (3) prohibit the right of the exclusive representative under a collective bargaining agreement to grieve and arbitrate the validity of an employee's termination or discipline for just cause or the causes.

Statute establishes immunity provisions for individuals who provide information or records in good faith as specified.

Selected Definitions

"Child sexual abuse," as defined in § 6-113.1 of the Education Article, means an act involving a minor or student by an adult that constitutes a sexual offense under the laws of the State or any sexual contact between an adult and a minor.

"Direct contact with minors" means the possibility of care, supervision, guidance, or control of a minor or routine interaction with a minor.

"Sexual misconduct," as defined in § 6-113.1 of the Education Article, is an act by an adult, including oral, nonverbal, written, or electronic communication, or a physical activity directed toward or with a minor that is designed to promote a romantic or sexual relationship with the minor, including (1) sexual or romantic invitations; (2) dating or soliciting dates; (3) engaging in sexualized or romantic dialogue; (4) making sexually suggestive comments; (5) grooming behaviors; (6) self-disclosure or physical exposure of a sexual, romantic, or erotic nature; and (7) a sexual, indecent, romantic, or erotic contact with the minor.

Local Expenditures: DPSCS advises that, under federal law, State legislation that requires a national criminal history records check must include specified authorizing language regarding the dissemination of the background check, which is not in the bill as drafted. Moreover, DPSCS advises that only State agencies may receive a background check from the FBI, typically for entities licensed by the State (*e.g.*, child care centers). Virtual tutoring service providers are not licensed by the State, and DPSCS advises that they are not eligible to receive background checks directly from the FBI under federal law. Therefore, the bill cannot be implemented as drafted.

Small Business Effect: Businesses that offer virtual tutoring services may be small businesses. It is unclear if local school systems are permitted to hire virtual tutoring services under the bill, as discussed above. If local school systems are not allowed to hire virtual tutors, then virtual tutoring services likely lose revenues.

Additional Comments: DPSCS advises that the FBI must approve any changes to relevant State law prior to processing any federal background checks. To the extent the FBI does not approve provisions in the bill, national background checks would not be permitted until the statutory requirements are changed and then approved by the FBI.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 1140 (Delegate Smith) - Ways and Means.

Information Source(s): Baltimore City Public Schools; Department of Human Services; Maryland State Department of Education; Department of Public Safety and Correctional Services; Maryland Department of Labor; Department of State Police; Department of Legislative Services

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