

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 656

INTRODUCER: Judiciary Committee and Senator Baxley

SUBJECT: Background Screening

DATE: March 6, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Fav/CS
2.			ACJ	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 656 provides the Office of the State Courts Administrator (OSCA) with statutory authority to conduct national background screenings for court-appointed mediators and foreign language court interpreters. Conducting background screenings is an element of OSCA's regulatory responsibility when determining the qualifications of applicants. This statutory change is needed to comply with requirements established by the U.S. Department of Justice and the Federal Bureau of Investigation.

The bill takes effect July 1, 2019.

II. Present Situation:

Mediators and Foreign Language Court Interpreters

In 1988, the Florida Supreme Court was tasked with the responsibility of establishing minimum standards for qualifications, professional conduct, and training for court mediators^{1,2} and

¹ A mediator is a neutral and impartial person who tries to help opposing parties reach a solution to their conflict. BLACK'S LAW DICTIONARY (10th ed. 2014).

² Generally, in order to become a certified mediator someone must be at least 21 years old, of good moral character, and earn a designated number of points for training, education, and mentorship. Training and education requirements vary depending on whether someone seeks to become a county court, family, circuit court, dependency, or appellate mediator. Fla. R. Cert. & Ct.-Apptd. Mediators 10.100(a).

arbitrators. Before a mediator could be appointed to serve in a circuit, he or she was required to be certified by the chief judge in accordance with the Supreme Court standards.³

Similarly, in 2006, the Florida Supreme Court was given the responsibility of establishing minimum standards and procedures to qualify, certify, discipline, and train foreign language interpreters who are appointed by a court.^{4,5}

The Authority of the Court Interpreter Certification and Regulation Program/Board and the Florida Dispute Resolution Center

The Supreme Court, with the assistance of the Office of the State Courts Administrator (OSCA), established two boards to oversee the responsibilities required of them by statute. The Florida Dispute Resolution Center (DRC) was established to assess the qualifications of mediators and the Court Interpreter Certification and Regulation Program/Board was established to determine the qualifications of foreign language interpreters. As part of their responsibilities, OSCA conducted background checks to determine the suitability of applicants. According to OSCA, as early as 2007, both groups conducted nationwide criminal history background checks, which required the submission of fingerprints through the Florida Department of Law Enforcement (FDLE) to the Federal Bureau of Investigation (FBI).⁶

In 2017, FDLE conducted records compliance and technical audits to determine whether state entities possessed the appropriate authority to access national criminal justice information.⁷ Pursuant to s. 943.053(2), F.S., FDLE is prohibited from disseminating criminal justice information that is not in compliance with federal and state laws, regulations, and rules. FDLE determined that OSCA did not have sufficient statutory authority to request national criminal history checks for a regulatory purpose.⁸ FDLE determined that OSCA had the authority to perform background checks as a criminal justice agency on its employees, but it did not have the authority to perform criminal history background checks on people who were not employees, such as mediators and court interpreters. Because OSCA lacked the authority to have FDLE access the national criminal history background information in the FBI databases, it was determined that OSCA was limited to accessing the results of Florida background information.

Because FDLE contends that there is no current statutory authority to provide for national criminal background screenings on foreign language court interpreters and mediators, OSCA is

³ Ch. 87-133, s. 6, Laws of Florida.

⁴ Ch. 2006-253, s. 1, Laws of Florida.

⁵ To become certified, a court interpreter must be of good moral character, pass a background check, complete courtroom observation requirements, and pass a written and oral exam demonstrating language proficiency. Florida Courts, *Court Interpreter Certification and Regulation Program, Application for Court Interpreter Registration Renewal* (Effective July, 18, 2018), <https://www.flcourts.org/content/download/402733/3454022/application-for-court-interpreter-registration-renewal.pdf>; Florida Courts, *Court Interpreter Certification and Regulation Program, Steps to Court Interpreter Certification* <https://www.flcourts.org/content/download/217092/1968498/FINAL-Certification-Process-Flow-Chart.pdf>.

⁶ Office of the State Courts Administrator, *Judicial Branch 2019 Legislative Agenda*, 19-20, (Jan. 14, 2019) (on file with the Senate Committee on Judiciary).

⁷ *Id.*

⁸ *Id.* OSCA's position, as stated in the *Judicial Branch 2019 Legislative Agenda*, is that the Department of Justice changed its policy on what constituted the proper authority to conduct national background checks, and this change has necessitated this bill.

of the opinion that this situation would be remedied by crafting a statute that provides the express authority and complies with the requirements of federal law.⁹

FBI Requirements for Conducting a Criminal Record Check for a Noncriminal Justice Licensing or Employment Purpose

The FBI derives its authority to conduct a *criminal* record check for a *noncriminal* justice licensing or employment purpose from Public Law 92-544. Under that law, the FBI is authorized to exchange identification records with state and local government officials for licensing and employment purposes when authorized by a state statute. The statute must be approved by the U.S. Attorney General.¹⁰ The standards that the FBI relies upon in approving state authorizations have been developed through a number of memoranda issued by the Office of Legal Counsel in the Department of Justice.¹¹

An authorization consistent with the standards must:

- Be the result of a legislative enactment or its functional equivalent;
- Require fingerprinting of applicants for a license or employment;
- Expressly or by implication authorize the use of FBI records for screening applicants;
- Not be against public policy; and
- Identify the specific category of applicants or licenses to prevent the authorization from being overly broad in scope.¹²

Additionally, the state must designate a government agency that is authorized and will be responsible for receiving the results of the record check and screen those results to determine whether the applicant is suitable for employing or licensing.¹³

If OSCA receives the requisite statutory authority to conduct criminal history checks for a regulatory purpose, it will be in compliance with federal law.

Level 1 and Level 2 Screening Standards

Chapter 435, F.S., establishes two levels of background screenings that employees must undergo as a condition of employment. Level 1 is the more basic screening and involves an in-state name-based background check, employment history check, statewide criminal correspondence check through FDLE, a sex offender registry check, local criminal records check, and a domestic violence check.¹⁴ Level 2 screenings are more thorough because they apply to positions of responsibility or trust, often with more vulnerable people, such as children, the elderly, or the disabled. Level 2 screenings require a security background investigation that includes

⁹ *Id.*

¹⁰ The Department of Justice has determined that Attorney General's authority to approve the state "statute is delegated to the FBI by Title 28, Code of Federal Regulations, Section 0.85(j)." U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Identification Services, *Appendix B: Criminal Justice Information (CJIS) Information Letter 95-3*, 5 (July 17, 1995), <https://www.ojjdp.gov/pubs/guidelines/appen-b2.html>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Section 435.03, F.S.

fingerprint-based searches for statewide criminal history records through FDLE and a national criminal history records check through the Federal Bureau of Investigation. It may also include local criminal records checks. A level 2 screening disqualifies a person from employment if the person has a conviction or unresolved arrest for any one of more than 50 criminal offenses.¹⁵

III. Effect of Proposed Changes:

The bill provides the statutory language for OSCA to comply with the federal standards for conducting background screenings. The bill requires the submission of fingerprints and provides for the submission of the fingerprints to the FBI for national processing. The bill does not appear to violate public policy and specifically identifies the categories of applicants, foreign language court interpreters and mediators, to be screened. Because the bill amends the statute sections where the Florida Supreme Court is authorized to establish minimum standards for foreign language court interpreters and mediators, it designates the government agency authorized to receive the results of the background screenings.

The bill takes effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

Article VII, s. 19, of the State Constitution requires that a new state tax or fee, as well as an increased state tax or fee, must be approved by two-thirds of the membership of each house of the Legislature and must be contained in a separate bill that contains no other subject. Article VII, s. 19(d)(1) of the State Constitution defines “fee” to mean “any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.”

The bill authorizes the use of background screenings at the national level, something that has not been done recently, and will require applicants to pay the additional fingerprinting fee for accessing the federal databases. The state background fees are existing statutory fees that are not increased; however, the bill will impose the national

¹⁵ Section 435.04, F.S.

background fees on new applicants under the bill. As such, the state Constitution may require that the fees be passed in a separate bill by a two-thirds vote of the membership of each house of the Legislature.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

According to the fiscal analysis by the Department of Law Enforcement, the cost for a state and national criminal history record check is \$37.25. The national portion costs \$13.25 and the state portion costs \$24. Individuals seeking certification under this bill would likely pay the total cost.¹⁶

C. Government Sector Impact:

The Office of State Courts Administrator states that the bill is not likely to have any meaningful effect on judicial or court workload. The Court's staff currently conducts background screenings of mediators and interpreter applicants so this additional responsibility would not affect them significantly.

The FDLE bill analysis provides that the \$24 state portion is deposited into FDLE's Operating Trust Fund. The cost to retain the information for the first year is included in the criminal history record check. The additional cost to retain a set of fingerprints is \$6 annually, which also is deposited in FDLE's Operating Trust Fund. FDLE states that when it begins to participate in the federal retention program, the FBI will not require a fee for federal fingerprint retention.¹⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

FDLE states in its bill analysis that is unclear if the Supreme Court will be conducting the criminal history record checks and receiving the results, or if each Clerk of Court will conduct the screenings. An Originating Agency Identifier number (ORI) must be requested by the authorized entity responsible for requesting and receiving the criminal history record check

¹⁶ Florida Department of Law Enforcement, *Senate Bill 656 Legislative Analysis* (Feb. 13, 2019) (on file with the Senate Committee on Judiciary).

¹⁷ *Id.*

results and the FBI must review, approve, and issue the ORI prior to this population being screened. If OSCA is the agency responsible for requesting and receiving the information, and not the clerks of court, then perhaps this is not an issue.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 25.386 and 44.106.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 4, 2019:

The intent of this committee substitute does not differ significantly from the underlying bill; it primarily differs in form. The committee substitute differs by expressly stating the federal requirements for an entity to conduct national background screenings, which are: require fingerprinting of the applicant, authorize the use of FBI records for screening the applicant, not violate public policy, specifically identify the category of applicants or licensees to be checked so that the authorization is not too broad, and designate an authorized governmental agency for receiving and screening the results of the record check.

- B. **Amendments:**

None.