

# CRIMINAL AND DISCIPLINARY HISTORY IN COLLEGE ADMISSIONS

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## Criminal and Disciplinary History in Admissions

The American Association of Collegiate Registrars and Admissions Officers (AACRAO) is a non-profit, voluntary, professional association of more than 11,000 higher education professionals representing approximately 2,600 institutions in more than 40 countries. Its commitment to the professional development of its members includes best practice guidance on admissions strategies to meet institutional diversity objectives, delivery of academic programs in innovative ways to meet the needs of a changing student body, and exemplary approaches to student retention and completion.

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# THE CHARGE

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### **Purpose**

Established in 2018, the AACRAO Board of Directors charged the work group with developing guidance and best practices concerning the use of student criminal history in the college admissions process. The work group reviewed the report from the AACRAO Disciplinary Notations Work Group to develop guidance and best practices related to the receipt of student transcripts with disciplinary notations or other notifications of disciplinary infractions at previous institutions.

### **Composition**

The work group was comprised of AACRAO members representing diverse positions, institutional types, and geographic locations. The work group also included representatives from other higher education associations to bring their organizations' perspectives and expertise to these issues.

### **Sub-Groups**

The work group created two sub-groups to:

1. review the Criminal History question on Admission applications.
2. develop best practices in the admission process when a school receives an application with a disciplinary notation on their transcript and/or a criminal history.

### **Listening Sessions**

The work group held nine listening sessions at the following meetings:

- 2018 AACRAO SEM meeting
- State and Regional Meetings: Texas, Illinois, Louisiana, Chesapeake and Potomac Maryland Community College Chief Student Affairs Officers
- National Institute for the Student of Transfer Students
- 2019 AACRAO Annual Meeting
- AAU Chief Enrollment Officers Annual Meeting

### **Outcomes and Responsibilities**

The work group developed:

- a set of recommendations for the use of the disciplinary notations in the admission process.
- a set of recommendations regarding criminal history questions in the admissions application. These include the placement of questions and the timing of collection of this information (prior to or after admission).
- a set of recommendations for review by the AACRAO Board for presentation to membership for feedback and implementation.

# THE WORK GROUP



- Philip Ballinger — University of Washington (Co-Chair)
- Lee Melvin — University of Buffalo (Co-Chair)
- Maureen Woods — University of Illinois at Chicago
- Bart Quinet — Vanderbilt University (Disciplinary Notations Sub-Group Chair)
- Kelly Gualtieri — Maine Maritime Academy
- Louis Hunt — North Carolina State University
- Kim Johnston — National Association for College Admission Counseling (Representative)
- Jamie Jorgensen — Pitzer College | National Association of College and University Attorneys  
(Representative)
- Cassandra Moore — Anne Arundel Community College
- Adam Ross Nelson — The Common Application (Representative)
- Matt Wilcox — University of Georgia
- Sherry Wells — Lamar University (Criminal Questions in Admission Sub-Group Chair)
- Lisa Cooper Wilkins — San Joaquin Delta College | National Association of Student Affairs in  
Higher Education (Representative)

# EXECUTIVE SUMMARY

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Postsecondary institutions work continuously through a variety of means to promote campus and classroom diversity as well as inclusivity, characteristics known to enrich and improve the overall educational experience.

At the same time, the national discussion about removing criminal history records questions from the admissions application and pushing this inquiry to later in the process, as well as conversations about using disciplinary notations on transcripts, has been met with guidance from the Department of Education and legislative proposal debates in Congress and State Houses across the country.

For this reason, the American Association of Collegiate Registrars and Admissions Officers (AACRAO) created the Criminal and Disciplinary History in College Admissions Work Group. The work group aimed to assist AACRAO members and legislators at the state and national level in developing sound policies balancing access to higher education with public safety. The recommendations of the work group are the following:

- If an institution has a choice, consider not asking criminal history on the application for admission.
- If an institution must or chooses to ask about criminal history, then it should delay the request for or consideration of criminal justice information (CJI) collected until after an admission decision has been made to avoid a chilling effect on potential applicants whose criminal history may ultimately be deemed irrelevant by the institution.
- Institutions should have clear and informed reasons for asking or not asking criminal history questions at any phase of the admission process. If they do not already exist, institutions should create and implement written policies and processes on the review and use of criminal history in their admission processes.
- Institutions' criminal history-related policies and processes should be transparent, readily accessible, and explained.
- If inquiring about criminal history, institutions should ensure the questions are specific and narrowly focused:
  - By avoiding the use of ambiguous criminal justice terms.
  - By clearly defining what information should not be disclosed.
  - By avoiding overly broad requests about criminal history.
  - By including a time limit on criminal background data.
  - By inquiring about convictions, not arrests. The AACRAO work group questions whether felonies, misdemeanors or infractions committed at a young age should be considered at all.
- If using criminal history in the admissions process, develop in-house expertise – establish campus personnel responsible for review, evaluation, and decisions once a criminal offense of institutional concern is identified. Ensure these individuals are trained to understand and assess the criminal history information they review.
- The AACRAO work group affirms the Department of Education's guidance that training for college personnel reviewing criminal history should include emphasis on the protection of privacy for applicants. As much as possible, access to disclosure information should be limited to those conducting the review.
- If using criminal history in the admissions process, define what additional information is required of the applicant (documentation, narrative explanation, a hearing, etc.). The AACRAO work group affirms the Department of Education's

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suggestion that applicants responding to questions of criminal or conduct history be given opportunity to provide context to their disclosure to help the reviewing body understand their disciplinary records.

- If using criminal history in the admissions process, institutions could identify options for potential mitigation (e.g. probation, ban from campus housing, etc.) as opposed to not admitting otherwise admissible students. Institutions using criminal history as a reason for denial or withdrawal of an offer of admission should inform the applicant of the reason. They should also have an established appeal process that can be clearly communicated to such applicants.
- When a school receives a transcript for an applicant that includes a disciplinary notation, the school should have an established process for how to respond.
- Before assigning applicants to further review because of criminal history information or a disciplinary notation on a transcript, they should be reviewed for admissibility. If an applicant is not admissible, then no further review would be necessary. If the applicant is otherwise admissible, then further review should proceed according to an institution's established policy and process for reviewing applications with criminal history information or disciplinary notations.
- The process should be the same for all such applicants, and the applicants should be provided appropriate process information.
- Institutions should offer on-campus support services for students who have criminal records.
- Institutions should conduct periodic policy and process reviews.

# INTRODUCTION

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### **Criminal History in the Application Process**

More than 70 million Americans have criminal records<sup>i</sup>. The number of persons in the United States with criminal records nearly equals the number of persons with 4-year college diplomas<sup>ii</sup>. A young adult today is 36 percent more likely to be arrested than their parents<sup>iii</sup>. Nearly a third of Americans have a criminal record by the age of 23<sup>iv</sup>. Nearly 50 percent of black males have been arrested by the same age<sup>v</sup>. Annually, over 600,000 people leave state and federal prisons and re-enter society<sup>vi</sup>. The social, economic, and civil rights consequences of these facts are severe not only for those with criminal records but also for American society as a whole.

Over the past 4 decades, criminal history-related questions on college applications for admission have become more common<sup>vii</sup>. The Center for Community Alternative's 2015 report, based on survey data from AACRAO and NACAC, found that 73 percent of colleges and universities collect high school disciplinary information, and 89 percent of those use the information in admissions decision making<sup>viii</sup>. A more recent study by the University of Minnesota found that 70 percent of four-year colleges (81 percent of private and 55 percent of public colleges) require criminal history information as part of the college application process<sup>ix</sup>. Additionally, 40 percent of community colleges report collecting such information.<sup>x</sup>

Some individuals point to the passage and revisions of the Crime Awareness and Campus Security Act of 1990 (Public Law 101-542, which later came to be known as the Clery Act) as a force that motivated colleges and universities to consider more closely applicant criminal records.<sup>xi</sup> Meanwhile, common college application platform providers have both influenced and responded to these trends. The Common Application began asking questions related to criminal history in 2006. Starting with the 2019-2020 application cycle, the Common Application will allow member institutions the flexibility to exclude Criminal Justice Information (CJI) questions. The Coalition for College application asked such questions in its inaugural year, but changed the policy for the 2017-18 application season. Member institutions on these platforms that wish to ask must do so in the institutionally-specific section of the application.

A primary reason for many colleges' use of such questions on their applications for admission is the desire to preserve campus safety.<sup>xii</sup> Yet there is no clear evidence that asking and using such questions on the application accomplishes this goal.<sup>xiii</sup> On the contrary, "a 2007 study that controlled for various institutional characteristics...found no statistically significant difference in rates of campus crime at colleges that ask about criminal records compared to colleges that do not ask."<sup>xiv</sup>

Instead, another effect was found. Criminal history questions asked on college applications seem to impede access for prospective students with many kinds of criminal history, including misdemeanors. A 2015 Center for Community Alternatives study found that of the 2,924 individuals with felony convictions who started applications for admission to State University of New York institutions, two thirds of the individuals never completed the application process while the attrition rate on applications for all applicants was only 21 percent<sup>xv</sup>.

The Center for Community Alternatives study concluded "that this [chilling] phenomenon, more than explicit rejection on

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the basis of a felony conviction, closes doors to higher education for people with criminal history backgrounds.<sup>xvi</sup> Impeding access to higher education amplifies the negative and disparate consequences and effects of having a criminal record in American society. Higher education, through both its positive certification and formative effects, acts as a potent antidote to some of the social and economic ills of pervasive criminalization in America.<sup>xvii</sup> Higher education is not only a powerful instrument for social mobility and civic cohesion, but also an effective means of reducing recidivism.<sup>xviii</sup>

Educational attainment (or lack thereof) also directly correlates with the economic welfare of individuals and broader society. According to the U.S. Census Bureau, 88 percent of Americans had at least a high school diploma or GED in 2015. Thirty-three percent had a bachelor's or more, and 12 percent had an advanced degree such as a master's or professional degree, or a doctorate. The report by the U.S. Census Bureau titled *The Big Payoff: Education Attainment and Synthetic Estimates of Work-Life Earnings* states that over an adult's working life, high school graduates can expect, on average, to earn \$1.2 million, while those with a bachelor's degree will earn, \$2.1 million; and people with a master's degree will earn \$2.5 million. Lower levels of education correlate not only with lower levels of income, but also higher need for social services and lower levels of tax revenue.<sup>xix</sup>

Impeding access to higher education 'at the gate' is a cause for national concern and a call for significant institutional soul-searching and debate. Based on concerns regarding barriers to reintegration and the racially disproportionate effects of the justice system, the Obama administration released a report, entitled *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, urging colleges to reevaluate and reconsider their admissions policies regarding criminal history questions.<sup>xx</sup> The AACRAO work group has interrogated anew the reasons institutions ask or do not ask applicants information regarding their criminal history.

AACRAO is aware of the challenges many institutions of higher education face as they seek to balance the complex and competing values surrounding the practice of asking applicants for information about their criminal histories. For some institutions, state legislative action or university system-level policy control if, how, or when schools ask applicants about their criminal histories. Currently, the states of Louisiana, Maryland, Washington, and Colorado have legislated the removal of criminal history questions from the applications of their public colleges. Meanwhile, the states of Massachusetts and North Carolina have laws in place that require institutions to ask criminal history questions on application forms. In other situations, career and professional certification, licensure, or accreditation requirements strongly affect policy. Some schools specifically prepare students for highly regulated professions. Many professional licensing or regulatory authorities limit licensing for those with criminal histories. A school that trains students to be nurses in a jurisdiction that prohibits those with criminal histories from obtaining a nursing license, for example, may choose to ask applicants for information related to their criminal history so as to preclude students from pursuing a career for which they may not be eligible. New York, Arkansas, Connecticut, Georgia, Illinois, North Carolina, Ohio, Rhode Island, Tennessee, Vermont and the District of Columbia have laws in place that allow people with felony convictions who wish to obtain professional licenses to obtain either a Certificate of Relief or a Certificate of Good Conduct. These certificates typically allow them to sit for licensing exams, but applicants may still be required to go before special review boards.<sup>xxi</sup>

The topic has been litigated and while some institutions avoided liability this was not always the case.<sup>xxii</sup> There is no legal duty to screen applicants based on criminal history, but institutions can, inadvertently or otherwise, assume such a duty.<sup>xxiii</sup> The research, actions, and collective wisdom from higher education membership associations such as National Association for College Admission Counseling (NACAC), National Association of College and University Attorneys (NACUA), NASPA: Student Affairs Administrators in Higher Education (NASPA), American College Personnel Association (ACPA), American

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School Counselor Association (ASCA), AACRAO, and The Common Application, also influence the conversation.

However, for most colleges and universities, institutional and mission-oriented values and priorities weigh heaviest in institution-specific conversations. Vital among these priorities are ensuring campus safety and creating optimal learning and living environments. Accordingly, reviewing and assessing the goals and purposes of asking, or not asking, applicants for criminal history information are an important set of tasks for enrollment management, student affairs, and academic leadership at institutions. Upon ascertaining the goals and purposes of seeking such information, enrollment management leaders should work to ensure their institutions articulate these goals. Also crucial for leaders in enrollment management is to ensure their policy choices convincingly advance those goals while also minimizing unintended adverse consequences.

### **Receiving an Application or Transcripts with a Criminal History or Disciplinary Notation**

As the conversation around removing or including questions about criminal history on applications for admission continues to spark debate, the question of what schools should do upon receiving this information from an applicant for admission is an important consideration. Asking criminal history questions on admission applications assumes the recipient of this information may take action upon receipt. If an institution is going to ask about criminal history on its admission applications, it should be prepared to provide information to prospective students about what an affirmative response will mean for the process of determining admissibility. Where possible, receiving institutions should have transparency and equitable treatment for all applicants as a primary objective when establishing how to respond to the receipt of such information during the admissions process.

Similar considerations exist for institutions receiving transcripts that include a disciplinary notation from applicants for admission. While not all schools include disciplinary notations on their transcripts, establishing policies and processes for responding to the transcripts that do include such notations is important for both the applicant and the institution. Given the increasing mobility of college students (roughly 1/3 of all college students transfer to at least one school according to a 2015 study released by the National Student Clearinghouse), the need for schools to have established policies and processes in place to ensure disciplinary transcript notations are flagged and reviewed has only increased. This is especially true in states where such notations are mandated by law.

Assuming a one-size-fits-all approach for establishing policies and processes around applicant criminal and disciplinary history is not realistic. The manner in which institutions establish governance concerning receipt of criminal or disciplinary history information from applicants for admission will largely be informed by institutional mission and the nature of the school or program to which an applicant has applied. A school that is a residential institution may have a different approach to how it views a student's criminal or disciplinary history than a school that offers no residential facilities. Admission to an entirely online school or program may have different considerations regarding criminal or disciplinary history than a school where physical presence is required. Institutions will align their policies and procedures in this area in a way that supports their mission and values. Regardless of the approach taken, all schools should work toward ensuring that their policies and processes regarding criminal and disciplinary history are appropriately transparent and equitable for all applicants.

In view of the information and recommendations above, AACRAO asks that member institutions review their current policies and processes involving the use of criminal history and disciplinary notation information. It urges member institutions that do not have written policies and procedures for this potential use to create them. AACRAO also suggests member institutions review the questioned effectiveness of asking criminal history questions at the time of application.

# THE PRACTICE OF USING CRIMINAL JUSTICE INFORMATION IN COLLEGE ADMISSIONS PROCESSES

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In 2009, the Center for Community Alternatives conducted a survey of institutions of higher education in association with AACRAO.<sup>xxiv</sup> The goal of the survey was “to explore the use of criminal records in college applications and admissions.”<sup>xxv</sup> The survey’s questions explored four areas: the prevalence of the collection of CJI, the procedures used by institutions to evaluate the admission of applicants with criminal records, how an applicant’s criminal history affects admission decisions, and what post-enrollment conditions and/or services are required or offered by institutions for students with criminal records.<sup>xxvi</sup>

Findings from this survey include the following information on gathering CJI:

- The majority of colleges (66.4 percent) responding to the survey collect CJI.
- 16 percent of responding institutions indicated that they do not use CJI in their admissions process even though they ask for the information in their application.
- Approximately 29 percent do not collect CJI at all, but some of these colleges use CJI in their admissions process if the information comes to them through alternative sources.
- Whether they collect CJI or not, 38 percent of institutions do not use the information.
- Private schools are much more likely to consider CJI in their admission processes than public schools, and four-year schools much more likely to do so than two-year schools. Private four-year institutions are more likely to both collect and use CJI than other types of institutions.
- Some institutions (5 percent of respondents) ask specific types of applicants for CJI. This occurs most often when an applicant seeks admission to a program that prepares students for jobs or professions that potentially restrict access to people with criminal records. Health-related degree programs are a prominent example.<sup>xxvii</sup>
- 20 percent of responding schools indicated that they conduct criminal background checks either through private companies’ services or through a state agency.<sup>xxviii</sup>
- Officials from 24 percent of the responding schools that conduct criminal background checks did not know how those checks were conducted.

With 433 institutions responding about practices on the undergraduate level, a more recent 2018 AACRAO ‘60-Second Survey’ showed that approximately half ask CJI questions during the admission process (65 percent of private institutions and 42 percent of public institutions).<sup>xxix</sup> A separate 2018 study found that 70 percent of four-year colleges (81 percent of private and 55 percent of public colleges) require criminal history information as part of the college application process.<sup>xxx</sup>

While demonstrating somewhat different results, these surveys nonetheless indicate that a majority of colleges and universities currently ask and variously use CJI in their admission processes. These results amplify the AACRAO work group’s concerns about the possible magnitude of the overall application chilling effect across the nation.

The Center for Community Alternatives report also describes how institutions responding to the survey use CJI in their admission processes.<sup>xxxi</sup> Over 60 percent of responding institutions indicated that they use CJI in their admission decision processes. A quarter of the responding schools further identified some types of records for criminal convictions (typically for

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violent or sexual offenses) as being a basis for automatic denial. Another quarter of schools use CJI to identify applicants that need further screening.<sup>xxxii</sup> Surprisingly, less than half of the schools that collect and use CJI in their admission processes have written policies to guide admissions officers and others involved in the admissions process and only 40 percent train staff on how to interpret CJI.<sup>xxxiii</sup> A possible result of this lack of training could be the relatively high degree of negativity with which many schools view even youthful offender or misdemeanor arrests.<sup>xxxiv</sup>

The Center for Community Alternatives concludes the analysis of its survey results by stating “the survey results show that criminal history screening of college applicants is becoming increasingly common; that people with criminal records are subjected to special admissions screening procedures; that college personnel other than admissions officials often participate in the admissions decision; that a wide range of criminal convictions and even arrests can negatively impact the admissions decision; that failure to disclose a conviction can result in rejection or expulsion; and that even after admission, students with records may be subject to special restrictions.”<sup>xxxv</sup>

# RECEIVING APPLICATIONS OR TRANSCRIPTS WITH A CRIMINAL HISTORY OR DISCIPLINARY NOTATION

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### Receiving Institutions

When a school receives an application for admission with an affirmative answer to a criminal history question, or a transcript for an applicant that includes a disciplinary notation, it needs to have an established process for how to respond. It is advisable that the application be reviewed for admissibility, even if there is an affirmative response to a criminal history question or a disciplinary notation on a received transcript, before assigning the application for further review. If the applicant is not admissible, no further review is required. If the applicant is otherwise admissible, the application should then be reviewed according to the school’s established process for reviewing applications that include information regarding criminal or disciplinary history. All such applicants should be afforded the same process, and appropriate information about that process should be available to prospective applicants.

If a school asks criminal or disciplinary history questions on its application/s for admission, it must ensure that an affirmative response to these questions is flagged for review in the admissions process. This must be consistent across all application platforms used (e.g., The Common App, LSAC, AMCAS, institutionally-specific, etc.). Institutions should formalize the review process for applications with an affirmative response to criminal or disciplinary history questions. This should include a process for contacting a prior institution or the applicant for further information. It is also advisable that schools formalize an appeal process for applicants who are denied admission due to a criminal or disciplinary history. This appeal process should be available to all students who are denied admission under these circumstances.

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In an environment where schools receive high volumes of paper transcripts, electronic transcripts, and electronic transcript data interfaces, building a process that ensures all disciplinary notations are seen and appropriate action taken can be a significant challenge. Schools that include disciplinary notations on their transcripts do so to communicate that information to the receiving institution. By doing so, there is, in a sense, a shifting of responsibility from the sending to the receiving institution. This is why it is essential for the receiving institution to ensure there is a process in place so that all transcripts that include a disciplinary notation are flagged for review. A process that identifies these documents on the chance that a reviewer sees the notation is a potential liability for the receiving institution if this means that there are incoming transcripts with disciplinary notations that might not be noticed and flagged.

An additional consideration for receiving institutions is what should happen when a final transcript is received after admission that includes a disciplinary notation that was not rendered on a prior transcript received when the applicant was applying for admission. Are there different processes if a transcript is received with a disciplinary notation after a student has matriculated? Information about such processes and potential outcomes (e.g., rescinding admission or expulsion) should be available to applicants when they are applying for admission.

### **Sending Institutions**

If an institution includes disciplinary notations on its transcript, it is doing so with the intent to communicate the notation to the recipient of the transcript. Given this intent, the sending institution may consider if it is appropriate to provide further notification when a transcript with a disciplinary notation has been sent another educational institution. Should there be a supplemental notification or is the transcript notation sufficient? Is there any responsibility of the sending institution in notifying the receiving institution if there is a pending serious disciplinary matter that has not yet been adjudicated? What notification responsibility does an institution have if a student is found guilty of a serious disciplinary violation resulting in a transcript notation after the student has left and enrolled at another institution?

FERPA, under specific circumstances, permits schools to provide education record information, including disciplinary information, to other educational institutions. Such exceptions are not permissible, however, when disclosing to third parties that are not considered an educational institution. It is worth noting that FERPA does not require institutions to release this information to other educational institutions where a student intends to enroll or has enrolled. It permits an institution to make the decision whether or not to release the requested information.

### **Applicant Rights and Responsibilities**

Applicants with a criminal or disciplinary history may feel stigmatized when applying for admission. A recent study by the Center for Community Alternatives clearly illustrated that applicants with a criminal history are more likely than not to never complete the application process. Schools can help alleviate the apprehension an applicant with a criminal or disciplinary history may feel by providing helpful information about how the process works for applicants in their situation. By making this information available, an applicant can do their due diligence when determining to which schools they should apply. This information can be published on admissions websites, in university catalogs, or other areas where applicants can access the information they need to make informed decisions. Additionally, any information about the appeal process for applicants denied admission due to a criminal or disciplinary history should be made available.

If schools ask criminal or disciplinary history questions on their applications for admissions, they should inform the applicant that failure to disclose such information at the time of application may lead to punitive outcomes, including the possibility of

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rescinding admission or expulsion. If it is the responsibility of the applicant to disclose the requested information, it is the responsibility of the institution to inform the applicant of the potential consequences for failing to do so.

There is not a singular standard that can be applied across all institutions regarding the degree to which criminal or disciplinary history impacts admissibility. For most institutions, the institutional mission informs these policies and processes. A commitment to transparency and equitable treatment, however, can be applied universally. All applicants for admission with a criminal or disciplinary history should be given access to due process, however that is defined at a given institution.

# RECOMMENDATIONS AND BEST PRACTICES

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Support for asking CJI questions on a college application may be diminishing. For example, many states no longer permit CJI-related questions on job applications for private employers. The U.S. Education Department under the Obama administration encouraged colleges and universities not to ask criminal history questions.<sup>xxxvi</sup> The states of Louisiana, Maryland, Washington, and Colorado have passed 'ban the box' legislation for college applications and several other state legislatures have considered similar measures. Additionally, the Common Application and the Coalition Application no longer ask CJI questions as part of their base applications, although member institutions may still choose to ask such questions in their supplemental information section. The AACRAO work group believes these shifts are significant, and should help inform college decisions and practices. Nonetheless, higher education institutions have choices and, therefore, options. The AACRAO work group, after consultation with various gatherings of representatives from member institutions across the country, considered a variety of institutional options and practices around the gathering and use of CJI. It offers the following recommendations and examples of best practices to AACRAO members:

- If your institution has a choice, consider not asking for disclosure of CJI on the application for admission.
- If an institution must or chooses to ask about criminal history, then it should delay the request for or consideration of CJI collected until after an admission decision has been made to avoid a chilling effect on potential applicants whose CJI may ultimately be deemed irrelevant by the institution.<sup>xxxvii</sup> If needed at all, CJI information should be sought only after an applicant is otherwise deemed admissible.
- Have clear and informed reasons for asking or not asking criminal history questions at any phase of the admission process. If they do not already exist, create and implement written policies and processes on the review and use of CJI in admission processes. Even if an institution does not use CJI in their processes, an institutional policy to this effect should still be in writing for use with staff, faculty, students, and external audiences. Concerns about complying with applicable state laws on this matter as well as due process are best addressed by having a written policy. Additionally, the process of creating (or updating) a written policy will help the institution ensure that all applicants are subject to consistent, fair, and equitable treatment rather than piecemeal or ad hoc solutions. Specifically, these policies need to ensure that the criteria for admission are clearly defined and do not discriminate on the basis of race, sex, disability, age,

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residence, or citizenship. This is clearly another area aided by the presence of a formal policy and associated training for involved staff to prevent inadvertently violating state or federal laws.

- Ensure that your institution's CJ-related policies and processes are transparent, readily accessible, and explained.<sup>xxxviii</sup> The issue of transparency comes up in nearly every discussion about CJ and any associated review. This is an area for improvement for many institutions. "Often, the felony review process policy is buried on the institutional website, and in some cases, the policy is not published at all... Notifying [prospective students] that this process exists before they apply is helpful; prospective students often report being shocked that they must disclose their criminal history in detail to get into college."<sup>xxxix</sup> Best practices include providing a clearly published policy regarding the gathering of criminal and conduct histories, how CJ is reviewed, what outcomes are possible, and how to submit additional information. The AACRAO work group concurs that "to avoid scaring minor offenders away, schools should explain clearly in their admissions materials that most criminal convictions are not an automatic bar to admission and explain how, and when, criminal records are considered in the admissions process."<sup>xl</sup> Increased clarity on how colleges and universities review these responses should help diminish the potential chilling effect for schools that do ask about criminal and conduct history. In any case, policies should be transparent about and define the nature and type of records that would require additional screening.
- The AACRAO work group affirms the U.S. Department of Education's *Beyond the Box* report recommendation that "if inquiring about criminal history, institutions should ensure the questions are specific and narrowly focused."<sup>xli</sup> The department parses this recommendation with the following examples:
  - Avoid the use of ambiguous criminal justice terms. When seeking CJ, colleges and universities should clearly define what information is required. Using ambiguous language can widen the net for what potential applicants must disclose.<sup>xlii</sup>
  - Clearly define what information should not be disclosed. It is a best practice to specify what is not required to be disclosed, such as information that may be beyond the scope of the question, including, in some cases, information regarding juvenile adjudications, or information contained in records that may have been sealed or expunged.<sup>xliii</sup>
  - Avoid overly broad requests about criminal history. It is also a best practice to identify the criminal conviction(s) on which it is absolutely necessary to base an admissions decision, or to focus any inquiry as narrowly as possible. Thus, rather than asking the generic question, "Have you ever been convicted of a crime?" it is recommended that institutions be as specific as possible.<sup>xliv</sup>
  - Include a time limit on criminal background data, such as within the last five to seven years. In some cases, it may be useful to base the designated period on the type of offense (for example, violent or nonviolent). Limiting the scope of CJ inquiries acknowledges the likelihood that those who have successfully transitioned out of the justice system and have not recidivated pose lower risks, and have the potential to thrive in an academic setting. Institutions should be sure to balance the value added in obtaining CJ with the significant impact of potentially deterring an otherwise qualified student from applying for postsecondary education.<sup>xlv</sup>
  - Inquire about convictions, not arrests.<sup>xlvi</sup> The AACRAO work group questions whether felonies, misdemeanors or infractions committed at a young age should be considered at all.
- If using CJ, develop in-house expertise – establish campus personnel responsible for review, evaluation, and decisions once a criminal offense of institutional concern is identified. Ensure that these individuals are trained to understand and assess the criminal history information they review.<sup>xlvii</sup>
- The AACRAO work group affirms the Department of Education's guidance that training for college personnel reviewing

## Criminal and Disciplinary History in Admissions

CJI should include emphasis on the protection of privacy for applicants.<sup>xlviii</sup> The sensitive nature of this review should limit those with access to disclosure information to those conducting the review. This work often happens in the context of committees. Commonly these committees will include representatives from a number of offices on campus. AACRAO surveying found the range of possible offices to include: Admissions, Registrar, Student Conduct Office, Dean of Students, Counseling Office, Police Department, Minority Affairs, General Counsel, Faculty, Affirmative Action/EOE/Title IX office, Athletics, Student Government, Housing, and Campus Threat Assessment or Safety representatives. Maintaining discretion and protecting the privacy of applicants should be weighed when determining the composition of such committees.<sup>xlix</sup>

- If using CJI, define what additional information is required of the applicant (documentation, narrative explanation, hearing, etc.). The AACRAO work group affirms the Department of Education's suggestion that applicants responding to questions of criminal or conduct history be given opportunity to provide more context to their disclosure to help the reviewing body understand their disciplinary records. This should include the opportunity to explain the circumstances surrounding the event(s) and to understand the nature and severity of each.<sup>l</sup> It should also include an opportunity for the applicant to describe and document personal growth and examples of rehabilitation.
- If using CJI, institutions could identify options for potential mitigation (e.g. probation, ban from campus housing, etc.) as opposed to not admitting otherwise admissible students. Institutions using CJI as a reason for denial or withdrawal of an offer of admission should inform the applicant of the reason. They should also have an established appeal process that can be clearly communicated to such applicants.
- Institutions should offer on-campus support services for students who have criminal records.<sup>li</sup>
- Institutions should conduct periodic CJI policy and process reviews.

# CASE STUDIES

## for Criminal History Working Group Guidance

Denying an otherwise qualified student admission to an institution is a serious and often difficult decision to make. An institution should consider the risk a student may pose to the safety of the campus community and whether it has the capacity to manage the risk such a student may pose. Policies and processes in place to evaluate concerns raised by the inappropriate behavior of a current student could serve as a guide on how to assess the risk a potential student might pose. Consistency and transparency should guide the decision on whether to admit such a student.

Institutions should know what sanctions are available to them when determining whether to impose conditions on a student they choose to enroll after evaluating a criminal history disclosure. Campuses often have a limited set of sanctions. These may include:

- Admitting the student on probation and requiring regular check-ins with a campus official.
- Banning the student from living in on-campus residence facilities.
- Restricting the student to online courses only.
- Restricting access to the campus to daytime only (8am to 5pm, for example).
- Deferring admission until the student has completed a set of conditions such as counseling or training.

The following hypothetical scenarios offer examples of student behavioral history institutions might discover during the admissions process. Considering the information and recommendations in this report, how would your institution respond?

### SCENARIO 1

Student A applies to a residential, four-year institution as a transfer from a community college, having successfully completed their associate's degree and meeting all academic requirements for admission. The community college did not inquire about criminal history in admitting Student A. During the transfer admission process, Student A discloses a four-year old misdemeanor conviction of domestic assault.

### SCENARIO 2

Student B seeks admission to your institution. He discloses that 8 years ago, he was charged with felony burglary but that the charge was dismissed and he entered a plea of guilty to misdemeanor trespassing. Student B also discloses that he pled guilty to driving while impaired one year ago, was given a deferred judgment, successfully completed his year of probation, and tells you that the record should be expunged in the court files.

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### SCENARIO 3

Student C is a veteran who seeks admission to your institution. Student C was honorably discharged from the army three years ago. Since that time, Student C has been convicted of two separate misdemeanor drug possession charges, both involving methamphetamine. Student C also submitted a letter from a drug rehabilitation counselor with the VA advocating for Student C's admission and explaining that Student C's drug usage is connected to his service-related PTSD.

### SCENARIO 4

Student D is a recent high school graduate who hopes to attend your institution. Student D discloses that he was suspended for fighting during his junior year of high school when he was 16 years old and that he was criminally charged for the incident. You inquire of court officials in Student D's jurisdiction and are told that the records are sealed because they relate to a juvenile court case.

### SCENARIO 5

Student E applies for admission to your institution and discloses that he is a sex offender. Student E explains that six years ago, he was convicted of lewd and lascivious acts with a minor relating to an incident that occurred when he was 18 and his victim was 15. Since that time, Student E has met all the requirements of his sentence, including maintaining his registration with applicable law enforcement authorities. None of the restrictions associated with his offender status would prevent him from attending your institution or participating in any of your institution's activities.

### SCENARIO 6

Student F seeks admission to your institution's nursing program and discloses a fifth-degree theft conviction from two years ago when the student was a senior in high school but over the age of 18. In your jurisdiction, fifth degree theft is the lowest misdemeanor theft classification, involving theft of goods less than \$500 in value. You are aware that following the completion of your academic program, graduates are required to apply for a license with a state licensing board which conducts a thorough background check as part of the application process.

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- i Friedman, M. (2015). *Just Facts: As Many Americans Have Criminal Records as College Diplomas*. Washington, DC: Brennan Center for Justice.
- ii Ibid.
- iii Ibid.
- iv Ibid.
- v Ibid.
- vi Guerino, P., Harrison, P. M., & Sabol, W.J. (2011). *Prisoners in 2010*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
- vii Weissman, M. & NaPier, E. (2015). *Education Suspended: The Use of High School Disciplinary Records in College Admissions*. Brooklyn, NY: Center for Community Alternatives.
- viii Ibid.
- ix Stewart, R. & Uggen, C. (2019). *Criminal Records and College Admission: A National Experimental Audit*. Minneapolis, MN: University of Minnesota, Working Paper.
- x Scott-Clayton, J. (2017). *Thinking "Beyond the Box": The Use of Criminal Records in College Admissions*. Washington, DC: Brookings Institution.
- xi For a discussion of the passage and subsequent amendments of the Clery Act see: Janosik, S.M., & Gregory, D.E. (2009). "The Clery Act, Campus Safety, and the Perceptions of Senior Student Affairs Officers." *Naspa Journal*, 46 (2): 208-227.
- xii Stewart, R. & Uggen, C. (2019). *Criminal Records and College Admission: A National Experimental Audit*.
- xiii Custer, B.D. (2016). *College Admission Policies for Ex-Offender Students: A Literature Review*. *The Journal of Correctional Education*, 67 (2): 35-43. See also: Olszewska, M.J.V. (2007). *Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants' Disciplinary Background Information and Its Relationship to Campus Crime*. Unpublished Dissertation for the degree of Doctor of Education East Carolina University.; Runyan, C.W., Pierce, M.W., Shankar, V., & Bangdiwala, S.I. (2013). Can Student-Perpetrated College Crime be Predicted Based on Precollege Misconduct? *Injury Prevention*, 19 (6): 405-11.
- xiv Olszewska, M. J. (2007). *Undergraduate Admission Application as a Campus Crime Mitigation Measure: Disclosure of Applicants' Disciplinary Background Information and its Relation to Campus Crime*. East Carolina University. Another study surveyed graduating seniors at a large public university and conducted criminal background checks on a subsample. When they compared those data to each student's response to the criminal history question on their undergraduate application, they found that most students did not accurately disclose their criminal records. However, they did find that students with prior criminal records were somewhat more likely to engage in misconduct while in college (primarily related to marijuana or alcohol use), but their criminal history responses were not an effective predictor of that college misconduct. A separate University of North Carolina study demonstrated that students with no prior criminal history commit the large majority of crimes on campus. The study documented that less than 2 percent of the crimes on UNC campuses were committed by students with prior felony convictions. Custer, B.D. (2016). *College Admission Policies for Ex-Offender Students: A Literature Review*. *The Journal of Correctional Education*.
- xv Rosenthal, A., NaPier, E., Warth, P., & Weissman, M. (2015). *Boxed Out: Criminal History Screening and College Application Attrition*. Brooklyn, NY: Center for Community Alternatives.
- xvi Ibid.
- xvii Ibid.
- xviii Rosenthal, A., NaPier, E., Warth, P., & Weissman, M. (2015). *Boxed Out: Criminal History Screening and College Application Attrition*.
- xix Newburger, E.C. & Day, J.C. (2002). *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*. For additional information, see Ma, J., Pender, M. & Welch, M. (2016) *Education Pays: The Benefits of Higher Education for Individuals and Society*. New York, NY: The College Board.
- xx U.S. Department of Education (2016), *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*. Washington, DC: U.S. Department of Education.
- xxi For additional discussion, see: U.S. Department of Education (2016), *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*. See also: Subramanian, R., Moreno, R. & Gebreselassie, S. (2014). *Relief in Sight: States Rethink the Collateral Consequences of Criminal Conviction*, 2009-2014. New York, NY: Vera Institute of Justice.
- xxii Institutions have avoided liability in cases that alleged a theory of negligent admission as a basis for liability. In one case a student that previously plead guilty to, and was convicted of, multiple charges including murder was admitted at a State University of New York (SUNY) institution. When the convicted student subsequently raped and murdered a fellow student, the slain student's family and estate sued various parties including the SUNY campus. At trial the SUNY campus was found liable, however on appeal that decision was reversed (*Eiseman v. New*, 511 N.E.2d 1128 (N.Y. 1987)) and at least one other similar case settled before litigation (*Estate of Faulkner v. Univ. N.C.* T-TA-19561 (N.C. 2007)). However, institutions are responsible when one student causes harm to another and that harm was foreseeable (*Tarasoff v. Regents of University of California*, 17 Cal. 3d 425 (Cal. 1976)). Additionally, institutions have paid millions in damages to either satisfy judgements or settle other claims related to violence perpetrated by one student against another. Dickerson, D. (2008). *Background Checks in the University Admissions Process: An overview of legal and policy considerations*. *Journal of College and University Law*, 34 (2): 424-427.
- xxiii See Custer, B.D. (2016). *College Admission Policies for Ex-Offender Students: A Literature Review*. *The Journal of Correctional Education*, 35: "The *Eiseman* case indicated that [institutions] do not have an explicit duty to protect the campus community from ex-offenders...assuming the duty to protect screening applicants may warrant more legal liability as it creates a contractual expectation for a safe campus" (internal references omitted). See also: Langhause, D. (2001) *Use of criminal convictions in college admissions*. *West's Education Law Reporter*, 154: 733-744: "perhaps most important for college counsel, current state law may not impose a legal duty on the college to inquire, and the college should not assume a duty that it could be held to breach."
- xxiv Weissman, M., Rosenthal, A., Warth, P., Wolf, E., & Messina-Yauchzy, M. (2009). *The Use of Criminal History Records in College Admissions Reconsidered*. Brooklyn, NY: Center for Community Alternatives, 7-21.
- xxv Ibid., 7.
- xxvi Ibid.
- xxvii Ibid., 11: One of the admissions officers interviewed stated that although her college does not automatically reject students with criminal records, such applicants who want to enroll in the Health Division are told that they will not be able to fulfill their degree requirements since they will not be permitted to intern at a clinical site. "At that point," the admission officer added, "people usually withdraw their application."
- xxviii Ibid., 12: "Of the 50 schools that conduct some form of background check screening, 14 percent do so for all students and another 14 percent do so only for students who are selected for admission. The remaining 72 percent of schools conduct background screenings only in certain circumstances: 56 percent screen applicants who disclosed a criminal conviction, 20 percent conduct screening for applicants applying to specific programs where future employment could be affected by a criminal record, and 10 percent conduct screening on a case-by-case basis."
- xxix American Association of Collegiate Registrars and Admissions Officers. (2018). *Admissions Practice Snapshot Results of the AACRAO November 2018 60-Second Survey*. Retrieved from <https://www.aacrao.org/docs/default-source/research-docs/aacrao-november-2018-60-second-survey-report-admissions-practice.pdf>.

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- xxx Stewart, R. & Uggen, C. (2019). *Criminal Records and College Admission: A National Experimental Audit*.
- xxxi Weissman, M., Rosenthal, A., Warth, P., Wolf, E., & Messina-Yauchzy, M. (2009). *The Use of Criminal History Records in College Admissions Reconsidered*, 17-19.
- xxxii Ibid., 17.
- xxxiii Ibid., 15 - 16
- xxxiv Ibid., 18.
- xxxv Ibid., 21.
- xxxvi U.S. Department of Education. (2016). *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*. Washington, DC: U.S. Department of Education.
- xxxvii Ibid., 20.
- xxxviii For example, see the University of Minnesota Twin Cities' written policies on reporting student conduct information: <https://admissions.tc.umn.edu/apply/conductFAQ.html>.
- xxxix See Custer, B.D. (2016). *College Admission Policies for Ex-Offender Students: A Literature Review*.
- xl Dickerson, D. (2008). Background Checks in the University Admissions Process: An overview of legal and policy considerations. *Journal of College and University Law*.
- xli U.S. Department of Education. (2016). *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, 22.
- xlii Ibid.: "For example, a midsized private university in Texas asks students if they have ever been convicted of a misdemeanor, felony, or other crime. The absence of a clear definition of 'other crime' makes the question ambiguous and creates an indiscriminate catch-all category for potential applicants." Ibid.
- xliii Ibid., 23: "Here is an example: Question: Have you been convicted of or pled guilty to a felony in the past 5 years? Explanation: A 'felony' is defined differently from state to state, but can generally be described as a more serious offense carrying a potential punishment ranging from more than one year in prison to life without parole or even death. 'Convicted' means a judge or jury has found you guilty of the crime(s) charged against you in a court of law, following a trial or guilty plea. If you have been adjudicated as a juvenile delinquent or have youthful offender status, you should respond to the felony question by checking 'no.' You should also answer 'no' if your conviction has been sealed, expunged, or overturned, if you were arrested, but not convicted, or if your felony conviction was over 5 years ago."
- xliv Ibid.: "For inquiries aimed at gathering information related to a specific crime, for example, crimes involving dishonesty or sexual violence, institutions should consider tailoring the specific questions asked to focus on that particular crime. Taking the time to determine whether and why the information is needed will assist in developing what specific questions to ask."
- xlv Ibid., 23 - 24.
- xlvi Ibid., 24.
- xlvii Ibid., 27 - 28.
- xlviii Ibid.
- xlix See Custer, B.D. (2016). *College Admission Policies for Ex-Offender Students: A Literature Review*. *The Journal of Correctional Education*, 35-36: "Current trends call for a committee of administrators, including those from student conduct, admissions, law enforcement, counseling, legal counsel, and the faculty, to review application materials of those students who admit past convictions on applications. The committee evaluates the information on the seriousness or severity of harm caused, the date and nature of the crime, patterns of misconduct, punishment served, and evidence of rehabilitation and responsibility acceptance. Applicants may be denied admission if their history shows an ongoing propensity for violence or misconduct."
- I See U.S. Department of Education. (2016). *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, 26: "There are a myriad of reasons why an individual might have a prior criminal conviction. Convictions may result from an individual's decision to forego a trial and plead guilty to a crime in order to avoid or reduce jail or prison time; a school-based infraction that led to involvement in the justice system; or an impulsive decision at a young age. Regardless of the reason, the individual has paid his or her proverbial 'debt to society.' Furthermore, as previously mentioned, criminal background checks could return inaccurate information about an individual's justice involvement. Colleges and universities that inquire about CJI should create a space on their application for admission to allow prospective students to explain their circumstances, and how they can positively contribute to the school community. For example, evidence of rehabilitation, community service, or persistence in higher education, whether while incarcerated or post-release, can be a strong indication that an individual is well positioned to positively contribute to a school community."
- li Ibid., 29 -36.