



Association of
Title IX Administrators

ATIXA Admissions Working Group Whitepaper:

Recommendations for Non-Discriminatory Approaches to Address Criminal and Disciplinary History in the College/University Admission Process

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INTRODUCTION

For decades, many colleges and universities have asked admissions applicants to disclose criminal charges, convictions, and/or disciplinary findings from previous educational institutions. In 2011, TNG¹ released its *Model Policy on Felony Admissions and Review* with the goal of enhancing the safety of campus communities and empowering effective risk assessment via the admission and enrollment processes. By 2016, there were an estimated 75-110 million people in the United States who had criminal histories, according to various sources.² That same year, the U.S. Department of Education published the *Beyond the Box Resource Guide* to support a holistic review of applicants by assisting institutions with removing barriers and encouraging alternatives to inquiring about criminal histories in admissions processes.³

Involvement in the criminal justice system is more likely for individuals from marginalized populations (e.g., persons of color and Indigenous peoples, individuals with disabilities, LGBTQIA+ individuals, low-income people), and the effect is compounded for individuals with multiple marginalized identities.⁴ Additionally, students of color, particularly Black and Indigenous students, are more likely to be subjected to school discipline in the K-12 environment.⁵ Institutions must ensure that gateways to higher education, such as admission

¹ www.tngconsulting.com, the firm that provides management services to ATIXA.

² Goggins, B.R. and DeBacco, D. A. (2018). Survey of State Criminal History Information Systems: A Criminal Justice Information Policy Report, 2016, Table 1. US Department of Justice, Bureau of Justice Statistics. Available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>; <https://www.politifact.com/factchecks/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/>.

³ See <https://www.ed.gov/beyondthebox>.

⁴ The Sentencing Project (2021). The Color of Justice: Racial and Ethnic Disparity in State Prisons. Available at <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; The Sentencing Project (2018). Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System. Available at <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; See the Arc's Criminal Justice Initiative. Available at <https://thearc.org/our-initiatives/criminal-justice/#overview>; Center for American Progress (2016). Disabled Behind Bars. The Mass Incarceration of People with Disabilities in America's Jails and Prisons. Available at <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf>; Prison Policy Initiative (2021). Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System. Available at <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/>.

⁵ Losen, D., Hodson, C., et al. (2016). Are We Closing the School Discipline Gap? The Center for Civil Rights Remedies. Available at http://www.schooldisciplinedata.org/ccrr/docs/AreWeClosingSchoolDisciplineGap_UCLA_219.pdf.

practices, do not disproportionately disadvantage justice-involved individuals or those with school disciplinary histories, and/or deter potentially well-qualified applicants from applying for, and enrolling in, post-secondary education and training.

While institutions initially began screening applicants out of an abundance of caution and to promote campus safety, a mounting body of national research shows no significant evidence that students with criminal or disciplinary histories pose a safety risk to colleges.⁶ Instead, using that history in the admission process denies access and/or creates a “chilling effect” on the very educational opportunities that reduce recidivism and make communities safer and more equitable. Disparities in criminal justice and school disciplinary involvement by race and class raise concerns about access to education and civil rights.

As research shows, education is a powerful pathway for successfully transitioning into the workforce that reduces recidivism by 43% — which actually makes society and campuses safer in the long term, and offers a new opportunity for generational change, personal success, and professional achievement.⁷ Education is one of the primary protective factors that fosters social and economic well-being among justice-involved⁸ students. Nationally, the rate of recidivism for formerly incarcerated individuals with a high school diploma or High School Equivalency (HSE) credential is 55%, but that rate drops to 14% for those who obtain an associate’s degree and 6% for those who obtain a bachelor’s degree.⁹ It drops further still, to 0%, for those who obtain a master’s degree.¹⁰

As a result of this research and growing public concern, the Common App¹¹ recently eliminated its criminal convictions question from its applications and makes it optional for

⁶ AACRO (2019). Criminal and Disciplinary History in College Admissions., footnote xiii citing 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.

⁷ Davis, L., Bozick, R., et al. (2013). Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults. Rand Corporation. Available at https://www.rand.org/pubs/research_reports/RR266.html.

⁸ Justice-involved refers to individuals who have had some interaction with the criminal justice system as a defendant. This include interactions from arrest through being placed on probation/parole.

⁹ See <https://www.prisonerresource.com/prison-education-facts/prison-education-reduces-recidivism/#:~:text=Ex%2Doffenders%20who%20complete%20some,reduces%20it%20to%205.6%20percent>.

¹⁰ Id.

¹¹ The Common App is a non-profit membership organization representing nearly 900 diverse institutions of higher education. See <https://www.commonapp.org>.

institutions to include this query.¹² The disciplinary history question will be eliminated from the Common App starting with the 2021-2022 admission cycle.¹³ In addition, some states have passed legislation to prohibit institutions from inquiring about an applicant's criminal history during the admission process.¹⁴

The Center for Community Alternatives conducted a study in 2015¹⁵ that offered the following statistics:

- 73% of colleges and universities asked criminal and/or disciplinary questions on admissions applications, with 89% of those saying the answers informed admissions decisions.
- 25% of the institutions that asked criminal and/or disciplinary history questions had written policies guiding their decision, with 30% training their staff on how to interpret the varying incidents and violations.

The disparate impacts of asking such questions include, but are not limited to:

- Individuals with criminal and/or disciplinary history are less likely to apply to college.
- Applicants with criminal and/or disciplinary history are more likely to receive restrictions or probation if admitted, resulting in a continuation of behavior policing.
- Applicants can feel stigmatized when applying for college admission.

Individuals with lived experience of the justice system are:

- Less likely to have guidance navigating the college application process and may face barriers to receiving financial aid or scholarships.¹⁶
- More likely to have academic gaps resulting from a history of changing schools or from attending low-quality schools.¹⁷

¹² See <https://www.commonapp.org/blog/change-criminal-history-question-2019-2020-application-year>.

¹³ See <https://www.commonapp.org/blog/common-app-removes-school-discipline-question-college-application>.

¹⁴ This is discussed further on page 26 of this document.

¹⁵ Center for Community Alternatives (2015). The Use of Criminal History Records in College Admissions Reconsidered. Available at <https://www.communityalternatives.org/wp-content/uploads/2020/02/use-of-criminal-history-records-reconsidered.pdf>.

¹⁶ Shah, R., and Strout, J. (2016). Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records. Juvenile Law Center. Available at <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/future-interrupted.pdf>.

¹⁷ Davis, L., Bozick, R., et al. (2013). Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults. Rand Corporation. Available at https://www.rand.org/pubs/research_reports/RR266.html.

- More likely to test below grade-level and require individual education plans as a result of lower educational quality within justice facilities.¹⁸
- More likely to have experienced trauma and neglect before confinement.¹⁹

Given this increasing awareness of admissions barriers and the implications for equitable access to higher education and workforce development, ATIXA solicited a group of volunteers with pertinent expertise from its membership that it empowered to make recommendations informed by research, best practices, and professional experience. ATIXA tasked this Working Group to review its existing admissions screening model policy and provide guidance to the field accordingly. This document is a result of that work and hereby summarizes the existing context, practices, and data that have formed the basis for the Working Group's recommendations and implementation considerations.

¹⁸ The Council of State Governments Justice Center. (2015). Locked Out: Improving Educational and Vocational Outcomes for Incarcerated Youth. New York: The Council of State Governments Justice Center. Retrieved from <https://csgjusticecenter.org/publications/locked-out-improving-educational-and-vocational-outcomes-for-incarcerated-youth/>.

¹⁹ Pace, S. (2018). From Correctional Education to School Reentry: How Formerly Incarcerated Youth Can Achieve Better Educational Outcomes. Texas Journal on Civil Liberties & Civil Rights, Vol 23(2), pages 127-143.

RECOMMENDATIONS

After careful review and thoughtful consideration of potential risks and benefits, the ATIXA Admissions Working Group recommends that institutions omit criminal and disciplinary history questions from admissions applications, and for some purposes (such as campus housing applications or special programs), relocate revised questions or screening tools, as appropriate.

The ATIXA Admissions Working Group’s recommendation to not ask about criminal or disciplinary history during the admissions process is a position also supported by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).²⁰ ATIXA’s position does not go so far as to adopt an absolute “Ban the Box” stance, it is at least embracing the need to minimize and/or relocate any “box” or screening questions that cause or are likely to cause disparate discriminatory impacts on applicants. This rationale is based on, but is not limited to, the following reasons:

- A disproportionate number of students with criminal and/or disciplinary history are BIPOC,²¹ specifically Black students.
- Asking applicants for their criminal and/or high school disciplinary history deters individuals from applying to college.²²
- Institutions may not have trained staff reviewing the admissions applications to properly identify incidents that may pose threats to campuses.
- Incidents may be several years old (e.g., a student was suspended as a first-year student in high school and is now entering college at the age of 25).
- The incident may have been a one-time offense, and the student has no additional criminal and/or disciplinary history.
- Some questions are overly broad and do not offer the applicant an opportunity to offer an explanation.

²⁰ AACRO (2019). Criminal and Disciplinary History in College Admissions. Available at <https://www.aacrao.org/signature-initiatives/trending-topics/criminal-history-and-college-admissions/criminal-and-disciplinary-history-in-college-admissions-report>.

²¹ Black, Indigenous, People of Color.

²² We are not suggesting that any institution should ignore information that it receives, but we are suggesting boundaries on what information institutions should actively seek.

- Many states have placed an emphasis on prison-based inmate education through community college programs, but those students may be unable to transfer or apply community college credits if they later face admission screening from four-year institutions.

Institutions that choose to not ask criminal and disciplinary history questions during the admissions process should consider whether there are other circumstances in which it may be reasonable to inquire about criminal and/or disciplinary history post-admission.

Establish Support & Relocate Questions (Sparingly)

Institutions that choose to remove the criminal and disciplinary history questions from their applications will need to take some steps to successfully mitigate risk and support their incoming students who may have criminal and/or disciplinary histories. Institutions should also be aware that one impact of “Banning the Box” may be that if the campus community later learns of an admitted student’s criminal or disciplinary history, the institution may face an uproar of outrage and calls to rescind the admission or expel the student. This can make life quite onerous for such students who have been admitted, especially in this age in which such information on histories is so easy to find online and share via social media. If an institution moves away from screening questions, a community education effort should be implemented to help members of the campus community understand why this change is reasonable, does not subject them to undue risk, and serves important institutional objectives.

While there is value in “banning the box,” there is also a desire within our society to end the so-called “pass the trash”²³ phenomenon that is worth consideration. One way that many schools have bridged these competing goals is to limit criminal or disciplinary history questions to those that relate to sexual harassment and other sex offenses. Others see this as a slippery slope to asking about other crimes and disciplinary histories.

The following non-exhaustive recommendations are provided to assist institutions as they consider the institutional changes that may be required to support the removal of criminal and/or disciplinary history questions from admissions applications and whether to incorporate these questions as part of a post-admission vetting process of some kind.

²³ An obviously stigmatizing label – referring to the ease with which sex offenders and harassers, especially, can move between schools and jobs without detection – that may or may not be merited, but which is probably unhelpful to advancing discourse around how to limit the passing.

- Relocate revised disciplinary and criminal history questions from the admission application to the application for campus housing and establish a consistent review process.
 - This approach may also have a discriminatory impact on students who may need access to subsidized campus housing in order to be able to afford college such as BIPOC or those who are socio-economically disadvantaged. However, institutions have obligations to balance access with safety and not compromise all screening efforts simply to achieve greater inclusion.
- Consider adding revised disciplinary and/or criminal history questions to applications to participate in study/travel abroad, internships, and other pertinent programs.
- Allow for program-specific advising and review strategies as appropriate, such as those with sensitive placements, state-based screening, and/or licensing requirements, for both program applicants and students changing their majors into these programs.
- Create a standard process for review of affirmative responses in situations when the questions are warranted.
- Engage in proactive discussions regarding public relations, including with faculty and other internal communities.
- Create a community of support specific to justice-involved students within your institution.

Recommendations for Institutions That Choose to Ask Criminal and Disciplinary History Question During the Admission Process (Including Limited Situations When You May Want to Ask)

Recognizing that many institutions may not yet be willing to forgo these practices, may not have the flexibility to omit or revise these questions, or may want to ask these questions in limited situations, we have outlined several factors that institutions should carefully consider when asking these questions as part of the admissions process. We have provided sample language and guidelines for practices that promote equitable, transparent, and consistent review of an applicant's information, understanding that a balanced approach is often desired.

The following general recommendations are offered:

- Inquire about criminal and/or disciplinary history after an admission decision, not for the purpose of rescinding the admission, but to implement protective actions that balance access and safety.
- If asking about criminal and/or disciplinary history during the admission process:
 - Ensure that institutional policies related to criminal and/or disciplinary history are readily available for applicants and can be easily understood.
 - Establish clear and informed reasoning for asking such questions and be transparent about how the answers are considered and what effect they can have on an application.
 - Establish an in-house Admissions Review Committee (ARC) to offer admissions recommendations when criminal and/or disciplinary histories need to be evaluated.
 - Consider offering an appeal process for applicants following a denied admission based on criminal and/or disciplinary history.²⁴

²⁴Working Group members were divided on this idea. We included it as something to consider, but it could be bureaucratically overwhelming for many institutions, and implies that an explanation is provided for a decision not to admit, which is culturally uncommon for most institutions. We think that an ARC could reach out to obtain clarifying information from an applicant such that there should not be additional information that an appeal would offer.

- Establish on-campus or community relationships with external partners to support students with criminal and/or disciplinary histories, as necessary.
- Conduct annual or biennial review of the admissions policy and process.

These recommendations are explained in greater detail below.

Recommendation 1

Know Why You're Asking

If institutions ask about history or previous records, there may be a duty to take reasonable action based on what is learned. Institutions should understand the responsibility undertaken when requiring applicants to provide previous criminal and/or disciplinary history. If asking the questions and receiving the subsequent information, the institution will want to ensure that such information is carefully assessed rather than simply collected. Ask and act, or don't ask and don't act.

Recommendation 2

Develop the Questions Thoughtfully

The way in which the questions are crafted can have a significant impact on the applicant, the information that they need to gather and submit, and potentially on the number of applications going through the review process. For these reasons, ATIXA recommends considering the following in creating your screening questions, if any.

Scope of Inquiry: Assuming that campus community safety is a primary driver for asking these questions, it is recommended that institutions limit inquiries to a defined historical timeframe, perhaps within the past five years. Institutions should limit questions to inquiries about criminal convictions and final disciplinary decisions rather than arrests, charges, or allegations.²⁵ Additionally, use of the word “felony” may not be sufficient to capture the full scope of conduct that may pose a safety risk. The classification of crimes as felony versus misdemeanor varies by state, and some misdemeanors may carry safety concerns that institutions want to review but would not be flagged by only asking about felony-level convictions. Consideration should be given to listing specific types of conduct (e.g., violent

²⁵ Such inquiries about arrests may be unlawful in some jurisdictions.

acts, sexual assault, stalking, domestic violence, assaults, cyber-crimes against persons) that may pose a safety risk in the questions. Disciplinary questions should not ask about academic-related misconduct issues as these do not pose a safety risk for institutions.

Documentation: Many state and local governments charge fees for criminal history records, thus institutions asking screening questions should be cognizant of those costs and the impact that may have on applicants if documentation of a criminal history may be necessary as a result of an affirmative answer. Many states offer subscription services for organizations wishing to run background checks. Using such a service can reduce costs for applicants, but most services are limited to individual states, rather than a federal records check. Alternatively, institutions may require a 50-state/federal background check as a follow-up. While many companies offer access to these reports, who will pay the fee? Does the existence of a fee prevent some applicants from obtaining the necessary verification documentation? Does an institutional fund to defray such costs for economically disadvantaged applicants make sense? Does the institution choose the provider and/or negotiate rates?

Alternatively, institutions may determine that a statement from the applicant regarding the circumstances is sufficient for review purposes. Institutions should be mindful of the potential that applicants with a history of multiple crimes may only list some of those crimes, or only the most recent or least violent ones. Institutions may elect to have a separate assessment process for applicants who are on probation, under supervision, or on the sex offender registry (example provided below) and may require additional documents and may speak with the probation/parole supervisors of applicants to inform their assessment. Documents submitted to the institution should be stored in a secure location and/or site and retained in accordance with the institution's record retention policy.

Sample Wording Options:

Criminal History Questions

- In the last 3/5/7 years, have you been convicted of a violent criminal offense? If so, please provide a brief summary.
- Are you currently subject to any court order or court-imposed supervision related to a violent crime (e.g., a protection order, probation/parole, sex offender registry)? If so, please provide a brief summary.

- In the last 3/5/7 years, have you been convicted for any behavior involving violence or harm to others (e.g., sexual assault, stalking, domestic violence, assaults, cybercrimes against a person)? If so, please provide a brief summary.

Institutions should consider adding a disclaimer such as: *Note that if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, or otherwise required by law or ordered by a court to be kept confidential you are not required to answer "yes" to these questions or provide an explanation.*

Disciplinary History Questions

- Are you currently facing violence-related disciplinary allegations at any school/educational institution? If so, please provide a summary.
- Have you ever withdrawn from a school/educational institution while facing violence-related disciplinary allegations or when reasonably expecting that such allegations could result in a complaint? If so, please provide a summary.
- Have you been expelled, dismissed, suspended, or placed on probation by a school/educational institution (for non-academic reasons) in the past 3/5/7 years for any behavior involving violence or harm to others (e.g., sexual assault, stalking, domestic violence, assaults, cybercrimes against a person)?
- Have you ever been expelled, dismissed, suspended, or placed on probation by any school/educational institution (for non-academic reasons) since the ninth (9th) grade (or international equivalent) for any behavior involving violence or harm to others (e.g., sexual assault, stalking, domestic violence, assaults, cybercrimes against a person)?

Promote Application Completion: It is well-evidenced that individuals with criminal or disciplinary histories are less likely to complete the college application process.²⁶ To reduce these disparities, we recommend inclusion of a statement aimed at promoting completion, such as:

Information regarding disciplinary history and/or criminal convictions will not be reviewed until after a determination has been made regarding [academic/applicant] qualifications. Having a disciplinary history and/or criminal conviction is not an automatic disqualification from admission. Only after an applicant has been deemed admissible will trained staff individually review the disciplinary history and/or criminal conviction information provided. [College/University] affirms its commitment to addressing inequities for students who have historically faced barriers to accessing higher education.

RECOMMENDATION 3

Be Intentional Regarding When the Review is Completed

Institutions that plan to adopt application questions regarding criminal and/or disciplinary history, or those that plan to continue asking such questions, should take care to thoughtfully structure both the questions and their processes to promote equity and inclusion while reducing risk. It is recommended that the criminal and/or disciplinary history be kept separate from the information being considered to determine admissibility. Once an applicant has been deemed admissible, only then should a review team consider their criminal and/or disciplinary history. Ideally, the admission decision would not be communicated to the applicant until after the review of the criminal and/or disciplinary history is completed. However, some institutions may choose to inform an applicant of a conditional admission pending the outcome of the review process. Consideration should be given to the impact of providing such a conditional offer as it may deter some applicants from moving forward to complete the review process.

²⁶ Rosenthal, A., NaPier, E., Warth, P., & Weissman, M. (2015). *Boxed Out: Criminal History Screening and College Application Attrition*. Brooklyn, NY: Center for Community Alternatives.

RECOMMENDATION 4

Identify and Train a Process Coordinator

Institutions that ask screening questions should appoint a person to serve as the coordinator for the admissions review process. The Coordinator may be a member of the admissions staff, Dean of Students office, or other area that makes sense based on institutional structure.

The Coordinator should be trained on:

- Why this process is necessary for the institution
- Which screening question answers do not need further review, allowing the applicant to be admitted
- Which screening question answers require review by the Admissions Review Committee (ARC) and may affect an applicant's conditional acceptance (if applicable)
- What communication will take place with applicants who are referred to the ARC regarding the process and the information needed to submit to the ARC

RECOMMENDATION 5

Establish and Train an Admissions Review Committee (ARC)

An Admission Review Committee (ARC) should be established to review applicant information. The committee should be comprised of multiple professional staff, and the number of representatives should be scaled to meet institutional needs. The Admissions Review Coordinator should be an ex-officio member who is responsible for coordinating the meetings and for recordkeeping. Appropriate committee members may include staff representing the following areas:

- Admissions/Enrollment Management
- Student Conduct
- Public Safety/Law Enforcement
- BIT/Care Team
- Academic Affairs
- Title IX (for consultation involving sex- and/or gender-based misconduct)
- Legal Counsel (for consultation only)

The ARC should receive training on a variety of different topics, including the goals of the screening process and how to use various risk assessment tools.²⁷ If an institution is hesitant to establish another committee, it may be helpful to know that many institutions use a subset of their BITs as their ARC, an approach that is both efficient and functional, with the proper training.

RECOMMENDATION 6

Establish a Comprehensive Review Process

Institutions should establish a comprehensive review process guided by a clear, consistent evaluative protocol. The process should be crafted for efficiency and consistency to minimize the potential for bias. We have provided a sample ARC process below, which we believe aligns with this purpose.

Sample Process

- 1.** The ARC Coordinator will notify the applicant that, based on their responses to the screening questions, a review of the circumstances is necessary. The Coordinator will inform the applicant of what additional information is needed and the deadline to provide the information. If conditionally admitted contingent upon completion of the ARC review, the Coordinator will explain to the applicant what conditional admission means and their role as a contact person for the applicant throughout the admission review process. If there is incomplete information in the application itself, the Coordinator will work with the applicant to ensure that all answers are complete.
- 2.** After receiving all of the requested information from the applicant, the Coordinator will redact personally identifying information (i.e., name, e-mail address, date of birth) and other information that could potentially bias a reviewer (e.g., immigration status, country of origin, previous institutions attended, upload it to a secure file (Box, Google Drive, etc.), and notify the full ARC to review the following documents prior to the scheduled ARC meeting:

²⁷ Institutions may often seek to conduct a threat assessment instead of a risk assessment. A threat assessment would be appropriate in situations where a threat has been made and an institution needs to determine an individual's ability to carry out such a threat. A risk assessment would be the most appropriate assessment for the ARC process so that an institution can determine what, if any, risk an applicant may pose to the campus community if admitted.

- Background check results
- Completion of any follow-up questionnaires
- Documentation of conviction/adjudication
- Documentation of release
- Completion of various risk assessments (some of which are noted in the following section)
- Other

3. If an applicant is on probation or parole, the ARC should have a conversation with the supervising probation or parole officer prior to admission, if possible (although this can be done before or after admission). The ARC should provide the probation or parole officer with a copy of a release of information signed by the applicant and explain nature of the request – to confirm the applicant’s self-reported information, to learn about compliance under the terms of supervision, and to help assess risk to the community and/or become aware of any concerns that the PO may have.

- Confirm applicant’s self-reported information regarding the nature of the conviction(s), the victim’s age, and whether they were known to the applicant, the applicant’s probation status, and any specialized condition(s) of supervision.
- Ask for an overview of the applicant’s supervision. Follow up questions could include:
 - Have there been any technical violations or incidents of new criminal conduct during the period of release?
 - Is the individual compliant, to their knowledge, with applicable conditions?
 - Has the applicant been working, engaged in other education, etc.?
 - Is their housing situation stable?
 - Does the applicant have adequate social support?
 - If the applicant has conditions regarding treatment, has the applicant been successfully attending or participating?
 - Are there recent assessments regarding the applicant’s risk of recidivism? If so, the outcomes of those assessments may inform your review, noting that there are distinct differences in evaluating the risk of recidivism for different types of misconduct.

- The most common tool for measuring risk of recidivism for sex offenders, specifically, is the Static-99,²⁸ with scores ranging from 1-50 with 50 indicating that the offender is likely to reoffend in the future. This tool is typically used to assess the dangerousness of an adult male sex offender.
 - The Level of Service Inventory-Revised²⁹ is a commonly used risk assessment tool that predicts overall likelihood of recidivism; individuals may score into one of several categories: Low, Moderate, High and High-Max. Individuals who are assessed as High or High-Max warrant further discussion to understand the factors associated with increased risk. Scores range from 1-55. It is common that probation and parole departments supervise low risk offenders administratively only (without monitoring or surveillance) and so may have little background information about the offender.
 - The Ontario Domestic Assault Risk Assessment (ODARA)³⁰ tool is used to assess the likelihood of physical violence by a male against a female domestic partner in the next five years, the score range is 0-13. Increments of scores range from a zero score (having approximately a 5% chance of assaulting again), to a 7-13 score (with a 70% likelihood of additional assault against a partner/future partner in the next five years).
- Ask for feedback from the probation or parole officer regarding what their general experience has been with the applicant and if they have any concerns about the individual being part of an academic community. It is important for these professionals to understand the campus context (e.g., nature of the student body; typical or specific public use of the facility by others; isolated nature of certain classroom environments). An applicant or student's FERPA protected information is not shared with a probation or parole officer unless a release permits it.
 - If the applicant has conditions that prohibit contact with minors, etc., inform the probation or parole officer that there are likely minors on campus/in online classes. Discuss with the probation or parole officer their expectations around "incidental

²⁸ <http://www.static99.org/>.

²⁹ <https://storefront.mhs.com/collections/lsi-r>.

³⁰ <https://odara.waypointcentre.ca/>.

contact.” Inform them that the institution does not actively notify faculty or the campus community about a student’s registered sex offender (RSO) status (although that information is passively, publicly available on the institution’s website); the expectation is that the student will comply with their conditions of release but can ask for assistance as needed in making arrangements to avoid group projects, one-on-one assignments with minors, etc.

- If there are existing protection orders (PFAs and the like) or conditions, ask for duration, concerns regarding contact, etc.
- If there are other specific conditions of release that could present as barriers to the student, discuss with the probation or parole officer the feasibility of academic participation, etc., if admitted.

4. The ARC will meet and discuss the information reviewed to determine the potential institutional risk if the applicant is admitted. The ARC should use a structured risk assessment tool (e.g., SIVRA-35³¹) to conduct this assessment. In making its determinations, the ARC should consider the following:

- Patterns of behavior
- How long ago the behavior occurred
- Risk of recidivism
- Severity of the circumstances
- Letters of recommendation
- Information from court-ordered supervision such as probation/parole officer
- The applicant’s personal statement
- The overall safety of the institution
- Other relevant information

5. There are times when the documents provided by the applicant may not be sufficient for the ARC to make an admission decision. In this circumstance, the ARC may request to meet with the applicant in person or via videoconference for a structured interview.

³¹ <https://www.nabita.org/resources/sivra-35-assessment-tool/>.

6. ARC will provide one of the following outcomes:

Accepted: Applicant is granted admission without any conditions. In general, ATIXA recommends that students be admitted without further stipulations so as not to create a chilling effect and because institutions should not accept students that they have to overly restrict in order to ensure safety.

Accepted with Conditions: Admission is granted if the applicant agrees to the conditions that are specified in writing. Conditions imposed should be specific to any outstanding concerns and/or designed to protect a specific institutional need. It should be made clear that failure to abide by the conditions during enrollment could result in revocation of admission.

Conditions may include:

- Restriction from living in campus housing or restriction to certain types of housing
- Restriction from participation in certain activities
- Restriction of certain privileges

Not Accepted: The application will be denied. The applicant may be given an explanation regarding why they cannot be admitted at this time, with information about any available appeal process.

ATIXA does not recommend the practice of accepting an applicant but prohibiting them from specific courses or programs. Instead, we encourage institutions to counsel students on the potential barriers for degree completion, employment, licensure, professional certification, etc. that they may face in the future as the result of their criminal and/or disciplinary history.

RECOMMENDATION 7

Plan for How to Screen Registered Sex Offenders (RSO)

Persons who are RSOs are often permitted to enroll in institutions of higher education. The following recommendations will aid institutions in developing a procedure to evaluate the candidacy of an applicant who is on a Sex Offender Registry or who has convictions for sex offenses. A similar approach may be used when considering applicants who have been dismissed from academic institutions as the result of serious Title IX-related violations. In either case, ATIXA offers suggestions on how to assist ARCs in assessing the applicant for admission, setting clear expectations for admitted students with criminal and/or disciplinary histories involving sex offenses, and providing appropriate guidance/resources to ensure adequate support.

Pre-Admission

Because RSOs typically have specific restrictions with which they must comply, and because the particularly significant nature of sex offenses, a post-application, pre-admission conversation should be held with the applicant so that a shared set of expectations can be developed, and should admission be granted, resources and supports can be made known to the individual.

- If on probation, parole, or other court-ordered supervision, seek a release of information from the applicant and get contact information for the probation or parole officer.
- Discuss with applicant their social and community supports, their current terms of supervision, employment history, academic goals, and other relevant life factors.
- Gather written documentation regarding the conviction(s) and, if applicable, the probation status and conditions. If the documentation is not provided at the meeting, or has not been previously submitted, documentation may be required for completion of the review.
- Discuss the individual's course of study and career goals. The applicant's desired major or area of study should be discussed to ensure the applicant's status does not preclude enrollment in the specific program of choice or preclude employment in the field.

- Discuss the implications for institutional employment or volunteer service on behalf of the institution. If the institution expects to admit the applicant but also to put conditions on admission regarding institutional employment or volunteering, discuss those potential outcomes during this conversation.
- Remind the applicant that they are expected to abide by the institution's policies, including conduct and Title IX-related policies. If there are required educational programs (such as mandatory online Title IX-related programs), let them know the expectation that they, too, must complete the program.
- For any restrictions imposed by the courts that present challenges for engagement in an educational program (e.g., restriction from using computers or the Internet), discuss whether it would be possible for them to proceed in an academic program given the restriction(s). If applicant has such restrictions, they may not be qualified to be in the program as most every course of study will require use of a computer, Internet, etc. For this reason, these applicants are not appropriate for admission at most institutions.
- Review their plans to avoid “dangerous” or triggering situations/influences while participating in institution-sponsored activities. Such situations could include those that put others in danger, that violate or appear to violate any conditions of probation or registrant conditions, or that create vulnerability to accusations or falling into old patterns, etc.
- Certain types of registered sex offenders should not be permitted to reside in campus housing. This issue should be discussed prior to admission so there are no misunderstandings.

Post-Admission Support for Registered Sex Offenders

Post-admission, most students need some sort of support, and RSOs are no exception. The following targeted supports should be offered, as available, to RSOs and made known during the admission and review process.

- If a student has a situation arise where they encounter a person they are not permitted to be around (e.g., they find themselves in a course with a 17-year-old and have a restriction to not have contact with minors), they should know to whom they can reach out for assistance in making schedule adjustments.

- If the student has been unable to secure housing, the student should be provided local resources that may be able to help them find housing and, as needed, assistance in determining how the student will be transported to and from campus. If the institution chooses to offer a list of potential housing options, legal counsel should be consulted concerning disclosures or disclaimers that need to be offered.
- The Title IX Coordinator should review the student's schedule and work with the student to develop strategies that support adherence with any requirements to avoid minors on campus or other conditions of release. If there are known locations where minors will congregate (e.g., campus-based daycare, dual-enrollment or early college programs, camps), they should be informed of those locations and the need to studiously avoid those areas.

RECOMMENDATION 8

Athletics and NCAA Requirements

Per National Collegiate Athletic Association (NCAA) policy,³² institutions of higher education are responsible for exercising due diligence in identifying and addressing serious or sexual misconduct issues involving prospective student-athletes and transfer student-athletes. Institutions offering intercollegiate athletics under the purview of other associations (i.e., NJCAA, NAIA) should consult the conference and national policies of those associations for expectations regarding collecting and sharing student-athlete and transfer student-athlete misconduct information. The institution should review all instances where sexual, interpersonal, or other acts of violence³³ are identified or suspected before a National Letter of Intent and/or offer of financial aid is sent to the prospective student-athlete.

Sample Procedure

The Athletics Department will collect information and perform the searches for any incoming or transfer student-athlete. (Note: Background searches for incoming or transfer *international* student-athletes will be modified as necessary as many will not have a driver's

³² https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf.

³³ The following definitions are used in the NCAA Policy: 1) Interpersonal Violence – violence that is predominantly caused due to the relationship between the victim and perpetrator, including dating and domestic violence; 2) Sexual Violence – a term used to include both forcible and nonforcible sex offenses, ranging from sexual battery to rape; and 3) Other Acts of Violence – crimes including murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury.

license or social security card.) The following personal information will be collected from all first-year or transfer student-athletes:

- Full name
- Social Security Number
- Driver's License Number/State
- Home Address
- Phone Number
- Date of Birth
- Email Address

Searches Performed

Background Check

A background check will be performed for all prospective student-athletes who the sport intends to sign to a Financial Aid Agreement or National Letter of Intent or extend an offer to join the team as a walk-on student-athlete, absent exigent or extenuating circumstances.

Internet/Social Media Search

An Internet/social media search will be performed for all potential student-athletes who the sport intends to sign to a Financial Aid Agreement or National Letter of Intent or extend an offer to join the team as a walk-on student-athlete.

Requirement to Disclose

Coaches should disclose to the chancellor/president, athletic director, and Title IX Coordinator any information relating to instances of sexual, interpersonal, or other acts of violence of the transfer or first-year student-athlete of which they become aware during the recruiting process, as these institutional officials are required to sign the annual NCAA Campus Sexual Violence Attestation Form.

Analysis

Following the results of the background check and Internet search, the institution will determine if additional steps need to be taken, to include but not be restricted to, contacting the transfer or first-year student-athlete's previous institution(s) (including former secondary and/or higher education institutions); contacting other relevant parties; and/or, requesting a personal statement from the transfer or first-year student-athlete. The transfer or first-year student-athlete will provide any authorization required for disclosure of such documentation or information, as requested by the institution. All instances where serious or sexual misconduct is identified or suspected will be reviewed by the ARC before an offer of financial aid or a National Letter of Intent is considered, or a transfer or first-year student-athlete can join the team as a walk-on.

RECOMMENDATION 9

Program-Specific Implications

Institutions may determine that they need to ascertain information about a student's criminal or disciplinary history outside of the admissions context to mitigate a potential risk or threat to the institutional community, such as a high-risk registered sex offender in campus housing or when students are seeking research or teaching assistantship opportunities. Where some majors and programs have occupational licensing requirements that may prohibit individuals with certain types of criminal history from being licensed, institutions may determine that it is beneficial to advise individuals before they choose to enter a program, which would require an inquiry into criminal history post-admission.

RECOMMENDATION 10

Consider Any Other State Law, Governing Body Policy, and Institutional Policy Implications

In the decision of whether, and how, to ask questions regarding criminal and/or disciplinary history, institutions must also consider the impact of federal, state, or local laws and institutional or system-wide policies that may prohibit inquiries altogether or at certain stages of the admissions process. This variation creates the potential for confusion, from applicants and the institutional community, so ATIXA advises institutions to work with their

legal counsel to understand any legal implications. Some legal and policy considerations include:

- Is there a state or local law that prohibits or requires asking about criminal and/or disciplinary history in the application process?
- If so, does it apply to:
 - All applicants or only undergraduates?
 - All stages of the admissions process or only at initial application?
 - All types of criminal history or does it differentiate between felonies, misdemeanors, etc.?
- Is there a governing body (e.g., Board of Regents) policy that prohibits or requires asking about criminal and/or disciplinary history in the application process?
- If so, does it apply to:
 - All applicants or only undergraduates?
 - All stages of the admissions process or only at initial application?
 - All types of criminal history or does it differentiate between felonies, misdemeanors, violent crimes, etc.?
- Is there a carve-out for certain types of offenses, e.g., sex offenses?
- Is there a carve-out for professional programs, law enforcement training, or other specialized education programs?

Beyond-the-Box Legislation

The decision to ask about criminal history might not be entirely up to the institution. For example, California recently passed Senate Bill 118 that prohibits all colleges and universities in the state—both public and private—from inquiring about an applicant’s criminal record.³⁴ As of this writing in 2022, there are only four other states to ban the box in higher education: Colorado, Louisiana, Maryland, and Washington. However, most states, many localities, and the federal government have passed laws limiting the use of criminal records in employment, which signals the potential for more impact to college admissions in the future.

³⁴ See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB118.

For the five states that have banned the use of criminal history in admissions, it is important to understand any limitations or carve-outs in the law that might apply to a specific institution. While California's bill explicitly applies to all postsecondary institutions in the state, courts in Washington have interpreted its bill to only apply to public institutions. California excludes professional degree programs and law enforcement training programs from the ban. Maryland's ban includes questions on arrest and conviction, but only for undergraduates and only on the initial application for admission. Louisiana was the first to pass its bill in 2017, which allows the institution to ask about criminal history after admission, which can be used as a factor to determine financial aid or campus housing.

Transcript Notations

Increasingly, transcripts have become vehicles for institutions to denote disciplinary history information that may alert a receiving institution to the disciplinary history of a student. In fact, some states mandate disciplinary notations on transcripts for certain offenses (e.g., New York, Texas, Virginia).³⁵ If an institution chooses not to ask screening questions as part of its admission process, care should be taken to ensure that any transcript notations are not taken into consideration in admissions decisions as well.

Institutional/System Culture and Mandates

The decision about whether to ask screening questions is also significantly impacted by the type of institution, its mission, and its student population. If the institutional culture expects or demands screening, then the goal is to implement screening in a way that minimizes the potentially discriminatory effects of that screening. If the institutional culture won't tolerate screening, consider whether questions about disciplinary and criminal history may need to be used in specific programs, or for access to programs like housing. If no screening is implemented at all, the institution may have occasional instances when someone's recidivism becomes the center of a community reaction and will need to manage those situations on a case-by-case basis.

Some communities expect unreasonable outcomes – that we both “Ban the Box” and that we protect the community from known repeat offenders. In such situations, admissions screening may not allow the proactive exclusion of someone from the community but

³⁵ See <https://www.nysenate.gov/legislation/laws/EDN/6444>; <https://legiscan.com/TX/text/HB449/id/1973837>; <https://law.lis.virginia.gov/vacode/title23.1/chapter9/section23.1-900/>.

demands for their removal may arise after their admission based on information that comes to light. It's unlikely that an institution will be able to remove that individual unless they have violated some school policy. That's why submitting false information response to a screening question can be the basis to revoke an admission, but if institutions don't ask screening questions, there is no basis to find that falsification occurred. Some institutions have tried to impose conditions on a student after their admission, based upon later discovering their criminal and/or disciplinary history, but it is unclear on whether imposing safety conditions after admission is lawful, and it is not a practice ATIXA recommends.

Before state laws mandated action, some university systems began banning the box for themselves. The State University of New York (SUNY), the largest system in the nation, voted to remove questions regarding prior felony convictions from its general application in 2016, though schools can still ask for students' criminal history after admission for decisions such as housing, study abroad, internships, and clinical or field placements.³⁶ Even before California's law in 2020, none of its three public college systems – the University of California (UC), California State University (CSU), and California Community College (CCC) – asked about arrest or conviction history on initial college applications.³⁷ Some institutions and systems that still include criminal history questions at the admission stage may be operating under the (real or mistaken) assumption that they are required to ask, so it is imperative that a current legal analysis be conducted.

RECOMMENDATION 11

Ensure You Have Sufficient Human and Fiscal Resources

These recommendations may have impacts on institutional resources and staffing. An important consideration for this review is the amount of time spent by staff conducting reviews of applicants with either criminal or disciplinary records. While many reviews may take only a few minutes for campus staff to process, some reviews may take hours of staff time – from soliciting documentation, communicating with students and staff, training, and conducting meetings. If not already screening exhaustively, expansion of this practice would likely have a significant financial and human resources impact for campus staffing.

³⁶ See https://www.suny.edu/sunypp/documents.cfm?doc_id=846; <https://www.theatlantic.com/politics/archive/2016/09/the-question-some-public-universities-will-no-longer-ask/500072/>.

³⁷ <https://rootandrebound.medium.com/celebrating-banning-the-box-in-higher-education-in-california-e50bf01e0f06>.

Institutions must ensure they have sufficient human and fiscal resources to effectively implement this process, because once undertaken, it must be performed competently, and there may be liability if it is performed negligently. There is currently no widely accepted standard of care with respect to screening, and the law is in flux as institutional practices evolve. But, at minimum, institutions cannot ignore information regarding a dangerous applicant about whom they become aware, regardless of how they become aware of it, and thus must have a protocol for addressing such information when received.

RECOMMENDATION 12

Be Consistent

Many institutions do not have a consistent strategy for how they work with students with criminal or disciplinary histories – a practice that has its own set of liabilities. Institutions that choose to use screening questions should ensure that the questions are asked of all students, including non-matriculated students, early college, continuing education programs, and participants in any campus programs such as volunteer programs. Inconsistent processes can decrease equity and increase liability for an institution. Conducting a periodic recurring assessment of institutional admissions practices can ensure that decision-makers are being consistent, incorporating best practices within their processes, and are not disproportionately impacting marginalized populations.

CONCLUSION

As previously stated, the goal for each institution is to balance the safety and public policy considerations discussed throughout this paper, so that individuals are not deterred from applying or persisting through the admission process, and to create a model based on individualized assessment rather than blanket prohibitions. The unique circumstances and culture of each institution should drive the practices implemented. The options include no screening, light admissions screening, screening only with respect to violence and/or sexual misconduct, comprehensive screening of all applicants, post-admission screening, and targeted screening of only certain populations (e.g., as required by NCAA with respect to student-athletes) or for certain purposes/programs. While this paper does not tackle similar questions for applicants for institutional employment, some of the very same considerations are applicable, and should be evaluated by institutions as part of a clear policy on hiring, references, and employee background checks.

We hope this content has been helpful. As always, the ATIXA team is available for consultation to assist any institution in developing a screening protocol that is well-suited to its needs and community.