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September 13, 2007

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1100 North Grand Avenue
Walnut, CA 91789

Re: Availability and Use of Information on Students' Past Conduct
Legal Opinion L 07-07

Dear Ms. Yamagata-Noji:

On behalf of the California Community College Chief Student Services Administration Association (CCCCSSAA), you asked a number of questions regarding colleges' interactions with students who have criminal records, sharing student disciplinary information, and disciplining students who have disabilities. As a preliminary matter, we caution that literally volumes have been written on some of the issues you raise, so they are not matters that can be thoroughly addressed through the mechanism of a legal opinion. We can answer some of the questions, and for more complex topics, we can provide analytical context to assist your members in adopting their own approaches to these complicated issues.

We will first briefly set forth your questions and our answers and then turn to the supporting analysis.

ISSUES

1. Is it possible to share official disciplinary actions taken against a student for serious offenses that present a threat to others, by one California community college with another California community college?

2. What are our current rights in terms of exchanging disciplinary information (on a limited basis for students who present a serious threat to self or others) when there is reason to believe a violent or criminal act could occur, especially in light of FERPA?

3. Are there any restrictions on the placement of expulsion action on students' academic transcripts?

4. We would like the ability to limit/prevent enrollment at another community college within the California Community College System (similar policy to what CSU and UC has). Is this possible?

5. Are we able to seek information about a student's current criminal record, if the student is currently on parole/probation, upon application to the college?

6. What actions can a college take if college officials become knowledgeable about the prior violent or criminal behavior a student has exacted at another college campus that creates concern for the safety of students and employees?

7. We are requesting clarification and guidelines regarding how to establish behavioral parameters and how to take disciplinary action against a student who has a verifiable mental disability (in light of ADA and 504 protections).

8. What liability protections should be in place when individuals with prior criminal records are on campus and adjacent to child care facilities on campus? Additionally, can a college limit a student's use of child care services/facilities on campus if the student has a prior criminal record, most notably if they are a convicted sex offender?

9. For community colleges who have sworn police officers and have what is considered as a "police agency," and known sex offenders must report in (per Megan's Law), what are the obligations of the college once this information is known?

10. If a student's conditions of parole/probation are made known to community college officials, what obligation does the college have to monitor their behavior and activities?

CONCLUSIONS

1. Disciplinary records are student education records, and education records generally cannot be disclosed without the consent of the student to whom they pertain. However, student disciplinary records can be shared with another institution of postsecondary education where the student intends to enroll. The final results of disciplinary proceedings for serious offenses may also be disclosed more broadly. These disclosures are subject to various conditions.

2. Colleges may disclose information from education records, including disciplinary information, in connection with a health or safety emergency as necessary to protect the student or others. What constitutes a health or safety emergency has been narrowly construed under FERPA.

3. Including disciplinary actions on academic transcripts is allowable if the information could be disclosed without the student's consent or if the student consents to the inclusion.

4. Current admission laws do not allow a community college district to deny admission based on discipline imposed by a different community college district.

5. Students cannot be required to disclose criminal records or parole/probation status as a condition to college admission. Prerequisites based on statutory requirements or on health or safety standards may limit the enrollment of students with certain criminal backgrounds.

6. Colleges may establish health or safety prerequisites or prerequisites based on statutory requirements. Colleges may seek temporary restraining orders if their employees are harmed or threatened. Colleges can share information from education records with college employees who have a legitimate educational interest in the information and may share information necessary to protect the health or safety of individuals. Colleges can educate the college community about potential risks and how to respond.

7. Disciplinary actions against students with verifiable mental disabilities must be addressed on a case-by-case basis within a general analytical framework.

8. Colleges should assume that children could be at risk from a variety of individuals who may be on campus – including, but not limited to, students who have criminal backgrounds – and should ensure that children are properly safeguarded. Certain sex offenders can be excluded as employees or volunteers; others must disclose their sex offender registrant status.

9. The police are responsible for assessing what sex offender information should be shared.

10. Colleges do not enforce conditions of parole/probation.

BACKGROUND

Before we can analyze the issues you raised, we need to discuss some basic principles and legal requirements.

The College Environment. The usual college student is an adult, and college enrollment is not compulsory. These factors distinguish a college's relationship with its students from the relationship that a K-12 school has with its minor students where student attendance is mandated by the state. In the K-12 system, the schools stand "in loco parentis," that is, in the place of the parent, and thus have a different relationship with their students than do community colleges.

> "Unlike high school students, whose attendance is compelled and over whom school officials have direct responsibility while the students are at school, adult college students attend school and participate in school activities voluntarily. [Citations] Furthermore, since college administrators have abandoned in loco

> parentis supervision of adult students and have recognized the students' rights to control and regulate their own lives, colleges and universities may no longer be charged with a general duty of care to supervise student activities. [Citations.]" (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1031, citing *Ochoa v. California State University* (1999) 72 Cal.App. 4th 1300, 1305.)

The extent to which colleges must (or may) oversee the conduct of their students and the related question of controlling students' college experiences is intertwined with the assumption that most students are adults. As adults, students attend voluntarily, they are responsible for their own conduct, and they do not have a "child/parent" relationship with the college.

Exclusion of Individuals from Colleges. The legislative goal for California's public higher education is expansive:

> "It is the intent of the Legislature that each resident of California who has the capacity and motivation to benefit from higher education should have the opportunity to enroll in an institution of higher education. Once enrolled, each individual should have the opportunity to continue as long and as far as his or her capacity and motivation, as indicated by academic performance and commitment to educational advancement, will lead him or her to meet academic standards and institutional requirements.
>
> The Legislature hereby reaffirms the commitment of the State of California to provide an appropriate place in California public higher education for every student who is willing and able to benefit from attendance." (Ed. Code, § 66201.)

The statutory admission requirement for community colleges is very broad and fully consistent with the above-stated goal: "The governing board of a community college district shall admit to the community college any California resident, and may admit any nonresident, possessing a high school diploma or the equivalent thereof." (Ed. Code, § 76000, emphasis added.) The section does not offer any exceptions to the mandatory requirement of admission for persons who have high school diplomas or the equivalent.

Education Code section 76000 also permits district governing boards to admit persons who are over the age of 18 who do not possess a high school diploma or its equivalent. Those who are admitted must be "capable of profiting from the instruction offered." The standard for admission relates to the academic potential of the individual. We understand that virtually every California community college district admits all persons over 18 regardless of whether they have diplomas, and that no individual assessments of capacity to profit from instruction are performed. In short, it appears that districts assume that every person who is over 18 can profit from instruction.

Districts are also authorized to admit special part-time and full-time students who are not 18 and who are still subject to compulsory attendance laws. The admission of these

students is based on a determination by their school district governing boards that they would "benefit from advanced scholastic or vocational work." (Ed. Code, § 48800.) As with persons who are over the age of 18 who do not possess a high school diploma, the admission requirement relates to the ability of the students to benefit from instruction at the college.[1]

None of these admission standards appear to authorize restricting admission of students with a history of certain conduct, even if that past conduct is criminal in nature.

If a K-12 pupil is expelled for acts that permit but do not require expulsion, and seeks to enroll in another school district during or after the period of expulsion, the second school district is required to hold a hearing to determine whether the "individual poses a continuing danger either to the pupils or employees of the school district." (Ed. Code, § 48915.1(a).) There is no such provision affecting admission to a second community college district even after the expulsion of an individual from another district.

Education Code section 76020 addresses the exclusion of students as follows:

> "(a) The governing body of any community college district may exclude students of filthy or vicious habits, or students suffering from contagious or infectious diseases.
> (b) The governing board of the community college may exclude from attendance in regular classes any student whose physical or mental disability is such as to cause his or her attendance to be inimical to the welfare of other students."[2]

Predecessor language for section 76020 was analyzed in 1966 by the California Attorney General. The Attorney General noted that the "exclusion of pupils under the foregoing provisions is authorized not as punishment but to provide school authorities a means to protect other pupils." (48 Ops.Cal.Atty.Gen. 4 (1966) [Opinion No. 66-23].) The Attorney General was contemplating the following facts:

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[1] Education Code section 76002 does provide, in pertinent part:

"(b) The governing board of a community college district may restrict the admission or enrollment of a special part-time or full-time student during any session based on any of the following criteria:
(1) Age.
(2) Completion of a specified grade level.
(3) Demonstrated eligibility for instruction using assessment methods and procedures established pursuant to Chapter 2 (commencing with Section 78210) of Part 48 and regulations adopted by the Board of Governors of the California Community Colleges."

While the third item in this list relates to assessment of a student's academic preparation, subdivisions (b)(1) and (b)(2) do provide two specific bases on which a special part-time or special full-time student can be excluded from admission for reasons not directly related to his or her readiness to pursue advanced scholastic work. However, section 76002(b) sets forth a short and finite list of grounds for denying admission and it does not include consideration of prior conduct.

[2] In 1962, the State Attorney General rejected the language of subdivision (b) as a basis for excluding married high school students from day high schools. (39 Ops.Cal.Atty.Gen. 256 (1962).)

> "The circumstances giving rise to the question involve a number of high school boys who participated in improper sexual activities with a twelve-year-old girl over a period of several months. The activities did not occur on the school grounds or during school hours. The nature and extent of the activities have become common knowledge among other students at the high school attended by the boys. Parents of other children have expressed concern that some of the participants, because of the nature of this activity and their 'contemptuous' and unremorseful attitude, may jeopardize school discipline and prove a bad example to other students." (*Id*. at p. 5.)

The Attorney General concluded that the district would need to determine whether the conduct was sufficiently related to school activity or school activity – even though it did not occur on school grounds – to warrant discipline (e.g., expulsion or suspension) or whether the conduct evidenced a "vicious or filthy habit" that supported exclusion under the exclusion provision.

Although section 76020 describes the potential exclusion of individuals from community college districts, its language is problematic. The language is vague and provides little guidance for implementation (e.g., what is a "filthy or vicious habit?"). The above-referenced Attorney General analysis appears to be the only interpretation of its provisions, and that analysis was necessarily limited to the facts considered. Relying on vague statutory language to exclude students from publicly funded education carries considerable risk because vague language does not provide clear guidance concerning what behavior supports exclusion.

Section 76020 also does not indicate what sort of due process must be afforded before excluding an individual. To the extent that a California resident is entitled to be admitted to a publicly funded community college district if he/she has a high school diploma, denying admission should be premised on some objective determination of the facts that support exclusion. Otherwise, higher education could be denied to persons who are entitled to it.

Section 76020 also purports to allow the exclusion of persons with medical conditions and disabilities. However, this authority may have been largely superseded by the subsequent enactment of the Americans with Disabilities Act (42 U.S.C. § 12100 et seq.) and other state and federal laws prohibiting discrimination on the basis of disability. Without undertaking a detailed analysis of the interaction of section 76020 with these newer nondiscrimination laws, we can certainly say that, if this portion of section 76020 has any continuing viability, it does no more than to grant to community college districts the same very limited ability that other institutions of higher education would have under state and federal nondiscrimination laws to restrict admission of persons with disabilities.

The original version of section 76020 was adopted before 1900, and it continued in various forms until the Education Code was divided in 1976 into sections that applied to the K-12 system and sections that applied to the community colleges. Section 48211

applied to the K-12 segment and 76020 applied to the community colleges. Section 48211 was repealed effective January 1, 2005. (Stats. 2004, ch. 895, AB 2855.) Thus the Legislature removed this provision as a means of excluding students from K-12 schools.[3] We believe the repeal of section 48211 was a signal that the Legislature no longer believed that its language provided proper authority for exclusion. Based on all the problems described above, we must conclude that the only section that authorizes the exclusion of students from community college districts provides very little practical authority for rejecting students.

Question number 5 asks what criminal information can be obtained prior to the admission of students. The question does not indicate what purpose this information would serve – e.g., to exclude certain students, to monitor certain students, to warn the campus community about certain students, or to provide additional services to certain students.

To the extent the question suggests that persons with criminal histories should be excluded from college admission, we must underscore that because the community college system is not part of the penal system, colleges are not generally authorized to act on criminal conduct. The intersection between the state's penal system and the community college system suggests enhanced services to persons with criminal backgrounds, as opposed to fewer services, presumably because education can have a rehabilitative function and facilitate the reintroduction of individuals into society. The Legislature certainly supports community college instruction in jails and prisons (e.g., Ed. Code, §§ 71029, 84810.5).

In fact, on June 1, 2007, the System Office recognized educational partnerships between the System Office, Palo Verde College, Ironwood State Prison, and the California Department of Corrections and Rehabilitation in granting two-year college degrees to 71 Ironwood prison inmates and to 27 Chuckawalla Valley State Prison inmates, and in issuing vocational certificates to another 35 inmates.

Even if a parolee or person on probation has certain restrictions that could impact his/her college enrollment or college activities, the enforcement of those restrictions rests with the penal system; the community college system is not responsible for – nor equipped for – monitoring or enforcing parole or probation conditions.

Criminal backgrounds come into play in only a few areas for community college students. These areas are discussed in our response to question number 5.

Under current law, colleges have very little authority to collect information about their students' histories as a condition to admission because the admissions standards are so open. Information about an individuals' past status or past conduct may simply not be relevant to their admission because every Californian with a high school diploma must be admitted, and because the admission standards for persons without high school diplomas

[3] Section 202 of title 5 of the California Code of Regulations still applies to the K-12 system: "A pupil while infected with any contagious or infectious disease may not remain in any public school."

and for special admit students are based purely on the ability of the individuals to benefit from instruction.

Moreover, as discussed in question number 5, the criminal history of students generally has little effect on their participation in college activities or even college employment.

Guarantee of Safety. While most of the questions you raise concern a college's ability to restrict admission based on a student's past or present conduct, the basis for such questions is the safety of other members of the college community. An environment where college students and employees are absolutely safe would be ideal. However, safety cannot be guaranteed. College admission standards require the admission of most students without regard to whether their presence might present risks. College campuses are open to the public, so even the exclusion of persons as students would not generally prevent their presence on campus.

Student discipline processes should be effective in severing a student's connection with a community college for significant misconduct that occurs once the individual is a student. Precluding an individual from attending a publicly-funded college based on past conduct, even criminal conduct, as a means of increasing safety is more problematic. There are several reasons for this.

First, given the breadth of actions that can be criminal, there may be no necessary connection between a criminal record and foreseeable safety issues. For example, a student with a criminal conviction for tax evasion would not necessarily represent any significant threat to other students or college employees.

Second, exclusion from a public service such as public education may constitute ex post facto punishment. Should a person who commits a crime and serves the requisite sentence be further "punished" with the lack of access to public education?

Finally, as exemplified by the statutes that relate to the employment of persons with prior drug or sex crime convictions, rehabilitation of criminals is an important social principle. Under current law, persons with criminal sex and drug backgrounds can be rehabilitated and become eligible for community college employment. This rehabilitation process presumably reflects the Legislature's belief that rehabilitation overcomes concerns about former criminals serving as college employees. A similar argument could be made for students with criminal records. There are no rehabilitation statutes that require student admission only after rehabilitation because there are no statutes that permit the denial of admission in the first place.

The issue of safety at a California community college was examined in *Kanayochukwu Nworji v. Rio Hondo Community College District* (2003 WL 22245393). A student was attacked on campus by another student. The student who committed the attack had a prior incidence of verbal violence against an instructor, an incidence of physical violence against another student, and he had previously been suspended.

The Court noted the principle that "public entities generally are not liable for failing to protect individuals against crime" (citing *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126). The Court found that the mere fact that a person is a student of a college does not impose a duty on the college to protect him/her "as both Dettmer [the attacker] and Nworji [the victim] were mature adults, the District had no duty to supervise their activities." In response to Nwori's assertion that Dettmer's previous misconduct "put the District on notice of Dettmer's violent disposition, thus creating a duty to warn and protect. . . " the Court noted that the College was not responsible for the "acts of third parties" unless the District had maintained property in a dangerous condition – and the "third party criminal conduct is not in and of itself a dangerous condition of property 'absent some concurrent contributing defect in the property itself.'" (citing *Zelig* at page 1135).[4]

The general principle outlined above would not apply where a specific law or a specific factual situation creates a college responsibility to monitor the conduct of students or others. We cannot explore all possible alternatives, but we will mention two recent federal court rulings. Both rulings considered Title IX of the Education Amendments of 1972, a federal law that prohibits sex discrimination (including sexual harassment) in education programs or activities receiving federal financial assistance. (20 U.S.C. § 1681 et seq.) These cases consider student-on-student sex harassment and a potential requirement to monitor the student conduct.

Each decision preliminarily assessed whether the plaintiffs could adequately state the necessary elements of a legal claim. In a student-on-student harassment claim, a plaintiff must prove that (1) the entity received federal funding (triggering the application of Title IX), (2) an "appropriate person" had actual knowledge of the discrimination/harassment, (3) the entity acted with deliberate indifference to known acts of discrimination/harassment, and (4) the discrimination/harassment was so severe, pervasive, and offensive so as to effectively bar access to education. (*Davis v. Monroe County Board of Education* (1999) 526 U.S. 629.)

These "procedural" decisions will allow the plaintiffs to move forward and try to prove their cases; these decisions are not the final decisions in the cases. However, they contribute to the dialogue about college monitoring responsibilities.

On February 9, 2007, the Eleventh Circuit Court of Appeals issued its opinion in *Williams v. Board of Regents of the University System of Georgia*, *et al.* (477 F.3d 1282.) A female student at the University of Georgia (UGA) alleged she had consensual sex with a UGA basketball player (Cole) who then facilitated sexual assaults by another UGA basketball player and by a UGA football player. She alleged that UGA and University of Georgia Athletic Association (UGAA) representatives recruited Cole to UGA knowing "he previously had disciplinary and criminal problems, particularly those involving harassment of women, at other colleges." (*Id.* at p. 1290.)

[4] This is not a "reported" case, meaning that it cannot be cited as legal precedence, but it is a recent appellate consideration of the state of relevant community college law.

She also alleged that UGA "failed to ensure that the student-athletes received adequate information concerning UGA's sexual harassment policy applicable to student-athletes and failed to enforce the policy against football and basketball players." (*Ibid*.) Finally, she alleged that UGA failed to respond appropriately to her allegations.

The court noted that "Nevertheless, even with its knowledge of the need to inform its student-athletes about the applicable sexual harassment policy and of Cole's past sexual misconduct, UGA and UGAA failed to adequately supervise Cole." (*Id.* at p. 1296, emphasis added.) The court stated that "By placing Cole in a student dormitory and failing to supervise him in any way or to inform him of their expectations of him under the applicable sexual harassment policy, UGA and UGAA substantially increased the risk faced by female students at UGA." (*Ibid*., emphasis added.)

On September 6, 2007, the Tenth Circuit Court of Appeals issued its decision in *Simpson v. University of Colorado, et al*. – again on a preliminary motion to assess the case's ability to go forward. The two plaintiffs alleged they were sexually assaulted by University of Colorado (CU) football players and by high school students who were being recruited as CU football players. The plaintiffs alleged that the institution's recruiting process included showing recruits "a good time," which caused the recruits to believe that plaintiffs were available for sex and led to the sexual assaults.

The court found that plaintiffs may be able to show that "(1) CU had an official policy of showing high school football recruits a 'good time' on their visits to the CU campus, (2) that the alleged sexual assaults were caused by CU's failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a 'good time,' and (3) that the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference."

The allegations in both cases concern specific undertakings of the universities with respect to specific students or groups of students. They do not establish a general rule that institutions are responsible for the criminal conduct of all students. Nevertheless, they verify that situations may exist where educational institutions must take action to decrease the risks presented by some students.

Student Discipline. Once an individual becomes a student, the college-student relationship can generally only be severed when the student voluntarily leaves or when the college takes appropriate disciplinary action to sever the relationship. Community colleges are required to adopt rules setting standards for student conduct and related penalties for violating those rules. (Ed. Code, §§ 66300, 76030 et seq.)

The focus of student discipline is student conduct. A student's history (e.g., as an ex-convict) or speculations about what a student might do in the future are not appropriate bases for imposing discipline.

There is a significant further limitation on the ability of a college to impose discipline for conduct even if that conduct is criminal in nature. Education Code section 76034 limits

the type of conduct that can be considered in the imposition of college discipline: "No student shall be removed, suspended, or expelled unless the conduct for which the student is disciplined is related to college activity or college attendance." In the 1966 Attorney General Opinion mentioned above, the Attorney General indicated that this language in a predecessor statute should not be interpreted to mean that school districts could only impose discipline for conduct that actually occurred at school and during school hours. (48 Ops.Cal.Atty.Gen. 4, supra, at p. 6.) Instead, the Attorney General determined that if a district could identify a link between the conduct and school activities or attendance, then conduct that occurred away from school could be considered for disciplinary purposes.

However, if a college student commits a crime that has nothing to do with a college activity or with college attendance, the college will be hard-pressed to suspend or expel the student for that conduct, based on the language of section 76034.

The student discipline provisions occasionally interact with the California Penal Code. For example, Penal Code section 626.2 provides that if a student has been suspended from a community college for disrupting the orderly operation of the campus and has been denied access to the campus as part of the discipline, if the student returns to campus, he/she is guilty of a misdemeanor. Upon a first conviction, the penalty is up to $500 and/or up to six months in county jail. Subsequent convictions also carry $500 fines and additional jail time up to six months.

Information About Students. Much of the law governing what types of student information can be shared and when it can be shared is set forth in the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations. (20 U.S.C. § 1232g; 34 C.F.R. § 99.1 et seq.) FERPA applies to colleges that receive federal financial aid, so for practical purposes it applies to all community colleges in California. FERPA generally prohibits the release of student education records without either a court order or the consent of the student about whom they pertain. Even when information can be shared with a particular person or entity without the student's consent, the further disclosure of that information by the recipients is generally restricted.

The Education Code includes numerous provisions that also affect the sharing of student records. (Ed. Code, § 76200 et seq.) These provisions largely track FERPA, but the provisions are not identical.[5]

Apart from the privacy of student records, general individual privacy issues are afforded particular attention under California law. In fact, California raises "privacy" to a constitutional protection.[6]

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[5] In Legal Advisory 04-03, we discussed two situations concerning the disclosure of disciplinary records where state law could conflict with FERPA.

[6] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I, § 1.)

There is no question that all of these laws create a confusing tangle of requirements and prohibitions. On June 13, 2007, a "Report to the President on Issues Raised by the Virginia Tech Tragedy" was jointly issued by the federal Department of Education, Department of Justice, and Department of Health and Human Services. The following quotations are particularly pertinent to the current inquiry:

> "We repeatedly heard reports of 'information silos' within educational institutions and among educational staff, mental health providers, and public safety officials that impede appropriate information sharing. These concerns are heightened by confusion about the laws that govern the sharing of information. Throughout our meetings and in every breakout session, we heard differing interpretations and confusion about legal restrictions on the ability to share information about a person who may be a threat to self or to others. In addition to federal laws that may affect information sharing practices, such as the Health Insurance Portability and Accountability (HIPAA) Privacy Rule and the Family and Educational Rights and Privacy Act (FERPA), a broad patchwork of state laws and regulations also impact how information is shared on the state level. In some situations, these state laws and regulations are more restrictive than federal laws.
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> A consistent theme and broad perception in our meetings was that this confusion and differing interpretations about state and federal privacy laws and regulations impeded appropriate information sharing." (Page 7.)

ANALYSIS

With the foregoing preamble, we turn to an analysis of your specific questions.

1. Is it possible to share official disciplinary actions taken against a student for serious offenses that present a threat to others, by one California community college with another California community college?

Yes, the sharing of student disciplinary actions is allowable in certain situations.

It is clear that disciplinary records are education records under FERPA and are subject to the general requirement that records regarding identifiable students cannot be shared without the student's consent or under court order. (*Gonzaga University v. Doe* (2002) 536 U.S. 273; 112 S.Ct. 2268; *U.S. v. Miami University; Ohio State University, et al*. (6th Cir. 2002) 294 F.3d 797.) There are exceptions to this general rule, and one exception specifically concerns discipline for serious offenses.

A college does not need the consent of a student to disclose "the final results of disciplinary proceedings" if it determines that "the student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and . . . .With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies" and the "final results" of the disciplinary proceedings were reached on or after

October 7, 1998." (34 C.F.R. § 99.31(a)(14)(i)(A),(B); 99.31(a)(14)(iii).) These terms ("alleged perpetrator of a crime of violence" and "alleged perpetrator of a nonforcible sex offense") are further defined in FERPA regulations. (34 C.F.R. § 99.39.)

"Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the jurisdiction. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student." (34 C.F.R. § 99.39, emphasis added.) The disclosure may not "disclose the name of any other student, including a victim or witness, without the prior written consent of the other student." (34 C.F.R. § 99.31(a)(14)(ii).)

If a college disciplined a student as a perpetrator of a crime of violence in 1997, it is not authorized to disclose the final results of that disciplinary proceeding without student consent under the foregoing authority. The federal regulation permits only the disclosure of final results of disciplinary proceedings reached on or after October 7, 1998.

Thus, if it acts within the limits described in 34 Code of Federal Regulations section 99.31(a)(14), a college is at liberty to disclose the final results of disciplinary proceedings. The allowable disclosure is not limited to disclosure to another institution to which the student seeks enrollment. However, it is important to note that this provision allows, but does not require, disclosure of information about the final results of disciplinary proceedings.

Both FERPA and the Education Code allow the sharing of personally identifiable information about a student with "officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll." (34 C.F.R. § 99.31(a)(2), emphasis added, and see Ed. Code, § 76243(a)(4).) Neither 34 Code of Federal Regulations section 99.31(a)(2) nor Education Code section 76243 authorizes distribution of student information on a broad basis as does 34 Code of Federal Regulations section 99.31(a)(14) discussed above. Even where 34 Code of Federal Regulations section 99.31(a)(2) permits the release of information to another college, the college where the information originated must make a reasonable attempt to notify the student that the information will be released unless the annual student notice that is required by FERPA indicates that the college will release the information. (34 C.F.R. § 99.34.)

This underscores the importance of the annual notice that must be given under FERPA. If the annual FERPA notice advises students that information will be released to other institutions where the student seeks enrollment, the college will not be required to attempt to individually notify students that it intends to release information to institutions where the student seeks enrollment.

FERPA and state law also require colleges to provide notice to students that they have a right to receive a copy of the record that is transferred to another college and of the student's right to challenge the content of the record. (34 C.F.R. § 99.34(a)(2) and Ed.

Code, § 76225.) Finally, if a student record includes information concerning disciplinary action, the affected student has the right to have included in the record a written statement or response regarding that disciplinary action. (Ed. Code, § 76223, and see 34 C.F.R. § 99.21(b) which permits a student to include a statement regarding contested information contained in an education record.)

In some cases, a college may also share information without student consent based on a health or safety emergency. We discuss this option in our response to question number 2.

Finally, student consent for release of information is not required where a court orders the disclosure.

Thus, we conclude that a community college district may, under certain circumstances, share information about disciplinary actions taken against a student with other community colleges. However, it is important to keep in mind that, as discussed in the background section and in the answer to question 4, the college receiving such a report may be able to make only limited use of the information.

2. What are our current rights in terms of exchanging disciplinary information (on a limited basis for students who present a serious threat to self or others) when there is reason to believe a violent or criminal act could occur, especially in light of FERPA?

We are not certain about the scope of this question. It is not clear with whom you are suggesting a college might wish to share information. We will, however, attempt to address what we assume the question is asking.

A college may have a duty to warn particular potential victims of foreseeable harm under the principles of *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.

The federal Clery Act, which requires various college actions designed to increase campus safety and provide information regarding campus crime, includes a "timely warning" regarding potential harm to the campus community. (34 C.F.R. § 668.46(e).) This section requires a warning to the campus community about types of crimes that are the subject of the crime statistics reports and crimes that are "considered by the institution to represent a threat to students and employees." (34 C.F.R. § 668.46(e)(iii).) The U.S. Department of Education recently cited Eastern Michigan University for Clery Act violations, including its failure to issue a warning to its students and employees that there had been a murder on campus. "When an institution has information indicating that a serious crime has been reported to campus security authorities or local police agencies and determines that the crime may represent a threat to students and employees, it must disseminate pertinent information to the entire campus community in a timely manner." (U.S. Department of Education Program Review Report, June 29, 2007, OPE ID: 00225900, at p. 5.)

However, given the scope of the question as relating to disciplinary information and FERPA, we will focus on that area. We addressed the general topic of release of disciplinary information in our response to question number one.

If there were an instance when disciplinary information needed to be disclosed in connection with an emergency, that would be permitted under FERPA (20 U.S.C. § 1232g(b)(1)(I)) as described in implementing regulations 34 Code of Federal Regulations sections 99.31(a)(10) and 99.36(a). Section 99.31(a)(10) allows disclosure without student consent if the "disclosure is in connection with a health or safety emergency, under the conditions described in §99.36." Section 99.36(a) addresses this issue as follows:

> "An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals."

The Family Policy Compliance Office (FPCO) is the federal agency that is responsible for investigating alleged violations of FERPA and providing technical assistance with respect to its provisions. In March of 2005, FPCO issued its findings concerning a complaint that alleged a Strayer University employee violated FERPA by accessing a student's education records and using information from those records to file a complaint against the student with the local police. The University raised several "defenses." including the "health or safety emergency" provision. FPCO rejected the claim because it concluded that the facts did not support a finding that there was an emergency. Within this context, FPCO described the intended scope of the "health or safety" exception to student consent, and the intended scope is fairly narrow.

FPCO noted that Congress intended to "limit application of the 'health or safety' exception to exceptional circumstances." In fact, section 99.36(c) requires that disclosures "be strictly construed." FPCO also reported that, "The Department has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals." (Emphasis in original.) It also quoted from earlier FPCO guidance as "a useful and relevant summary of our interpretation:"

> "[T]he health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of

> the emergency and generally will not allow for a blanket release of personally identifiable information from a student's education records.
>
> "Under the health and safety exception school officials may share relevant information with 'appropriate parties,' that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. (Citations omitted.) Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception . . . .
>
> "The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individual . . . ."
>
> "In summary, an educational agency or institution may disclose personally identifiable, non-directory information from education records under the 'health or safety emergency' exception only if it has determined, on a case-by-case basis, that a specific situation presents imminent danger or threat to students or other members of the community, or requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. Any release must be narrowly tailored considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under State law."

Education Code section 76243 also permits release of student record information to "appropriate persons in connection with an emergency if the knowledge of that information is necessary to protect the health or safety of a student or other persons, or subject to any regulations issued by the Secretary of Health, Education, and Welfare."

In addition to notifying persons to protect their health or safety, under California law, if a student's conduct "may be in violation of Section 245 of the Penal Code," upon the suspension or expulsion of that student, the college president must notify "the appropriate law enforcement authorities of the county or city. . . ." (Ed. Code, § 76035.) Penal Code section 245 describes assault with a deadly weapon or force likely to produce great bodily harm.

Accordingly, we conclude that a college may, and in some circumstances is required to, disclose information about disciplinary actions against a student if the standards articulated above have been met.

3. Are there any restrictions on the placement of expulsion action on students' academic transcripts?

In reviewing this inquiry, we were surprised to find that there is very little guidance in federal or state law as to what should be included on academic transcripts. We believe that an academic transcript is generally recognized as the record of college courses that were taken, the grades earned in those courses, and any certificates or degrees that were earned.[7] Title 5 provisions that discuss course repetition require the annotation of "the permanent academic record" so that there is a "true and complete academic history." (E.g., § 55044.) We believe that this "true and complete academic history" is the college academic transcript. (See also § 59023(d) that verifies that "records of enrollment and scholarship" are permanent student records.)

Academic transcripts are not intended to be a full record of each student's relationship with a college. For example, a college academic transcript does not divulge the student's eligibility for financial aid, even though financial aid eligibility is a part of a student's educational record. FERPA does not designate what form various types of recorded student information must take, and we find nothing in FERPA to preclude adding expulsion information to a transcript. Because student information can generally only be released with the student's consent, if a college includes an expulsion on the transcript, the college can still only release the transcript with the student's consent or pursuant to one of the exceptions that allows disclosure without the student's consent.

Thus, a college could include expulsions for crimes of violence or non-forcible sex offenses that also violate the college's rules or policies where the final results of the disciplinary proceeding were reached on or after October 7, 1998. As noted above, this information can be released without the consent of the student under 34 Code of Federal Regulation section 99.31(a)(14).[8] However, expulsions that are not covered by 34 Code of Federal Regulation section 99.31(a)(14) cannot be disclosed without the student's consent unless they fall under another exception to the requirement for student consent.

A college does not need student consent to share education records with an institution where the student intends to enroll. (34 C.F.R. § 99.31(a)(2).) Because a college can disclose the expulsion information to the institution where the student intends to enroll in any event, the transcript is not a necessary conveyance for that information.

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[7] For example, section 80445 of title 5 of the California Code of Regulations describes the transcript that must accompany an application for a California teaching credential: "Transcript of Record. Each direct application for a credential shall be accompanied by accurate and clear transcripts of record listing college and university courses, including grades earned, completed in fulfillment of the requirements for the credential sought. Such transcripts of record shall also evidence the fulfillment of the scholarship requirements specified in Section 80454." Section 1611 of title 16 concerns physician and surgeon applications and require a "transcript of grades." Section 63830 of title 22 concerning environmental health operator certification applications refers to "copies of college transcripts if claiming credits pursuant to section 63800(f), 63800(h) and 63805(f)." and section 3700 of title 23 concerning the examination certification of wastewater treatment plant operators requires "copies of college transcripts, grade cards, or certificates of completion for courses related to wastewater treatment to verify completion of education requirements. . . ."

[8] Of course, because the information can be released without the consent of the student, it need not appear on the transcript in order to be shared.

It is not clear why a college would want to include expulsion information on the transcript, particularly when a college is already at liberty to share that information with other institutions where the student intends to enroll. We assume that there might be an interest in sharing expulsion information with persons or organizations other than colleges where the student intends to enroll.

We understand that official academic transcripts are used for a variety of purposes beyond use by other educational institutions. Transcripts may be used by prospective employers, to verify course work relevant to volunteer services, or to confirm student status for purposes of scholarship awards. If a college includes expulsion actions on transcripts, an affected student may meet the academic standards for employment, volunteer services, or scholarships, but might be reluctant to consent to release of a transcript because it also includes expulsion information. In effect, a college would inextricably tie the academic record to an expulsion record because a student could not verify the former without disclosing the latter.

If the expulsion information were added to the transcript, an argument could be made that a student consents to the release of expulsion information when he/she requests a transcript. We question whether this is true consent, unless the practice of linking academic and disciplinary information on the transcript is disclosed to the student at the beginning of the educational relationship. If a college clearly notifies prospective students that it will include expulsion information on its transcripts, we believe a college could make a stronger argument that the student actually consented to the release of disciplinary as well as academic information when he/she requested that a transcript be provided to a third party. If advance notice was provided, the student enrolled in the college with full knowledge of the college's practice and engaged in conduct that supported discipline with the knowledge that the disciplinary result would appear on the transcript.

If a college wishes to tie a student's academic and disciplinary records together on the transcript, we believe that it should make a policy decision to do so, and that policy could have a significant effect on students. As such, a college would need to allow students the opportunity to participate in the formulation and development of the policy. (Cal.Code Regs., tit. 5, § 51023.7.)

Under California law, a disciplined student has the right to include a written statement concerning any disciplinary action taken against him/her in any record that includes the disciplinary action. (Ed. Code, § 76233.) If the transcript becomes a record of an expulsion, the college must find a way to include on that transcript the student's written statement or response concerning the expulsion. As a practical matter, it is unclear how a transcript could include such a statement.

In sum, while including information about expulsion actions on academic transcripts may be possible, a decision to do so should be approached cautiously. A district wishing to adopt such a policy would need to engage in the shared governance process before taking action and, unless the practice is limited to circumstances involving final disciplinary

action resulting from crimes of violence, the district will need to ensure that necessary safeguards are in place.

4. We would like the ability to limit/prevent enrollment at another community college within the California Community College System (similar policy to what CSU and UC has). Is this possible?

We assume that this question is really whether enrollment can be limited or prevented at one college based on disciplinary action taken at another college. If that is the question, then we must conclude that the present admission laws do not allow such limitation.

As previously noted, under current law, each district admits and enrolls its own students. Each district also sets its own rules of conduct and administers its own disciplinary system. Under the community college structure, it would be possible for one district to establish a rule of student conduct that is not a rule of student conduct at a second district. The district that adopted the rule could discipline a student for violating the rule. There would be no logical basis for a second district that does not have the same rule of conduct to exclude a student for conduct that does not violate its own rules.

As mentioned above, the K-12 system permits the exclusion of students who have been suspended or expelled from another school. However, the statutory structure for student discipline in the K-12 system is more uniform from one district to another and it includes specific requirements for the conduct of disciplinary hearings and the like.

You represented in your question that UC and CSU apply enrollment restrictions systemwide based on misconduct at one of the institutions making up the respective systems. If student conduct rules and disciplinary processes are uniform systemwide, that would lend credibility to a systemwide enrollment restriction. However, the community college system does not have uniform rules of student conduct nor uniform disciplinary processes.

Education Code section 76031 expressly requires that a district's adopted rules of conduct prohibit a student who is suspended from one college in a district from enrolling in other colleges in the district during the period of suspension. When the Legislature creates a restriction that applies only to the colleges in a single district, that is strong evidence that it does not presently support such a restriction throughout the system.

5. Are we able to seek information about a student's current criminal record, if the student is currently on parole/probation, upon application to the college?

The two most probable sources for information about a criminal record are the students themselves or law enforcement authorities.

Given the system's broad admissions policy, there is no general authority requiring students to disclose their criminal records upon application to a college. As noted at the outset of this analysis, under current law, there is little direct connection between the

penal system and the higher education system. Once an individual has satisfied his/her penal obligations, there is little "spill-over" into that person's educational life. Since we have indicated that a college could not bar a student from admission if the student did disclose a criminal conviction, it is not clear how a college would enforce a disclosure requirement.

However, we should note that statutory provisions that took effect October 28, 2002, require students who are convicted sex offenders to register with campus police or other local law enforcement officials. But even this registration information is not public and whether the campus community or specific individuals are notified about specific sex offenders depends on an assessment by law enforcement of the need to release the information.

Although a student's criminal past may not prevent his or her admission to a district, in some limited circumstances, it may impact the student's enrollment in certain areas. In Legal Advisory 05-02, we stated our opinion that a college could require students to undergo a legally required criminal background check as a prerequisite for a clinical course in nursing. This is because individuals with certain criminal backgrounds may not have access to clinical facilities. Title 5, section 55003(c)(1) permits a "prerequisite or corequisite [that] is expressly required or expressly authorized by statute or regulations" and there is a statute that requires a criminal background clearance before a person can have contact with clients of a clinical facility.

A district may also establish prerequisites or corequisites that are "necessary to protect the health and safety of a student or the health and safety of others." (Cal. Code Regs., tit. 5, § 55003(c)(4).) If a college can demonstrate that a student's criminal background or parolee/probation status falls under this provision, it can establish a health or safety prerequisite and require students to disclose relevant information. Of course, all students would be required to disclose the information, and a college would need to consider how to verify the truth of the information provided.

A recent legislative enactment demonstrates the limitations on considering a student's criminal record with respect to college enrollment, much less admission. Section 67362 was added to the Education Code, effective January 1, 2007. It restricts participation on intercollegiate athletic teams of a student who "at any time *after* his or her enrollment as a college student" is prosecuted as an adult and convicted of various crimes.[9] Because the limitation is triggered by prosecutions after enrollment, if an individual was convicted of any of these crimes prior to becoming a student, the individual's participation in sports would not be affected. Moreover, the statute suggests that the Legislature was willing to

[9] Penal Code section violations that could prevent a student from playing community college intercollegiate sports are described in sections187 (murder), 209 (kidnapping), 210 (false representation of kidnapping), 211 (robbery), 220 (assault with intent to commit mayhem, rape, sodomy, oral copulation), 243.8 (battery against a sports official), 245 (assault with a deadly weapon other than a firearm), 261 (rape), 262 (spousal rape), 264.1 (gang rape), 286 (sodomy), 288 (lewd or lascivious acts), 288a (oral copulation), 288.5 (sexual abuse of a child), 289 (forcible sexual penetration), 459 (burglary), and 664(a) (criminal attempt).

permit students convicted of certain crimes to continue their education, albeit without the privilege of participating in athletics.

A second Education Code provision affects the employment options of students with criminal histories at community colleges, but it does not exclude them as students:

"Notwithstanding any other provision of law to the contrary, the governing board of any community college district may employ any student enrolled in the district who is an ex-convict or who is on parole, other than a person determined to be a sexual psychopath, to perform noninstructional duties and such student workers shall not be considered to be classified employees."[10] (Ed. Code, § 87406.5.) The very existence of this section confirms that ex-convicts, parolees, and mentally disordered sex offenders (sexual psychopaths) can be students, and only mentally disordered sex offenders are prevented from being employed while attending as a student.

The second source of information about the criminal records of potential students would be law enforcement authorities. Police agencies are specifically required to notify community college districts when employees are arrested for certain crimes. (See Pen. Code, § 291.5; Health & Saf. Code, § 11591.5.) We are unaware of any similar obligation of police to notify community colleges of criminal actions of their students.

However, while law enforcement agencies may not be required to disclose a student's criminal conviction to the college the student attends, it appears that FERPA would not be a barrier if a campus law enforcement agency chose to disclose such information to other college officials. Information in "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement" are not educational records under FERPA. (20 U.S.C. § 1232g(a)(4)(B)(ii).) This means that FERPA does not require the consent of the student to whom they pertain as a condition to release. However, because we are not experts in police/criminal processes, we cannot advise you of what information police agencies are required or allowed to provide with respect to particular individuals.

In sum, we are doubtful that colleges can require students to disclose criminal background information upon application, but such information may be relevant to enrollment in particular programs or participation in athletics. We are not in a position to advise as to whether law enforcement agencies can or must disclose information they maintain to college officials.

6. What actions can a college take if college officials become knowledgeable about the prior violent or criminal behavior a student has exacted at another college campus that creates concern for the safety of students and employees?

[10] "Sexual psychopath" is an outdated term. Welfare and Institutions Code section 6300 provides in part that "Whenever the term 'sexual psychopath' is used in any code, such term shall be construed to refer to and mean a 'mentally disordered sex offender.'"

As noted above, under current California law, there are very limited instances where a student can be prevented from attending a California community college. There is no current authority (apart from Ed. Code, § 76020, discussed above) to restrict student admission based on past conduct, even if that conduct occurred at another community college district.

We also discussed the ability of a college to establish health or safety prerequisites related to the enrollment in specific programs or courses or to establish prerequisites based on statutory or regulatory requirements. Under appropriate circumstances, a college can establish a prerequisite that might restrict the ability of a person with a particular criminal background to enroll in a program or course.

If an employee has "suffered unlawful violence or a credible threat of violence. . . that can reasonably be construed to be carried out or to have been carried out at the workplace," the employing college can seek a temporary restraining order and injunction on behalf of the employee and other college employees. (Code Civ. Proc., § 527.8.) "Employee" includes members of boards, volunteers, and independent contractors for purposes of this statute. If the temporary restraining order is replaced by an injunction following a hearing, the injunction can remain in place for a maximum period of three years. Thus, if a student engaged in behavior towards an employee, as defined by section 527.8, a college could secure a restraining order. Whether and under what circumstances a college has the ability to secure a restraining order on behalf of its students who have suffered unlawful violence or a credible threat of violence is a matter beyond our area of particular expertise.

Assuming that information about a student's past violent or criminal conduct was received by the sharing of student records from a previous college, that information can be shared with college employees who have a legitimate educational interest in the information. Depending on how a college defines "legitimate educational interest" in its FERPA policies, instructors of the courses taken by the student, the campus police, and/or other employees may be informed of the information. We do not believe that a general announcement can be made to the effect that a particular student presented a disciplinary problem at another college.

Colleges can certainly offer services to persons with violent or criminal histories to assist them to function within a college setting without disrupting the college environment. This approach goes more to preventing potential problems than restricting attendance or warning of potential dangers.

Apart from the authorized sharing of information about specific students, colleges can provide training to employees on how to deal with potentially violent situations. Colleges should also ensure that employees know how to secure assistance.

We understand that colleges do not wish to create the impression that their campuses are unsafe. Nevertheless, we believe that it is prudent to ensure that employees understand that some of their students may have violent or criminal pasts and that they should act

accordingly. We have heard of instances where faculty members provide their home telephone numbers to students to maximize accessibility or invite students to their homes to celebrate the end of a term. They should understand that sharing personal information with students of a variety of backgrounds carries risks – some of those students may have violent or criminal pasts.

Colleges are already required to maintain statistical reports concerning campus crime. Employees can ensure that that information is being accurately maintained and review it to stay informed.

An individual who has a violent or criminal past may be perceived as a future threat. The potential for future problems might suggest to some that the college should treat those students in special ways. For the sake of discussion, perhaps a college wants to limit the number of courses such a person could take or the amount of time such a person could spend on campus. Such differential treatment could create a number of issues that are beyond the scope of this analysis, but we consider some of the more obvious ones below.

Implementing a system that treats individuals differently requires the identification of the persons who will be treated differently. This could involve privacy considerations that would need to be assessed under federal and state law.

In addition, treating classes of individuals differently would create "classifications" of students that raise equal protection issues. Both federal and state law require governmental action (such as public education) to treat people equally. If certain students (e.g., students with criminal convictions) are treated differently as a class of students, and restricted in their access to or use of public education, those classifications must be carefully justified.

The relationship between higher education and criminal convictions was recently assessed by a federal district court in South Dakota. A student advocacy group challenged the federal statute that suspends financial aid eligibility for students who are convicted of drug-related offenses. (See 20 U.S.C. § 1091(r).) The group asserted that the statute violated the Equal Protection clause of the U.S. Constitution because it "singles out, for denial of financial aid, the category of individuals with a controlled substances conviction." (*Students for Sensible Drug Policy Foundation v. Spellings* (2006) 460 F. Supp.2d 1093, 1095.) The Court noted that the class of persons with drug convictions were not a "suspect class" such as classes based on race or religion. Accordingly, the classification would be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Id*. at p. 1096, quoting *F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313; 113 S.Ct. 2096, 2101.) The justifications for the ineligibility that were offered by the U.S. Department of Education were that the statute "(1) . . . deters drug-related offenses on college campuses and (2) prevents taxpayer subsidization of such conduct." The Court stated that "[t]he latter justification is enough, standing alone, to survive rational basis analysis." (*Id.* at p. 1097.) The foregoing demonstrates the analysis that would be required to treat a class of persons (students with various criminal

histories) differently from other students, particularly in light of the open access statutes that govern the community college system.

Another concern is that persons with criminal pasts have already been punished as prescribed by law. If a college where to impose additional restrictions that are not specifically authorized, they could be challenged as improper additional punishment. (U.S. Const., art. 1, § 9, cl. 3: "No bill of attainder or ex post facto law shall be passed.")

In fact, the sex offender registration statute specifically limits the use of sex offender registration information. Penal Code section 290.4(d)(1) allows members of the public to obtain certain access to sex offender registration information. It provides that, "A person is authorized to use information disclosed pursuant to this section only to protect a person at risk." Subsection 290.4(d)(2) provides that, "Except as authorized under paragraph (1) or any other provision of law, use of any information that is disclosed pursuant to this section for purposes relating to any of the following is prohibited: . . . (F) Education, scholarships or fellowships."[11] When the California sex offender registration system was challenged as being retroactive punishment that is prohibited by the U.S. Constitution's Ex Post Facto Clause, part of the argument in defense of the statute was that it did not place a punitive restraint on the activities of persons who were required to register. The Court noted the limitations on the use of information about sex offenders to demonstrate that registration and release of information was not further punishment. (*Hatton v. Bonner* (2004) 356 F.3d 955, 964: "We find no evidence that an objective of § 290 is to shame, ridicule, or stigmatize sex offenders." (*Id.* at p. 965.)) The California Department of Justice website also provides: "The law is not intended to punish the offender and specifically prohibits using the information to harass or commit any crime against an offender."

The foregoing statute specifically concerns the use of information that is obtained through public inquiries to the sex offender registry. Nevertheless, it represents a statement that sex offender status was not intended to deter access to various benefits. Absent specific authority to consider past crimes in limiting access to higher education, we believe that imposing limitations could raise challenges that the limitations are additional prohibited punishments.

Please see question number nine for a consideration of disclosure of information under sex offender registration guidelines.

Based on the foregoing, we conclude that colleges may take certain steps to inform and protect the campus community about the risks which might be posed by students with criminal backgrounds, but treating such students differently from other students (except where a criminal background clearance has been established as a prerequisite) may be problematic. At the very least, such an approach could invite legal challenges and should be thoroughly reviewed in advance by legal counsel for any district seriously considering such measures.

[11] Other prohibited uses concern access to health insurance, credit, and employment.

7. We are requesting clarification and guidelines regarding how to establish behavioral parameters and how to take disciplinary action against a student who has a verifiable mental disability (in light of ADA and 504 protections).

This is a complicated question and we are not entirely clear on what sort of guidance you seek, but we can confirm that colleges may set behavior parameters for all their students. We can also confirm that discipline must be based on the conduct of the individual and not on the fact or belief that the student has a medical condition, has a disability or is receiving services from the counseling center or from a particular program such as Disabled Student Programs and Services.

Under the ADA and section 504, colleges must provide appropriate accommodations to students with disabilities who are otherwise qualified. As is always the case with disability issues, the circumstances of a given situation will dictate the appropriate course of action.

In many instances the fact that a student has a mental disability will have no effect whatever on how disciplinary action is approached because the alleged misconduct has nothing to do with the disability. However, if the mental disability in some way affects behavior, the issues become more complex. For example, a student with a psychological disability may find it difficult or impossible to control his/her conduct or the disability might prevent the student from understanding the potential effect of his/her conduct. In such instances, the student may request that the college provide some form of accommodation which the student believes would permit him or her to meet the behavioral standard. Should such a request be made, the college will need to consider whether the requested accommodation would fundamentally alter the nature of its program or impose an undue financial or administrative burden on the institution. (28 C.F.R. § 35.150.) If it concludes that this would be the case, the college must then engage in an interactive process with the student to attempt to determine if some other type of accommodation might be provided which would allow the student to meet the college's behavioral standards without the undue burdens or fundamental alterations which would have been imposed by the originally requested accommodation. (*Guckenberger v. Boston University* (D. Mass. 1997) 974 F.Supp. 106, 141-42.)

With respect to the actual disciplinary processes themselves (e.g., a suspension or expulsion hearing), the student with a disability may require accommodations similar to what the student needs within the instructional environment. A college must be prepared to go through the same process described above to provide reasonable accommodations necessary for the student to be able to participate in the proceeding.

A fuller consideration of these issues is far beyond the scope of this report, particularly since colleges must address the issues on a case-by-case basis.

8. What liability protections should be in place when individuals with prior criminal records are on campus and adjacent to child care facilities on campus? Additionally, can a college limit a student's use of child care services/facilities on

campus if the student has a prior criminal record, most notably if they are a convicted sex offender?

We first need to clarify the type of operation that is at issue. Although you refer to "child care services," we assume that you mean child development centers.

Child development centers are authorized by Education Code section 79120 which permits community college district governing boards to establish and maintain child development centers pursuant to the provisions of Education Code section 8200 et seq. (otherwise known as the Child Care and Development Services Act). The Act is quite detailed. The centers must meet standards developed by the Superintendent of Public Instruction.

By contrast, "child care centers" fall within the California Child Day Care Facilities Act and are regulated by the Department of Social Services. (Health & Saf. Code, § 1596.76 et seq.) The two programs are not interchangeable; they have different functions, different standards, and different regulatory requirements.

You ask what liability protections should be in place when individuals with prior criminal records are on campus and adjacent to child care facilities on campus. Your question is probably better posed to experts in risk analysis, but we can address some issues.

Colleges should certainly undertake assessments as to how to best safeguard children who are present at their child care facilities on campus. Obviously, children must be carefully monitored. The facilities themselves should be structured to provide security to the children.

Since your first question in this area does not identify the types of criminal backgrounds you are concerned about, it is worth noting that not every criminal record necessarily presents an increased threat to children. However, given reports of high criminal recidivism rates and the concern about the presence on-campus of persons with criminal records that entail harm to children, we assume that this is the population of criminal offenders about which you are concerned.

The simple answer is that a college should recognize that its students represent a broad spectrum of backgrounds and safeguard children under its care accordingly. Colleges generally lack information about the backgrounds of their students. Some students will have unsavory backgrounds but no criminal convictions. Since campuses are also open, colleges must recognize that members of the public will also come on campus.

Based on these situations, in assessing the risks of a particular operation, we believe that colleges should assume that some individuals who are present on campus (whether students or not) have criminal records and that some of those past criminal acts involved harm to children. At the same time, safeguarding the children will not necessarily depend on how many enrolled students – or members of the public present on campus – have criminal backgrounds. It is possible for individuals who have no past convictions to

present a risk. A college cannot assume that there is no potential danger simply because it knows of no students with criminal histories. All reasonable efforts must be directed towards providing safety and security to children.

We cannot detail every step that might be taken to safeguard children. If you have specific questions that might be susceptible of legal analysis, we would be happy to respond. Otherwise, we can only suggest that colleges assume that there is a risk of potential harm and act accordingly, including ensuring that all non-district individuals (e.g., volunteers, students and visitors) are properly supervised and are not left alone with the children.

The second part of your question is whether a college may limit a student's use of child care services/facilities on campus if the student has a prior criminal record, most notably if they are a convicted sex offender.

Penal Code section 290.95(c) is part of the sex offender provisions. It provides:

> "No person who is required to register under Section 290 [the sex offender registration section] because of a conviction for a crime where the victim was a minor under 16 years of age shall be an employer, employee, or independent contractor, or act as a volunteer with any person, group, or organization in a capacity in which the registrant would be working directly and in an unaccompanied setting with minor children on more than an incidental and occasional basis or have supervision or disciplinary power over minor children. This subdivision shall not apply to a business owner or an independent contractor who does not work directly in an unaccompanied setting with minors."

The foregoing section prohibits persons with sex crimes against minors under 16 from acting in an employee, volunteer or independent contractor status with minor children; it does not preclude a student who is a covered sex offender from merely bringing his/her own child to the facilities. It would certainly prevent a parent who is a sex offender from being employed or volunteering if the work or volunteer service would allow for direct and unaccompanied contact with children on a regular basis or if the work or volunteer service included supervising or disciplining minor children.

The same limitation applies in any situation where minor children might be enrolled. For example, if a college has a PE class that included such children, it cannot assign to that class an employee or a volunteer coach or assistant with a sex crime conviction against a victim under 16 if the duties fall under the prohibitions outlined in section 290.95.

In addition to the above-described ban related to persons with sex crimes against minors under 16, section 290.95 also requires <u>all</u> sex offender registrants who would be working or volunteering in an unaccompanied setting with minors to disclose their status as registrants to the employer or the organization with which they would volunteer. The failure to notify the employer or organization of their status is a misdemeanor.

9. For community colleges who have sworn police officers and have what is considered as a "police agency," and known sex offenders must report in (per Megan's Law), what are the obligations of the college once this information is known?

Penal Code section 290.01 requires community college students, employees, and persons carrying on a vocation at a community college (e.g., contractors) who are required by Penal Code section 290 to register as sex offenders to register with campus police departments.

Education Code section 72330 authorizes community colleges to establish campus police departments, but not all community college districts have done so. If a district does not have its own police department, other agencies function as the recipients for the registration of students, employees, and contractors.

One of the key features of the law is notification concerning sex offenders. Campus police disclosures are authorized, but not required. Disclosures must be based on the professional assessment of the police that disclosure is appropriate.

The type of disclosure and the information that can be disclosed depends on whether a sex offender is considered a high risk sex offender, a serious sex offender, or a sex offender who does not fall into either of those categories (Pen. Code, § 290.03.)

More information can be disclosed on high risk and serious sex offenders than can be disclosed for "other" sex offenders. For example, the type of victim who might be targeted and information concerning parole or probation conditions that are pertinent (e.g., no contact with children) may be disclosed for high risk and serious sex offenders. Less information can be provided regarding "other offenders;" for example, the home address of such offenders cannot be disclosed.

We have no jurisdiction over the Penal Code provisions that address sex offender registration at community colleges, so we have no specific expertise in this area which would allow us to advise you regarding the responsibilities of sworn police officers under the law. The California Department of Justice is responsible for this area, and they have issued campus sex offender registration guidelines for use by campus police (the guidelines are not available to the public). We provided the foregoing general information, but more public information can be obtained from the Department of Justice. (http://meganslaw.ca.gov.)

10. If a student's conditions of parole/probation are made known to community college officials, what obligation does the college have to monitor their behavior and activities?

As noted above, colleges do not enforce the conditions of parole/probation. We cannot authoritatively address what information the penal system can share with districts.

However, if a college official is aware of a particular student's parole/probation conditions, and that official observes conduct that violates those conditions, the official can report that conduct to appropriate law enforcement personnel. Such a report would not violate FERPA or state law prohibitions to disclosing education records, because the personal observation of the official is not a record. ("Record means any information recorded in any way, including, but not limited to , handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. § 99.3.)

Even if the official becomes aware through education records of conduct that violates known conditions of parole/probation, the official may disclose the information without consent of the student if a health or safety emergency exists. (34 C.F.R. § 99.31(a)(10).) If the campus police officials have been designated as persons who have a legitimate educational interest in the information under a district's policy, disclosure of student records to campus police officials would also be allowed. (34 C.F.R. § 99.31(a)(1).)

You might wish to consider seeking the advice of law enforcement experts as to the various processes that might impact on knowledge and enforcement of parole/probation conditions.

We hope the foregoing information is helpful to you.

Sincerely,

Steven Bruckman
Executive Vice Chancellor and General Counsel

Virginia Riegel
Staff Counsel

cc: Linda Michalowski, Vice Chancellor for Student Services
SB/RB/VR/rs/fr
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