

STUDENT BACKGROUND RECORD CHECKS:
An overview of the considerations at issue

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In addition to helping employers with school law related issues, Mr. Arroyo's practice includes handling and assisting with cases before the Equal Employment Opportunity Commission, the Labor and Industry Review Commission, the Wisconsin Employment Relations Commission, the Department of Workforce Development, the Eastern and Western District Courts and the Seventh Circuit Court of Appeals regarding race, age, sex, national origin, disability claims, worker's compensation claims and unemployment compensation matters for public and private employers. He also conducts diversity awareness and training programs tailored to fit the individual needs of each employer. The training encompasses both legal awareness and multicultural sensitivity concerns faced by today's employers.

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¹ This outline is intended to provide its readers information of a general nature and should not be considered legal advice. If you do have questions about the information contained herein as it applies to you or your institution, please contact your legal counsel.

I. OUR MISSION

A. Wis. Stat. 38.001(1) Mission and purpose

“The legislature finds it in the public interest to provide a system of technical colleges which enables eligible persons to acquire the occupational skills training necessary for full participation in the workforce; which stresses job training and retraining; which recognizes the rapidly changing educational needs of residents to keep current with the demands of the workplace and through its course offerings and programs facilitates educational options for residents; which fosters economic development; which provides education through associate degree programs and other programs below the baccalaureate level; which functions cooperatively with other educational institutions and other governmental bodies; and which provides services to all members of the public.”

B. Wis. Stat. 38.001(1)

“(3) The additional purposes of the technical college system are to:

[. . .]

(d) Provide education in basic skills to enable students to effectively function at a literate level in society.

(e) Provide education and services which address barriers created by stereotyping and discriminating and assist minorities, women and the handicapped or disadvantaged to participate in the workforce and the full range of technical college programs and activities.”

II. ADMISSION REQUIREMENTS

A. Wis. Stat. §38.22(1) Admission Requirements. “[E]very person who is at least the age specified in s. 118.15 (1) (b) is eligible to attend a technical college if the person is:

(a) A resident of this state.

(d) A nonresident of this state, and if the district board of attendance approves the enrollment.”

B. Wis. Stat. 38.23 Student discrimination prohibited. “(1) No student may be denied admission to, participation in or the benefits of, or be discriminated against in any service, program, course or facility of the board or any district because of the student’s race, color, creed, religion, sex, national origin, disability, ancestry, age, sexual orientation, pregnancy, marital status or parental status.”

C. Wisconsin Technical College System Manual

Policy 502- Admission (6/27/1990)(listed as “under review”)

“Technical college districts shall:

Develop admission requirements and make them available to all enrolling students. Disseminate information on educational programs and services.

Collect necessary applicant data.

Inform applicants who do not meet stated program or course admission requirements of program(s)/course(s) for which they are eligible or which could prepare them for admission to program(s)/course(s) of their choice.

Provide admission procedures designed to ensure fair and equal treatment of all applicants. “

III. **ADMISSION PRINCIPLES**

- A. Courts have generally granted broad authority to higher education institutions on who they admit as long as the refusal is not for unlawful reasons. See, *Martin v. Helstad*, 699 F.2d 387, 397 (7th Cir. 1983)(concurrence), citing *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
- B. The values of academic freedom and the need for professional academic judgments broadly empower colleges to select and apply their criteria for admission. *Bakke*, 438 U.S. at 312; *Martin*, 699 F.2d at 397; *Martin v. Helstad*, 578 F.Supp. 1473, 1482 (W.D. Wis. 1983).
- C. *Martin v. Helstad*, 578 F. Supp. 1473 (W.D. Wis. 1983)

Henry Martin applied for admission to the University of Wisconsin Law School. He failed to mention that he was, at that time, incarcerated in Michigan. He omitted this information when responding to a question on the application concerning arrests and convictions. Upon finding out that Martin was in fact incarcerated and had lied, the Law School withdrew its acceptance of Martin.

In examining the decision of the Law School, the court made several pronouncements about admissions that address the issue faced in our situation. “An applicant has no...constitutional right to admission...Academic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution...**As long as admission standards remain within constitutionally permissible parameters, it is exclusively within the province of**

higher educational institutions to establish criteria for admissions”.
Martin, 578 F. Supp. at 1480-1482 (emphasis added).

D. In the federal analysis--So long as consideration of criminal convictions is not constitutionally impermissible, a public institution can establish a policy of not admitting students with certain criminal backgrounds. Race, sex, and national origin are all constitutionally protected categories. “Criminal background” and/or “criminal record” are not.

E. Sweezy v. State of N.H. by Wyman 77 S.Ct. 1203, 1218 (1957).

This Supreme Court case lays out important guidance as to the breadth of academic freedom. It lists “‘the four essential freedoms’ of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study” (emphasis added). This statement was cited with approval in Regents of the University of Michigan v. Ewing, 474 U.S. 214, 226 n.12 (1985).

F. Gagne v. Trustees of Indiana University, 692 N.E.2d 489, 496 (App. Ct. Ind. 1998)

When a trial court reviews a university’s application of its Code (in determining the expulsion of a student), its sole function is to determine whether the university acted illegally, arbitrarily or capriciously, and the court is bound to accept the evidence most favorable to support the university’s decision.

IV. THE CONCERN LEADING TO THE QUESTION

A. Campus Violence

1. Instances - Virginia Tech, etc.

2. Governor’s report on Campus Safety.

a. Task force created in the wake of Virginia Tech.

b. Does not address student checks in admissions.

c. HEO Reauthorization does not require but clearly addresses campus safety as an important factor.

B. LAB Letter Report, Employment of Felons by the Wisconsin Technical College System, June 2006. See, http://www.legis.state.wi.us/LAB/reports/06-WTCSFelons_ltr.pdf

V. **ARE YOU REQUIRED TO ASK**

A. State Law

1. Caregiver Law
2. Police and Fire programs
3. Teacher programs

Wis. Admin Code PI 34.14(1)

(a)The SCD **shall** establish standards for admission to initial programs that include all of the following:

1. Student competency in communication skills, which includes computers and emerging technology, as determined through passing scores on standardized tests approved by the state superintendent, or through assessments designed and adopted by the SCD prior to admission to the programs.
2. **Other student program entry requirements such as** letters of recommendation, specific courses completed within the program, prior experience with children, personal interviews, or **background checks**.

B. By Contract

1. Affiliation Agreements.
 - a. Clinical placements in the health care field.
 - b. Police department clinical.
 - c. Student teachers.
 - d. Other clinical in workplaces that require background checks be performed.

C. Student Employees

1. WTCSB Policy 801 requiring background checks for all new hires but allowing districts discretion in exempting a certain “employee groups.” (Attached).

2. Your campus policy. Does it require student-employee background record checks?

VI. WISCONSIN CAREGIVER LAW, LITE

A. General Requirement

1. Wisconsin law requires checks on the background of persons who provide care for others or have access to people who receive care. This law applies to students in many of the programs in the Health, Human and Protective Services Division. A completed background check as prescribed under Wisconsin's law includes:
 - a. completed self-disclosure background information;
 - b. electronic status check of professional licenses and credentials through the Department of Regulations and Licensing;
 - c. electronic criminal history search from the Wisconsin Department of Justice; and
 - d. electronic review of records kept by the Department of Health and Family Services for any substantiated findings of abuse or neglect, and license restrictions or denials.
2. A caregiver is not:
 - a. A person who performs solely clerical, administrative, maintenance or other support functions for an entity and who is not expected to have regular, direct contact with clients or the personal property of clients.
 - b. A person who is employed or under contract with an entity to provide infrequent or occasional services, such as delivering items to the facility, equipment maintenance, grounds keeping, construction, or other similar services that are not directly related to the care of a client.
3. May refuse job/terminate if applicant/employee commits certain crimes.

B. Contracting to technical colleges

1. Covered Entities may contract out the caregiver background check process to another party (e.g., technical college) but the entity is ultimately responsible for the completion and accuracy of the background check process. If the entity contracts with another party

to conduct and maintain the background checks, the entity must retain on file a written agreement allowing the party to retain the required background information. Wis. Stat. § 50.065(2)(d).

2. Where there is a written letter of agreement with the entity, schools, temporary employment agencies or other agencies may conduct and maintain the caregiver background checks. Where such agreements exist, the school, employment agency or other agency must certify in writing to the entity that the student or caregiver employee has no offenses on the Offenses List (see [Appendix III to Caregiver Policy Manual](#)) and is therefore eligible for clinical placement or employment at the entity. The school or agency must also advise the entity of any convictions the person has so that the entity may consider whether any convictions are substantially related to the duties of the job.
3. The contracted agency must provide the entity with a letter that includes:
 - a. Each caregiver's name;
 - b. Their social security number, if available;
 - c. Any convictions;
 - d. Any findings of misconduct;
 - e. Any licensure denials or restrictions; or
 - f. Other credential limitations.

HFS 12.04(2)

C. Students

1. Background checks are required for students who will be completing internships or clinical training at covered entities. All students must complete the Background Information Disclosure (BID) Form (HFS-64) that must be on file with the entity, unless the school maintains the records under an agreement with the entity (see [2.2.2](#)). The complete caregiver background check is not required if the student will be at the entity for less than 60 days, is under supervision, and the student's BID form does not indicate a crime or offense that would make the student ineligible to be placed (see [2.2.3](#)).
2. Students under age 18 are also not subject to the full caregiver background check requirement if their completed BID form does not

indicate any offense that would make them ineligible. Students are not eligible to be accepted by an entity if their BID indicates an offense on the Offenses Affecting Caregiver Eligibility list (see Appendix III), unless the student applied for and received approval through the Rehabilitation Review process (see [Chapter 5](#)). Entities may also refuse to accept students because of a conviction that the entity determines is substantially related to the duties of the job.

3. Wis. Stat §§ 50.065(4m)(c); s.50.065(2)(bad).

D. Ongoing requirement

1. After the initial background check at the time of employment or contracting, entities must conduct new caregiver background checks at least **every four years**, or at any time within that period an entity has reason to believe new checks should be obtained. Wis. Stat. § 50.065(3)(b).

VII. **DO WE CONDUCT BACKGROUND CHECKS?**

A. NACUA List serve—informal findings U. of Tennessee, counsel

1. Do no background check.
2. Question criminal background but do not check.
 - a. Possibly asked to use as disqualification if later becomes an issue.
3. Do background checks in limited programs.
 - a. Teacher education, health-related fields.
4. In connection with clinical affiliation agreements.

B. The Common Application:

1. Private membership organization formed by colleges that wished to provide a common, standardized first-year application form for use at any member institution. In 2007, The Common Application, which is accepted by approximately 300 colleges and universities nationwide, added the following questions:

Have you ever been found responsible for a disciplinary violation at an educational institution you have attended from 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in

your probation, suspension, removal, dismissal, or expulsion from the institution? Have you ever been convicted of a misdemeanor, felony, or other crime?

2. Of those who did use The Common Application in 2007, “2.32% (6,176 out of 266,087 applicants) indicated they had been suspended or dismissed from school, and 0.26% (692 applicants) indicated they had been convicted of a misdemeanor or felony. 34 JCUL 419, 433 (citations omitted).

C. UW System

1. No general requirement unless program requires, i.e. medical school or upon entering clinical component of program.
2. Working on employee checking.
3. Notice of possible checks as part of a program are announced ahead of time.

D. Technical College System Board

1. Policy 502 regarding “Admission” is under review (Attached)
2. In 2007 passed employee background check policy 801. (Attached).

E. University of North Carolina

1. Requires background checking on all applicants offered admission or all applicants offered admission who indicate their intent to attend.
2. See Attachment B policy.

VIII. THE CASE FOR CONDUCTING CRIMINAL BACKGROUND CHECKS

A. Legal for

1. Wisconsin has no current prohibition. See Wis. Stat. § 38.23 prohibiting the denial of admission on protected classes such as race, sex sexual orientation, marital status, etc. Does not state arrest or conviction record.
2. Wisconsin’s Arrest and conviction record discrimination applies in the employment context only.
3. On the federal level

- a. The few nationally reported opinions directly on point hold that, absent state statutory provisions to the contrary, colleges may either deny or revoke admission because of an applicant's prior criminal conviction. *Martin, 578 F.Supp. at 1485; Martin, 699 F.2d at 392; Gagne, 692 N.E.2d at 496.*
 - b. Such denial or revocation typically occurs for two reasons:
 - (i) because the conviction is incompatible with values of the institution or
 - (ii) the course of study sought; and/or because the applicant failed when requested to disclose the conviction fully, accurately or at all. *Martin, 578 F.Supp. at 1485; Martin, 699 F.2d at 392; Gagne, 692 N.E.2d at 496.*
 - c. In either instance, the test for an institution is one of reasonableness, i.e. whether the college's decision is arbitrary, unreasonable or capricious; and whether it is consistent with standards of professional judgment. *Id.; Ewing, 474 U.S. at 225.* This may be shown by demonstrating a mere rational relationship between the nature, severity, and temporal nature of the crime; the truthfulness/forthcoming of the applicant; and the interests of the college.
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- (i) because the conviction is incompatible with values of the institution or the course of study sought; and/or
 - (ii) because the applicant failed when requested to disclose the conviction fully, accurately or at all. *Martin, 578 F.Supp. at 1485; Martin, 699 F.2d at 392; Gagne, 692 N.E.2d at 496.*

B. Policy for

1. Exclude those that would otherwise not be able to graduate from a program or course of study due to licensure or clinical requirements for the need to have a background check conducted. If you have a

competitive program, this is a way of weeding out certain program applicants.

2. Provide a defense of subsequent claims for negligent admission or placement, breach of duty to provide safe environment or other tort claims requiring a duty of care to prevent harm.
3. Serving as a basis for dismissal/expulsion if you later find that person lied on the application about criminal background.
4. Preclude enrollment of a student or the assignment of a student to a training site may prevent harm to an individual and may protect the reputation of the institution by avoiding negative publicity.
5. Provide a safer campus environment. Governor is imperative as part of safe campus taskforce.
 - a. QUESTION: What is the source of violent incidences on your campus. From students, non students, friends/spouses of students?

IX. THE CASE AGAINST CONDUCTING CRIMINAL BACKGROUND CHECKS

A. Legal against

1. No requirement to do so on a general basis.
 - a. Discrimination claims.
2. Effect of the policy serves to discriminate against a certain minority.
 - a. Statistics showing minorities are the main users of the criminal justice system.
 - b. The decisions from a background record check may disproportionately affect a minority population.
3. Having assumed the duty to perform checks, you could incur liability for
 - a. Not performing the background check.
 - b. Not properly performing the background check.
 - c. Failing to warn others once you have the information from the check.

B. Policy against

1. Who are we to deny admission to someone who paid their debt to society?
2. Cost of background checks.
 - a. Who pays?
 - b. Build it into fees; extra payment.
3. Effectiveness of background checks.
 - a. You will likely not discover juvenile record. Time period captured could be small for students coming in out of high school.
 - b. Disciplinary actions at other universities are typically confidential.
 - c. Reliability of reports.
 - (i) Some backgrounds are expunged, or not centrally maintained.
 - (ii) According to the Christian Science Monitor, a private background checking firm given a list of 120 people known to have criminal records, only 56 of them were reported. The FBI only found 87 out of the 120.
 - (iii) Consider wide disparity of application of sex offender/predator moniker among states.
 - d. Scope of search.
 - (i) Wisconsin searches.
 - (ii) Nation-wide searches.
 - (iii) Interpol.
4. Accuracy/completeness of databases.
5. False sense of security from a check that failed to reveal an important conviction.
6. What type of offense will deny admission?
 - a. Theft, murder, sex offenders, stalkers, etc.

- b. Should we apply the substantial relationship standard?
 - (i) What is the offense?
 - (ii) When did it occur?
 - (iii) Severity of the offense.
 - (iv) How often, i.e. recidivist?
 - (v) How does it relate to the college?
- 7. Administratively, how does the process work?
 - a. Applications are a quick and fluid processing general.
 - b. How can you get it done on a timely basis?
- 8. Do you do ongoing checks?
- 9. What is our mission as a technical college?

X. WHAT TYPE OF CHECK

A. State Background Checks

- 1. Only get Wisconsin, DOJ.
- 2. May also want to conduct check for states employee lived.

B. FBI

- 1. More complete but also more intrusive.
- 2. Requires fingerprinting, costly and takes longer to receive.

C. Interpol

- a. For international students.

XI. WHO PERFORMS THE SEARCH

A. The college in conjunction with the DOJ

B. Affiliated training sites

C. The student

D. Outside Agency

1. Cost analysis
2. FCRA compliance
 - a. Requires prior notification of obtaining a credit report
 - b. Rights to review the credit report upon which negative decision was based

XII. **WHEN TO ASK**

A. At Admission

1. No property or liberty interest attached.
 - a. Pursuit of education is not a fundamental right or liberty for purposes of substantive due process. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35-37(1973); *Tobin v. University of Maine*, 59 F.Supp. 87, 90 (D.Me. 1999).
 - b. Applicants for admission do not have a legitimate claim of entitlement to post-secondary or graduate school admission and, therefore, do not generally have either a property or a liberty interest in their application. *Tobin*, 59 F.Supp. at 90, 92; *Phelps v. Washburn University of Topeka*, 632 F. Supp. 455, 459 (D. Kan. 1986); *Martin*, 578 F. Supp. at 1480; *but see Grove v. Ohio State University*, 424 F.Supp.377 (S.D. Ohio 1976)(graduate school applicant has a liberty interest in pursuing an occupation).
 - c. Absent a property interest, applicants have no procedural due process rights to their application and no right to a hearing. *Martin*, 578 F.Supp at 1480.
2. Delay checks until admission decision is made (for specific programs) before conducting checks to limit the amount of checks needed to be performed.

B. After Admission

1. Property and liberty interest may attach requiring procedural and substantive due process consideration.
2. Once a public institution offers admission and the applicant accepts, the student may have a contract right to enforce. *See, i.e.,*

Eden v. Board of Trustees of the State University, 374 N.Y.S.2d 686 (N.Y.App.Div. 1975).

3. Even though such interests are less substantial than those of students who have matriculated and attended for some period of time, *Martin*, 578 F.Supp. at 1480; *Doe v. New York University*, 666 F.2d 761, 773 (2d Cir. 1981), a public institution cannot deprive the student of that interest without due process. *Martin*, 578 F.Supp. at 1481.
4. Process due is a flexible concept and depends on the particular situation but generally requires:
 - a. adequate notice,
 - b. a meaningful opportunity to respond,

Martin, 578 F.Supp. at 1481-85; *Martin*, 699 F.2d at 391; *Gagne*, 692 N.E.2d at 493.

5. Once due process is accorded, the institution must demonstrate a reasonable and substantiated basis for its deprivation -- that its decision was not arbitrary, unreasonable or capricious.
6. **Exception** to due process requirement: Was the admission fraudulently induced. In this case, did the person lie on his admissions application about his criminal record? *Martin*, 699 F.2d at 395-96; *Martin*, 578 F.Supp. at 1481, citing *Jago v. Van Curen*, 454 U.S.

C. Program that requires background check as a requirement of clinical requirement.

1. Prior to entry into program.
2. When ready to enter into the clinical portion of the program.

XIII. FERPA ISSUES

- A. Admissions information generally not FERPA information
- B. Storage and Disclosure of Information
 1. Need to place limits on who has access to the information.

2. Should store information separate from academic record so that persons with access to academic record does not have automatic access to criminal information.
3. Need to know basis dissemination, can only be disclosed or used by “school officials” for legitimate educational or security purposes.
4. May have to notify student before disclosure.

C. Disclosure of information where health or welfare is at stake

In an emergency, *FERPA* permits school officials to disclose without student consent education records, including personally identifiable information from those records, to protect the health or safety of students or other individuals. At such times, records and information may be released to appropriate parties such as law enforcement officials, public health officials, and trained medical personnel. See 34 CFR § 99.31(a)(10) and § 99.36. This exception to *FERPA*'s general consent rule is limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from a student's education records. In addition, the Department interprets *FERPA* to permit institutions to disclose information from education records to parents if a health or safety emergency involves their son or daughter.

D. Disciplinary Records

While student disciplinary records are protected as education records under *FERPA*, there are certain circumstances in which disciplinary records may be disclosed without the student's consent. A postsecondary institution may disclose to an alleged victim of any crime of violence or non-forcible sex offense the final results of a disciplinary proceeding conducted by the institution against the alleged perpetrator of that crime, regardless of whether the institution concluded a violation was committed. An institution may disclose to anyone—not just the victim—the final results of a disciplinary proceeding, 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. See 34 CFR §§ 99.31(a)(13) and (14).

E. The Clery Act

The *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* requires postsecondary institutions to provide timely warnings of crimes that represent a threat to the safety of students or employees and to make public their campus security policies. It also requires that crime data be collected, reported, and disseminated to the

campus community and to the Department annually. The *Clery Act* is intended to provide students and their families with accurate, complete, and timely information about safety on campuses so that they can make informed decisions. Such disclosures are permitted under *FERPA*. The following Web site provides more information about these and other provisions about campus safety:
<http://www.ed.gov/admins/lead/safety/campus.html>.

F. Law Enforcement Unit Records

Many technical colleges contract with private security companies and may designate a particular office or school official to be responsible for referring potential or alleged violations of law to local police authorities. Investigative reports and other records created and maintained by these “law enforcement” units are not considered education records subject to *FERPA*. Accordingly, institutions may disclose information from law enforcement unit records to anyone, including outside law enforcement authorities, without student consent. See 34 CFR § 99.8.

XIV. **DISCUSSION ON SPECIAL CIRCUMSTANCES**

- A. Dealing with “sexual predators” on campus
- B. Huber Release programs
- C. Other?

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