

May 10, 2018 DRAFT FOR DISCUSSION

BUSD Draft Record Sealing and Destruction Policy

Introduction:

When a young person is arrested for a crime, and adjudicated guilty in juvenile court, in most cases all records related to the incident are eventually sealed. This allows the young person to answer “no” when job, housing, and educational applications ask whether he or she has been arrested or convicted of a crime. In the California juvenile courts, this is called “sealing” but the concept is also referred to as “expungement” in other contexts. The basic idea is to rebut the increasing use of prior criminal history among employers and admissions officers. (The other way to combat this practice is to “ban the box”; i.e. disallow the question to be asked in the first place.)

Under the status quo, BUSD students can petition to “expunge” their discipline records to the Board, although no Board policy governs or explains the process. These requests typically come with a staff recommendation to expunge or not expunge the record. Sometimes the student has appeared before the Board, sometimes not. Some settlement agreements with students have also had expungement provisions, which have required staff to support a request for expungement on the condition that the student comply with behavioral conditions. The Education Code provides no guidance for the criteria the Board is supposed to use to determine expungements, so the evaluation of these requests tends to be somewhat ad hoc. There is also no guidance about what it means to “expunge” a record.

Under the attached policy, which does not use the term “expungement,” the process is streamlined in an attempt to mirror the juvenile court process, which automatically seals most juvenile delinquency records. Under the attached proposed policy, the District would automatically seal all files pertaining to a disciplinary record by the first day of a student’s senior year in high school or, if a disciplinary incident occurs during a student’s senior year, once the student graduates from high school. Imposing this default allows all students, regardless of whether they have access to an attorney, to equally benefit from the sealing of disciplinary records. Ultimately, the policy allows students to answer “no” when asked whether they have been subjected to discipline on college applications, shielding them from potential prejudice as they strive to achieve post-graduation goals.

Under the policy, the Superintendent can nevertheless petition the Board to keep a disciplinary record unsealed if staff believes that the benefits to safety of keeping a disciplinary record unsealed outweighs the benefits to the student of sealing the record. Similarly, students may petition to seal their disciplinary record based on specific circumstances prior to their senior year.

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The main goal of this policy is simply to ensure that mistakes our students make as children do not haunt them throughout their life. The “punishment” students receive for inappropriate behavior is the discipline that is imposed. It is not BUSD’s mission to further punish students by maintaining negative discipline in their permanent records.

Under the status quo, however, BUSD students may be faced with repercussions years after their conduct, and even after having satisfactorily completed the discipline imposed (whether it is traditionally exclusionary, or restorative, or something else). This is so because almost three-quarters of colleges and universities collect high school disciplinary information.¹ Of those that collect the information, 89 percent use the information in admissions decisions.²

Our high school students apply for college in the Fall of their senior year. With the system currently in place, they are at risk of rejection if they have a disciplinary record. The fact that students of color are still disciplined at rates disproportionately higher than other students only exacerbates the issue of maintaining disciplinary records past students’ senior year. This is especially true because college admissions officers are often not trained to distinguish between the various disciplinary events that are reported by student applicants.³

¹ See Scott Jaschik, *Unfair Admissions Criteria?*, Inside Higher Ed (May 26, 2015), <https://www.insidehighered.com/news/2015/05/26/report-questions-why-colleges-consider-high-school-disciplinary-records>. This article explains that many colleges and universities collect this information through the Common Application, which asks:

- 1) Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution.
- 2) Have you ever been adjudicated guilty or convicted of a misdemeanor or felony? Note that you are not required to answer “yes” to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise required by law or ordered by a court to be kept confidential).

² Scott Jaschik, *Unfair Admissions Criteria?* (citing findings in a survey conducted by the Center for Community Alternatives, a nonprofit group that focuses on alternatives to incarceration).

³ In fact, “only about a quarter of the 408 colleges that responded to the survey [conducted by the Center for Community Alternatives] have formal written policies on how the data should be interpreted — and only about a third have trained their admissions staff in how to interpret disciplinary violations.” The Editorial Board, *What College Applications Shouldn’t Ask*, The New York Times (May 23, 2015), <https://www.nytimes.com/2015/05/24/opinion/sunday/what-college-applications-shouldnt-ask.html>.

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With the Common Application's increasing popularity among colleges,⁴ it has become that much more important to give our students the ability to answer "no" when asked if they have been subjected to discipline. While we cannot control whether colleges look beyond students' disciplinary history, we have the opportunity to act preemptively by "sealing" students' disciplinary records, so that they can legally answer "no" to the Common Application question.

A comparable process has been adopted by California's juvenile court system, which allows students to move forward from their mistakes. Judges automatically seal juvenile records upon completion of the sentence or probation, and keep them confidential, as a matter of course. State law provides that, in the context of juvenile delinquency records that are sealed, **"the arrest and other proceedings in the case shall be deemed not to have occurred and the person who was the subject of the petition may reply accordingly** to an inquiry by employers, educational institutions, or other persons or entities regarding the arrest and proceedings in the case." Cal. Wel. & Inst. Code § 786(b) (emphasis added).⁵

All that said, members of the BUSD community, as well as the future college communities of our current students, have a reasonable expectation that universities will do all they can to provide a safe learning environment for all of their students. This policy does not prevent universities from making good on this promise. Should the District feel that colleges ought to be aware of a student's inappropriate conduct, the proposed policy provides a straightforward process for the District to petition the Board to keep a disciplinary record unsealed in a student's cumulative file. Even though the District may still be prohibited under FERPA from revealing that information to college admissions offices, the student will still have to report it.

Similarly, the proposed policy does not ask administrators to keep their heads in the sand with regards to student conduct. Just like juvenile court proceedings, for which sealed records are accessible by certain court personnel under certain proscribed circumstances, this policy allows administrators

⁴ See Juleyka Lantigua-Williams, *'Ban the Box' Goes to College*, The Atlantic (April 29, 2016), <https://www.theatlantic.com/politics/archive/2016/04/ban-the-box-comes-to-campus/480195/>.

⁵ In practice, a juvenile court will automatically seal a juvenile record if an individual has satisfactorily completed "(1) an informal program of supervision pursuant to Section 654.2, (2) probation under Section 725, or (3) a term of probation for any offense." Cal. Wel. & Inst. Code § 786(a). Even for more serious cases in juvenile delinquency court (those that fall under California's Welfare & Institutions Code section 707(b)) an individual may petition the court to dismiss the case under section 781 and then seal the juvenile record under section 786(a). See Cal. Wel. & Inst. Code §§ 781, 786(a). It is difficult to justify a system in which BUSD is more punitive than the juvenile court system. By way of example, California's Welfare & Institutions Code section 707(b) lists serious juvenile offenses such as murder, arson, robbery, and rape with force, violence, or threat of great bodily harm. See Cal. Wel. & Inst. Code § 707(b).

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access to the discipline records of their students, until they are destroyed upon graduation. Under the proposal as written, site administrators (and District staff) have the same access to these records that they currently have.

The policy also ensures that we comply with the disclosure requirements to teachers, contained in the Ed Code and our contract with BFT.

**Berkeley USD
Board Policy**

Commented [A1]: Need to review how this policy impacts with complaints policy around discipline

Sealing, Destruction, and Confidentiality of Discipline Records

BP XXXX

Definitions

To “**seal**” a record means to limit access to the record as described in this policy.

In the context of juvenile delinquency records that are sealed, state law provides that “the arrest and other proceedings in the case shall be deemed not to have occurred and the person who was the subject of the petition may reply accordingly to an inquiry by employers, educational institutions, or other persons or entities regarding the arrest and proceedings in the case.” Cal. Wel. & Inst. Code § 786(b).

Similarly, in the context of school disciplinary records, when a record has been sealed, the facts leading to the disciplinary action shall be deemed not to have occurred and the student may reply accordingly to an inquiry by employers, educational institutions, or other persons.

To “**destroy**” a record means to remove and destroy hard copy and electronic versions of the record from the District’s cumulative academic file for the student.

Automatic Sealing and Destruction at Beginning of Senior Year

Commented [A2]: Alternative proposal: Rather than automatically sealing suspension records, maintain all suspension records for one calendar year from the date of the suspension. After 1 year, student and parent meet with Director of Student Services/Principal/Dean to review progress. If student has demonstrated good behavior and has not engaged in any additional suspendable offenses, suspension record will be sealed. (This means, any suspensions earned during junior year WILL impact college admissions prospects.)

For disciplinary incidents that occur prior to a student’s senior year in high school, the Superintendent or designee shall seal all files pertaining to a disciplinary record by the first day of the student’s senior year.

For disciplinary incidents that occur during a student’s senior year in high school, the Superintendent or designee shall seal all files pertaining to a disciplinary record upon the student’s graduation from high school or its equivalent.

At the time of the sealing, the student shall be notified about the rights students have and the duties schools have with respect to sealed records.

Records that have been sealed but not yet destroyed may be accessed at any time by the Superintendent or designee, as well as the relevant site administrator(s) and staff.

Upon a student's graduation from high school or its equivalent, the District shall destroy all disciplinary records, except where a District Petition has been granted pursuant to this Policy.

Discretionary Sealing

In addition to the automatic sealing at the beginning of senior year, a student may petition the Superintendent to seal his or her disciplinary record upon a specific showing of a need for sealing based on one of the following circumstances:

1. The student wishes to apply for a specific job, job program, educational program, or volunteer opportunity, the application to which asks for information about school discipline history;
2. The student wishes to apply to transfer to a school outside of the District, the application to which asks for information about school discipline history;
3. The student's immigration status or ability to obtain a visa is threatened by the lack of sealing;
4. The student wishes to apply for a military position, the application to which asks for information about school discipline history;
5. An incident that happened at the very beginning of senior year that the student seeks to seal in order to apply for colleges at the beginning of senior year;
6. Or other extraordinary circumstances.

The Superintendent's decision on the petition for discretionary sealing is final.

District Petition to Leave Record Unsealed

The Superintendent or designee may, at any time prior to a student's graduation from high school, petition the Board to keep a disciplinary record unsealed in a student's cumulative file. The student has the right to be heard before the Board decides whether to grant the Superintendent or designee's petition. In deliberation of the petition, the Board must consider whether the benefits to safety of keeping a disciplinary record unsealed in a student's cumulative academic file outweigh the benefits to the student of sealing the record of the conduct in question. If the petition is granted, the record shall not be automatically destroyed upon the student's graduation.

Commented [A3]: Check to make sure this doesn't preclude BUSD from providing information required by Ed Code

Confidentiality of Discipline Records

Except where a District Petition (as set forth above) has been granted, no District employee shall reveal any student's disciplinary records or information to any agency, organization, or institution, including higher education institutions, without a court order or authorized release from the student or a student's legal guardian, except as provided by section 49076 of the California Education Code.

Notwithstanding this provision, the District may provide a student's disciplinary record to another K-12 district pursuant to section 49076 of the California Education Code if the student is transferring to that district.

Notwithstanding this provision, the District shall inform teachers of their students' prior disciplinary records as required by California Education Code 49079.

Statutory Correction or Removal of Student Records

Pursuant to Ed Code 49070, the parent or guardian of a pupil may file a written request with the Superintendent to correct or remove any information recorded in the written records concerning his or her child which the parent or guardian alleges to be any of the following:

- (1) Inaccurate.
- (2) An unsubstantiated personal conclusion or inference.
- (3) A conclusion or inference outside of the observer's area of competence.
- (4) Not based on the personal observation of a named person with the time and place of the observation noted.
- (5) Misleading.
- (6) In violation of the privacy or other rights of the pupil.

The procedures for responding to such a petition are contained in Ed Code section 49070.

Destruction of Records for Students Who Do Not Receive High School Diploma

If a student who attended school in the District completes a General Equivalency Diploma (GED) or the California High School Proficiency Exam (CHSPE), the student may inform the District of such completion, at which time the District will, within a reasonable time period, destroy the student's disciplinary records, if those records still exist.

Commented [A4]: Even if never sealed, wouldn't discipline records always be confidential? What happens now when (or if) BUSD gets request from colleges for discipline records? Does BUSD hand those over? Maybe make policy clear that BUSD won't disclose discipline records to colleges no matter what and the effect of keeping them unsealed has to do with the students' ability to answer "no" to the question on the box.

Commented [A5]: Check BFT contract for language re assaults on teachers

Commented [A6]: What about students with disciplinary record in elementary school or middle school who want a "fresh start" going into next level?

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Reporting

Nothing in this Policy shall be read to interfere with the District's ability and obligation to report accurate disciplinary data where required.