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CHANCELLOR'S OFFICE**

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TO: Superintendents/Presidents
Chief Instructional Officers
Chief Student Services Officers
Nursing Directors
Admissions Officers and Registrars

FROM: Steven Bruckman
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SUBJECT: Questions and Answers Regarding Criminal Background Checks for
Students in Clinical Settings
Legal Advisory 05-02

In recent months the System Office has received numerous inquiries from community college districts concerning problems districts are encountering when students are required to undergo a criminal background check in order to participate in a clinical activity. This advisory is intended to provide answers to the most frequent questions we have received on this subject. Districts are strongly encouraged, but not required, to follow the guidance provided in this advisory. Districts which do so will be deemed to satisfy any statutory or regulatory requirements administered by this office.

Question 1. Does the law require that students obtain a criminal background clearance before they can work as nurses or nurse assistants in clinical settings such as hospitals or other health care facilities?

Answer. Yes, under some circumstances. Health and Safety Code section 1338.5 requires that:

"Upon enrollment in a training program for nurse assistant certification, and prior to direct contact with residents, a candidate for training shall submit a training and examination application and the fingerprint cards to the state department to receive a criminal record review through the Department of Justice." (Health & Saf. Code, § 1338.5(a)(2)(A).)

Business and Professions Code section 144 requires a person applying for licensure as a registered nurse (RN) or licensed vocational nurse (LVN) to undergo a criminal background check. However, there do not appear to be any legal requirements for students in RN or LVN

training programs to undergo such a background check before having contact with patients in a clinical setting.

Question 2. If there are no legal requirements for students in RN or LVN programs to receive a criminal background clearance before working with patients, why are many health care facilities which provide clinical placements of such students requiring that students undergo a background check?

Answer. This is a question which can best be answered by the health care facility in question. However, it is certainly possible that health care facilities might impose such rules in order to limit their exposure to liability in the event that patients are harmed by students in clinical nursing programs.

We also understand that some health facilities may be imposing such requirements because they believe this is necessary in order to satisfy accreditation standards for such facilities. However, this may not actually be the case. The policy of the Joint Commission for Accreditation of Healthcare Organizations (JCAHO) states that: "if state law, regulation or hospital policy requires background checks on all employees, volunteers and students, JCAHO expects them to be done on all three categories. If state law requires background checks on only specified types of health care providers (e.g. nursing assistants), then JCAHO would require background checks on only those specified in state law (unless hospital policy goes beyond state law)." See the JCAHO website at:

http://www.jcaho.org/accredited+organizations/hospitals/standards/hospital+faqs/manage+human+res/planning/background_checks.htm

Question 3. Are there legal requirements for students in other types of clinical settings to undergo criminal background checks?

Answer. Yes. Health and Safety Code section 1736.6¹ provides that a person in a training program to become a certified home health aide must undergo a criminal background check before having direct contact with clients. Other provisions of law do not explicitly mention training programs, but several do require that any person having contact with certain types of clients must undergo a criminal background check. For example, Health and Safety Code section 1522 requires a criminal background check for "Any staff person, volunteer, or employee who has contact with the clients" of community care facilities. Section 1568.09 imposes similar restrictions on persons having contact with clients of residential care facilities for persons with life-threatening illnesses and section 1569.17 covers persons having contact with residents of a residential care facility for the elderly.

Section 1596.871 requires that any volunteer or employee who has contact with children in a licensed day care facility must undergo a criminal background check. However, it does provide an exemption for a student enrolled at an accredited educational institution if "the student is

¹ All subsequent section references are to the Health and Safety Code unless otherwise specified.

directly supervised by the licensee or a facility employee with a criminal record clearance or exemption, the facility has an agreement with the educational institution concerning the placement of the student, the student spends no more than 16 hours per week at the facility, and the student is not left alone with children in care."

Question 4. Are colleges legally responsible for enforcing the requirements for students to go through a criminal background check?

Answer. No. Most of the statutes discussed above make the facility where the clinical program is conducted responsible for ensuring that all persons who have contact with their patients or clients pass a criminal background check. Section 1338.5, which relates to criminal background checks for students enrolled in certified nurse assistant training programs, and section 1736.6, relating to criminal background checks for persons enrolled in home health aide training programs, place the responsibility for obtaining the criminal background clearances on the students themselves. However, none of the provisions discussed above appear to impose any obligation on community college districts which place students in clinical programs to ensure that the required background checks of students have been completed.

Question 5. Can a college require that students undergo a legally required criminal background check as a prerequisite for a clinical course?

Answer. Yes. The rules for establishing prerequisites are set forth in title 5, California Code of Regulations, sections 55200 et seq. Section 55201 describes the circumstances under which a district may establish prerequisites. Subdivision (c)(1) of section 55201 specifically permits prerequisites which are "expressly required or expressly authorized by statute or regulation."

However, it should be noted that some of the statutes discussed above, which require a criminal background clearance before a person can have contact with clients of a facility, provide for an exemption process. For example, Health and Safety Code section 1522(g) permits the Department of Social Services to grant an exemption allowing a person to work or volunteer in a community care facility despite certain types of criminal convictions based on "substantial and convincing evidence to support a reasonable belief" that the person convicted of the crime is "of such good character as to justify" granting an exemption.

Title 5, section 55201(f) requires that districts provide a procedure by which students may challenge a prerequisite on various grounds. Subdivision (f)(6) allows districts to specify additional grounds for challenging prerequisites beyond those outlined in the regulation. Districts which establish a legally required criminal background clearance as a prerequisite for a clinical course should modify their prerequisite policies to permit students to challenge the prerequisite in the event that an agency (such as the Department of Social Services), which is authorized to do so, grants the student an exception to the requirement for a criminal background clearance.

Question 6. What options are available to a college where there is no legal requirement for a criminal background check but a facility nevertheless insists that the college arrange for criminal background checks?

Answer. If a facility where a district wishes to conduct a clinical program indicates that a criminal background check will be required for all students, the district should determine if this requirement is imposed by any of the statutes discussed in this advisory. If not, the district should ask the facility to clearly identify the grounds on which it justifies the need for the background check. If the facility cannot identify any legal requirement for a criminal background check, the district may wish to ask the facility to eliminate the requirement.

However, if the facility continues to insist upon a criminal background check for all students and the district cannot locate another comparable facility which does not impose such requirements, the district may have little choice but to accept the necessity for students to obtain a criminal background clearance. One way of dealing with this situation is suggested by title 5, section 58106 which allows districts to establish limitations on enrollment for various reasons including to protect health and safety.

Section 58106 requires that the governing board of the district establish "fair and equitable procedures" for determining who can enroll in a course with an enrollment limitation. Such procedures must conform with one of the methods listed in subdivision (b) of section 58106. Subdivision (b)(1) allows "limiting enrollment to a 'first-come, first-served' basis or using other nonevaluative selection techniques." In Legal Opinion L 96-03 we explained that "nonevaluative selection techniques" are those which do not involve "evaluating or measuring a student's skills or abilities." A criminal background check does not involve evaluating a student's skills or abilities, so it could be used as a basis for limiting enrollment in a course.

However, it must be emphasized that this would not justify barring a student from participation in a clinical program if a criminal background check shows any criminal violation. For example, it would seem difficult to demonstrate that a student convicted of a traffic violation would necessarily represent any safety threat to patients or clients of a clinical facility. On the other hand, a conviction for a serious sex offense or crime of violence probably would justify the conclusion that the student represents some safety risk. Thus, if a criminal background clearance is going to be established as a limitation on enrollment for health and safety reasons in the absence of a statutory mandate, the district will need to work with the clinical facility to carefully define the types of offenses that would bar a student from participation.

Moreover, even where a legitimate health and safety concern exists, districts still need to provide for a process by which students can challenge the enrollment limitation pursuant to title 5, section 58106(c). The challenge procedure is particularly important in this case because of the absolute nature of the restriction. When other types of enrollment limitations are used (e.g. a lottery or accepting students on a "first-come, first-served" basis) the student always has some chance of getting into the course. However, a student who has certain types of convictions on his or her criminal record will be unable to obtain a clearance and will be forever barred from participating in a clinical course where enrollment is limited to those who have such clearances. If completion of the clinical course is a required part of the district's training program, the

student's inability to obtain a criminal background clearance will effectively preclude him or her from participating in the program and from seeking professional licensure or certification. The courts have held that constitutional due process considerations prevent a governmental entity from arbitrarily interfering with an individual's pursuit of his or her chosen profession. (See *Gresher v. Anderson* (Feb. 24, 2005, A103684) ___ Cal.App.4th ___ [2005 WL 428582 (Cal.App. 1 Dist.)] and cases cited therein.)

Thus, before a district agrees to use a criminal background check as an enrollment limitation for a clinical program in the absence of a statutory requirement, the district should consult with legal counsel to ensure that the health and safety justification for the limitation is well established and that sufficient due process safeguards are provided.

Question 7. Do colleges need to warn students about the need to obtain a criminal background clearance before they enter a program where such a clearance will be required for clinical courses?

Answer. Yes. If a college has established a criminal background clearance as a prerequisite or enrollment limitation, then this fact should be clearly indicated in the college catalog, schedule of classes, and other appropriate publications. Where a program is structured so that a student could complete considerable coursework before needing to enroll in a clinical class, it would be particularly advisable for the college to take additional steps to ensure that students are aware of the requirement for a criminal background clearance when they first begin the program so that those who will be unable to obtain such a clearance do not invest a great deal of time and money in pursuing a goal they will not be able to complete.

Question 8. Can a college charge a student a fee to offset the cost of processing a criminal background check?

Answer. Yes. Title 5, section 51012 provides that a community college district "may only establish such mandatory student fees as it is expressly authorized to establish by law." There is no statute or regulation authorizing a district to charge a fee to conduct a criminal background check on a student, so a district may not impose a mandatory fee for this function. However, the Chancellor's Office Student Fee Handbook, Legal Opinion M 04-0.5, recognizes that districts may charge fees for performing services for students. Where a district has established a criminal background clearance as a prerequisite or enrollment limitation for enrollment in a clinical course, obtaining the clearance is not optional. However, so long as the district allows a student to obtain his or her own criminal background clearance,² it may offer to process the request on the student's behalf in exchange for a fee to cover the costs it incurs. The fee charged by the district could also include a reasonable amount for the staff time associated with processing the request, but districts are encouraged to keep such charges to a minimum to prevent the cost from becoming a barrier to enrollment in clinical programs.

² Individuals are authorized to obtain their own criminal history information from the Department of Justice pursuant to Penal Code section 11105(b)(11) and Penal Code sections 11120 et seq.

Question 9. Is a district authorized to obtain criminal background information on a student without the student's consent?

Answer. No. Penal Code section 11105 authorizes the California Department of Justice to collect criminal history information and make it available to certain specifically defined individuals and agencies. Subdivision (b)(10) authorizes release of this information to "Any city or county, or city and county, or district, or any officer, or official thereof if access is needed in order to assist that agency, officer, or official in fulfilling employment, certification, or licensing duties." However, the courts have read this provision to apply narrowly only where the local entity is carrying out "employment and occupational certification or licensing" activities. (*Housing Authority v. Van de Kamp* (3rd Dist. 1990) 223 Cal.App.3d 109, 117.)

It is true that for most students the completion of a clinical course will contribute to completion of a degree or certificate that will, in turn, lead to licensure and employment. However, this seems to be a more tenuous connection to occupational certification and licensure than contemplated in the *Housing Authority* decision. Thus, we recommend that a district wishing to process a criminal background check for a student ask the student to authorize the college to receive a copy of his or her criminal history information pursuant to Penal Code section 11124.³

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³ We understand that some colleges have experienced difficulty in obtaining criminal background information from the Department of Justice for students in RN or LVN programs because there is no statutory requirement for criminal background checks for these individuals. Some districts have therefore turned to private firms which provide criminal background checks. This solution may work well where there is no statutory requirement, so long as it satisfies the needs of the clinical facility. However, if a district needs or desires to obtain a criminal background check from the Department of Justice, it may be possible to accomplish this by having the individual student request that the college receive a copy of his or her records pursuant to Penal Code sections 11120 et seq.