

**PROTECTING CALIFORNIA'S MOST VULNERABLE POPULATIONS:
AB 2632 (MAIENSCHIEIN)
May 16, 2014***

*Also see supplemental report dated September 9, 2014

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STATEMENT OF THE ISSUE

For three years, a state agency tasked with protecting others has failed to do just that, despite existing laws and regulations in place designed to protect vulnerable Californians, and despite the requests and demands of others. KCRA 3 News, Sacramento, early this year reported that the California Department of Social Services (DSS), the agency tasked to “serve, aid, and protect needy and vulnerable children and adults,”¹ was granting criminal background clearances to individuals arrested of serious and violent crimes without further investigation into arrest records. This practice allowed, over the last three years, potentially dangerous individuals to find employment in any of the 225,000 residential care facilities for children in foster care, the elderly, persons with chronic, life-threatening illness, and child day care facilities licensed by the DSS.

Community care licensing requirements in California require that the DSS investigate the arrest and conviction records of applicants who seek employment in those facilities.² California Health and Safety Code § 1522(a)(1) in part provides:

(a)(1) Before issuing a license or special permit to any person or persons to operate or manage a community care facility, the State Department of Social Services shall secure from an appropriate law enforcement agency a criminal record to determine whether the applicant or any other person specified in subdivision (b) has ever been convicted of a crime other than a minor traffic violation or arrested for any crime...for which the department cannot grant an exemption if the person was convicted and the person has not been exonerated.

¹ California Department of Social Services Mission Statement, <http://www.dss.cahwnet.gov/cdssweb/PG190.htm>

² Cal. Health & Safety Code § 1522.

As students in the University of the Pacific, McGeorge School of Law, Legislative and Public Policy Clinic (Clinic), we were fortunate to work with Ed Howard, Senior Counsel for the Children's Advocacy Institute. The Children's Advocacy Institute (CAI), founded at the nonprofit University of San Diego School of Law in 1989, is one of the nation's premier academic, research, and advocacy organizations working to improve the lives of children and youth, with special emphasis on improving the child protection and foster care systems and enhancing resources that are available to youth aging out of foster care. CAI is keenly interested in criminal records clearance issues given the vulnerability of foster youth living in homes licensed by DSS. Where the State has removed a child from his or home for abuse or neglect, surely the State has a duty to ensure that those supervising and caring them do not place foster children, and others, at further risk of harm.

STATEMENT OF FACTS

On March 12, 2014, DSS announced it would end its policy of providing criminal record clearances to individuals with arrest records without conducting investigations. The DSS policies in question, in place since 2011, cleared these individuals to gain employment in residential care facilities. DSS admitted that prior to 2011 it had conducted full criminal record evaluations, including case investigations, prior to issuing clearances but changed its procedure in response to threat of legal action by Oakland-area attorney Peter Sheehan. For the last three years, DSS issued clearances without inquiry or further investigation into arrest or other records. The facilities seeking to employ individuals for care service, required by state law to obtain clearances prior to hiring applicants, received the same clearance from DSS that they did for a person with no arrest record. The residential care facilities to relied, to their detriment, upon those DSS clearances placing our most vulnerable populations – children, the elderly, and the chronically ill - at risk. The danger has not abated; according to DSS, nearly 1,200 people with arrests for serious and violent crimes have received those clearances while their backgrounds are still under investigation.

Will Lightbourne, Director of DSS, indicated that DSS was following the law. Pat Leary, Chief Deputy Director for DSS, stated shortly afterward that “it was clear (DSS) had over-corrected,” that the policy put in place by DSS was inadequate, and that the agency would complete investigations for background checks before granting criminal clearances for people with arrest records.³ Leary said the department would change its practices and would “triage” the applications when received by the background check department. Leary said this would allow DSS to speed up the investigative process and still follow the law. A department spokesperson said Social Services gets 200,000 applications for criminal clearances every year.

While the DSS' proposal to change its clearance procedure may sound encouraging, its efforts do not go far enough to ensure that DSS follows the intent of Health and Safety Code § 1522 and related law to ensure that the state's most vulnerable individuals in residential care facilities are adequately protected. For these reasons, AB 2632 (Maienschein) was drafted to clarify existing state law to ensure that the Department of Social Services cannot do nothing when faced with an applicant with an arrest record; that it, that DSS must always do something to further investigate

³ *DSS to fix background policy after KCRA investigation*, KCRA-TV, March 12, 2014, <http://www.kcra.com/news/local-news/news-sacramento/dss-to-change-background-check-policy-after-kcra-investigation/24946476>.

records of arrests and other incidents to evaluate, prior to clearing, the risk of putting that applicant in close contact with those in the care of the State.

RESEARCH

Before issuing a clearance, DSS must evaluate the criminal record of the applicant to determine if they are barred from working in a facility because of a conviction for a serious felony. DSS is also responsible for the evaluation of arrests for which no trial has yet taken place, and is authorized to place a hold on the clearance process where an applicant has a non-adjudicated arrest pending its outcome.

A. DSS licenses care facilities for those unable to care for themselves

The DSS regulates and licenses facilities that provide services for California's most vulnerable populations, including community care facilities, foster family homes, or certified family homes of a licensed foster family agency⁴ as well as other categories of care facilities that are governed by separate statutory provisions: residential care facilities for the chronically ill, including persons with life threatening illnesses,⁵ residential care facilities for the elderly,⁶ and in child day care facilities.⁷

B. Applicants with criminal convictions are presumptively disqualified from working in community care facilities

1. Applicants must undergo a criminal record background check

The Legislature recognizes the need to generate timely and accurate positive fingerprint identification of applicants as a condition of issuing licenses, permits, or certificates of approval for persons to operate or provide direct care services in a community care facility, foster family home, or a certified family home of a licensed foster family agency . . . It is the intent of the Legislature in enacting this section to require the fingerprints of those individuals whose contact with community care clients may pose a risk to the clients' health and safety. An individual shall be required to obtain either a criminal record clearance or a criminal record exemption from the State Department of Social Services before his or her initial presence in a community care facility.⁸

Each applicant must submit fingerprint images and related information to the Department of Justice (DOJ) for the purpose of searching the criminal records of the Federal Bureau of Investigations (FBI) and self-disclose any criminal convictions to the DSS.⁹ The DSS receives criminal records information from the DOJ and the FBI identifying the applicant's criminal history, and DSS uses these records, plus court documents and information from the self-disclosure form, to

⁴ Cal. Health & Safety Code § 1522.

⁵ Cal. Health & Safety Code § 1568.09.

⁶ Cal. Health & Safety Code § 1569.17.

⁷ Cal. Health & Safety Code § 1596.871.

⁸ Cal. Health & Safety Code § 1522.

⁹ Cal. Health & Safety Code § 1522 (a)(4)(A), and Cal. Code Regs. § 80019.

determine if an applicant is eligible for work or if criminal records exist, if the applicant is eligible for a criminal record exemption.

2. Applicants convicted of certain offenses will be denied clearance, unless an exemption is granted.

If the applicant has been convicted of a crime other than a minor traffic violation, DSS shall deny the application¹⁰ unless it grants an exemption.¹¹ An exemption can only be granted if the applicant is “of good character” and exemptions are limited depending on the nature of the conviction and the type of employment sought by the applicant.¹²

3. Applicants awaiting trial for a crime have been granted clearance, despite provisions that allow the DSS to place a hold on the application pending adjudication.

Under current law, the DSS *may* cease processing an application until the conclusion of a criminal trial.¹³ However, since 2011, DSS has not used this discretion and has instead issued clearances without regard for arrests.

By comparison, Nevada state law requires that employment be prohibited (and terminated, if a current employee) in the case where an employee who may come into direct contact with a child placed in a foster care agency is arrested for or has charges pending for a specified crime.¹⁴ The laws of the following states include some version of agency review prior to employment for arrests and pending charges: Arizona, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Vermont, and Washington. In some cases, there is a complete preclusion of employment based on the pending charges; in others, investigation is required and consideration given but there is some discretion available to the agency. The California Department of Social Services’ three-year policy of granting criminal clearances and investigating after the fact is comparatively lenient.

ALTERNATIVE SOLUTIONS

After researching the problems raised by the California Department of Social Services 2011 policy, and in consultation with Ed Howard at CAI, we considered other alternatives in addition to pursuing legislation. Those alternatives identified included submitting Public Records Act requests to DSS requesting relevant information regarding the issuance of clearances to individuals arrested of violent and serious crimes without further investigation; drafting a letter to DSS requesting that the department alter their current clearance practice; proposing regulations to amend DSS clearance evaluations through California’s administrative law process; petitioning DSS to adopt emergency regulations addressing issuing clearances without further investigation; considering federal options regarding DSS accountability and funding; and assisting the Children’s Advocacy Institute (CAI), with related research and support.

¹⁰Cal. Health & Safety Code § 1522 (a)(4)(A).

¹¹Cal. Health & Safety Code § 1522 (g).

¹² *Id.*

¹³ Cal. Health & Safety Code § 1522 (a)(4)(B).

¹⁴ Nev. Rev. Stat. § 424.155(6) (2013).

Of the alternatives considered, we took the following actions, further detailed below. We assisted CAI with the drafting of one request to DSS under the California Public Records Act (PRA), drafted and submitted a second PRA request, both requesting in various detail relevant information regarding, among other things, foster care licensing matters as well as the issuance of clearances to individuals arrested of violent and serious crimes without further investigation. We researched the process to petition DSS to adopt emergency regulations. We prepared a draft request letter addressed to DSS that could be used by a Member of the Legislature to obtain relevant information from the Department, including requesting documents and a status update regarding investigations of arrest records prior to the issuance of clearances..

Public Records Act Requests

February 12, 2014 PRA Request – We assisted CAI with the drafting of the PRA Request to the DSS requesting, among other items, documents memorializing actions taken by DSS to monitor and evaluate the Child Protective Service (CPS) operations of Los Angeles and Sacramento Counties.

April 4, 2014 PRA Request – We drafted and sent a PRA Request to DSS on behalf of the University of the Pacific, McGeorge School of Law’s Legislative and Public Policy Clinic requesting records including any internal and external communications received by DSS since January 2014 on the policies and procedures for granting clearances. We received a response from DSS that was issued one day later than the initial ten-day response period given public agencies. That response indicated a need for an additional fourteen days, allowed by statute, for the DSS to evaluate the records further. At the time of this writing, we have not received a further response, despite being well past the deadline for DSS’ further response, and despite a status inquiry made by us on May 13, 2014.

Request to DSS for information, prepared on behalf of a Member of the Legislature

We prepared a draft request letter to DSS that could be submitted by a legislator to request information from the DSS regarding relevant documents, as well as to request a status update on the process changes regarding investigations of arrest records prior to the issuance of clearances. The draft requests, in part, that DSS provide copies of any and all internal DSS memoranda and related documents and communications regarding the changes in policies and procedures that the DSS has directed its staff to take.

The letter also sought copies of documents related to interagency collaboration with the DOJ related to DSS’ actions to complete investigations of arrest records prior to the issuance of clearances, for pending applications, future applications, and for those clearances issued from 2011 to the present, as well as further information about the status of changes, both internal and external, to properly address the issues. This letter was provided to a member of the legislature for use.

Other Alternatives Considered

1. Legislative Counsel Request: We considered requesting the assistance of a member of the Legislature to ask for an opinion from Legislative Counsel on the following issue: Does Health & Safety Code §1522 (and related statutes) require that the DSS clear for employment those with criminal arrests prior to DSS investigation?

2. Office of Administrative Law: We considered possible underground regulations claim. Was the DSS policy response put in place three years ago, after threat of litigation, an underground regulation? We researched underground regulations and the rulemaking procedures under the Administrative Procedures Act.¹⁵
3. Federal matters related to DSS accountability. Because federal funds are provided to the State for foster care services under Title IV-E of the Social Security Act, the extent to which the State fails to secure the safety and well-being of state foster youth is material. We were interested in the extent to which federal obligations exist related to outcomes for foster youth; and evidence that the U.S. Department of Health and Human Services is aware of California's violations; any current or past related federal actions; or documentation of ongoing inaction in this arena.

The above, other alternatives were considered but have not yet been acted upon.

PREFERRED SOLUTION

We assisted with the research, drafting, and advocacy for a bill in the California State Legislature. Assembly Bill 2632 (Maienschein) seeks to require the DSS to investigate applicants with arrest records prior to issuing a criminal record clearance. There are topics of ongoing discussion, including the extent to which the arrest records, and additional items that may be available for review, are investigated, the level of discretion to be left to DSS for determining the risk of certain records depending on the type of crimes or incidents, the number of years elapsed since the incident or arrest, and the consideration of the totality of the circumstances of an applicant's criminal record information.

Assembly Member Brian Maienschein, a freshman Republican representing the 77th Assembly District in San Diego County, is the author of AB 2632. We participated in discussions with the Assembly Member, his Legislative Director and also the Assembly Republican Caucus Policy Consultant for the Assembly Human Services Committee. Assembly Member Maienschein is considered a key author for this bill for several reasons, including his commitment to and record of care for California's youth and elderly, as well as his position as Vice Chair on the Assembly Human Services Committee, which had jurisdiction over AB 2632 in its first policy hearing.

Our role in preparing for the presentation of this bill in the Assembly Human Services Committee included working with the author's office on amendments; drafting a fact sheet, distributing the fact to the office of each committee member and meeting with a staff person in each of those offices, contacting other organizations for support; drafting a committee background sheet that was relied on by Assembly Committee on Human Services policy consultants in their writing of the bill analyses; drafting an author's statement on behalf of Assembly Member Maienschein; and participating in various planning strategy meetings with the legislator's staff, policy consultants, Ed Howard, and others.

AB 2632 was introduced on February 21, 2014 and was amended on March 28, 2014 to

¹⁵ Cal. Gov't Code § 11340 et seq.

include the initial draft of proposed language. On May 7, 2014, AB 2632 was further amended, but in a manner that will require further revision to meet the purpose of the bill. Further discussions regarding bill language and status are pending between the author, sponsor, and others.

EXCERPTS OF LEGAL DRAFTING

AB 2632 was initially introduced on February 21, 2014 as a non-substantive “spot” or placeholder bill. It was subsequently amended on March 28, 2014 to amend Health and Safety Code 1522(e) (and Health & Safety Code §§ 1568.09(e), 1569.17(e), and 1596.871(e) to read as follows (proposed changes in italics):

(e) The State Department of Social Services shall not *issue a criminal record clearance to a person with a record of an arrest prior to the department’s completion of an investigation of that arrest record.* *The State Department of Social Services shall not* use a record of arrest to deny, revoke, or terminate any application, license, employment, or residence unless the department investigates the incident and secures evidence, whether or not related to the incident of arrest, that is admissible in an administrative hearing to establish conduct by the person that may pose a risk to the health and safety of any person who is or may become a client. The State Department of Social Services is authorized to obtain any arrest or conviction records or reports from any law enforcement agency as necessary to the performance of its duties to inspect, license, and investigate community care facilities and individuals associated with a community care facility.

After the hearing of AB 2632 in the Assembly Human Services Committee, the bill was amended further on May 7, 2014 to revise the subdivision (e) of each of the code sections noted above to the following (deleted language in strikeout; new language in italics):

(1) The State Department of Social Services shall not ~~issue a criminal record clearance to a person with a record of an arrest prior to the department’s completion of an investigation of that arrest record.~~ *The State Department of Social Services shall not* use a record of arrest to deny, revoke, or terminate any application, license, employment, or residence unless the department investigates the incident and secures evidence, whether or not-related to the incident of arrest, that is admissible in an administrative hearing to establish conduct by the person that may pose a risk to the health and safety of any person who is or may become a client.

(2) *The department shall not issue a criminal record clearance to a person who has been arrested, and that arrest is pending investigation or conviction, for any crime specified in Section 290 of the Penal Code, for violating Section 245 or 273.5, subdivision (b) of Section 273a, of the Penal Code, or, prior to January 1, 1994, paragraph (2) of Section 273a of the Penal Code, prior to the department’s completion of an investigation pursuant to paragraph (1).*

(3) *The State Department of Social Services is authorized to obtain any arrest or conviction records or reports from any law enforcement agency as necessary to the performance of its duties to inspect, license, and investigate community care facilities and individuals associated with a community care facility.*

The present language of AB 2632 as above, amended May 7, 2014, is not representative of the ultimate language sought. While the actual language will ultimately be determined by the author and sponsor in consultation with others and dependent on the pending and future legislative action, the Clinic offered alternate language and participated in further research and meetings to discuss proposed revisions.

CURRENT STATUS – as of May 16, 2014

AB 2632

AB 2632 was heard in the Assembly Human Services Committee on the afternoon of April 29, 2014. Issued the day prior to the hearing, the Assembly Human Services Committee Analysis noted that “this measure seeks to help resolve what has been a back-and-forth state policy,” by “providing a blanket requirement that every person shall undergo a full investigative review, regardless of the nature of the arrest or when the arrest occurred, would unfairly limit employment...”¹⁶ The Committee Analysis prepared by the Office of Republican Policy stated that AB 2632 “would clarify and leave no ambiguity that DSS must investigate thoroughly the arrest records of potential workers prior to the issuance of criminal records clearances,” and that “our foster children, our elderly, and our chronically ill, who must rely on the State for their own safety, deserve no less.”¹⁷

Organizations that wrote in support included the Children’s Advocacy Institute (the bill sponsor); The Arc and United Cerebral Palsy California Collaboration; and the Clinic. Organizations opposing the measure included the American Civil Liberties Union; the Social Justice Law Project (attorney Peter Sheehan); the East Bay Community Law Center; and the Youth Law Center. Arguments in opposition noted concerns about what arrest records would be used and how far back DSS would reach in considering those records, that procedures might delay or limit employment to anyone who has been arrested and is seeking to help serve those provided for by state care facilities, and that the procedures could delay timely placement of with relatives of youth removed from their homes.

Assembly Member Brian Maienschein presented the bill, together with Ed Howard, Children’s Advocacy Institute. Also testifying in support of AB 2632 was Lexi Purich Howard, on behalf of the Clinic. Offering comments in opposition was the ACLU’s Valerie Small-Navarro. Small-Navarro expressed concern that arrest records twenty years or older might be used to deny employment, and that the length of time needed for an investigation would result in lost

¹⁶ Assembly Committee on Human Services analysis of AB 2632 (Maienschein), prepared in anticipation of April 29, 2014 hearing.

¹⁷ Assembly Republican Analysis of AB 2632 (Maienschein), prepared in anticipation of April 29, 2014 hearing.

employment opportunities for applicants. Ed Howard explained that AB 2632 does not disturb current law that provides that records of the arrests alone, without something more, cannot be used to deny employment. Rather, AB 2632 provides that an arrest record is the point at which the DSS must begin its investigation, and clarifies the law to make clear that the DSS must do something to investigate the record of arrest before issuing a criminal record clearance.

Additionally, Assembly Member Mark Stone, Assembly Human Services Committee Chair, and Assembly Member Maisenschein discussed possible amendments to the bill recommended by the Committee. There seemed to be general agreement that the bill language would benefit from further revision to clarify the extent of investigations, though the language recommended by the committee may actually be less stringent than the current standards in several respects. Ed Howard also noted concerns that further refinement was needed to address a drafting issue that seemed to suggest, contrary to the purpose of the bill, the creation of a category of crimes for which there would be no investigation.

AB 2632 passed out of the Assembly Human Services Committee on a 5-0 vote (with two members absent, abstaining, or not voting) to the remarks of the Chair that the bill was still “tethered” pending the amendments. The present language of AB 2632 as above, amended May 7, 2014, is not representative of the ultimate language sought and further amendments are anticipated. AB 2632 is scheduled for hearing next in the Assembly Appropriations Committee.

Legal Challenge to the DSS Policy Implementation

On April 8, 2014, California attorney Peter Sheehan of the Oakland-based Social Justice Law Project, and Sarah Crowley of the East Bay Community Law Center filed a complaint in California Superior Court for the County of Alameda “challenging policies and practices of the California Department of Justice (DOJ) and the California Department of Social Services (DSS) in processing requests for criminal record clearances.”¹⁸ *Roe v. Lightbourne*, Case Number RG14720549, was brought on behalf of Plaintiffs Laurence Roe, George Galvis and a prospective class tentatively identified as “all persons who have been arrested for designated offenses described in this complaint but never convicted and who are seeking, will seek, or are discouraged from seeking, due to defendants policies, a criminal record clearance to being employment in the facilities specified in Health and Safety Code §§ 1522, 1568.09, 1569.17, and 1596.87.”¹⁹ The action seeks permanent injunctive relief to prevent DSS from continued implementation of the challenged policies and procedures.

The complaint describes Roe as having been arrested in 2010 for a violation of Penal Code § 245, assault with a deadly weapon. The charges were subsequently dismissed as a case of mistaken identity. The complaint further asserts that Plaintiff Roe “would like to apply for employment with community care facilities covered by the defendant’s challenged policies but is discouraged and dissuaded from doing so due to defendants’ policies of not notifying community care employers that he and other persons with an arrest only record have been granted a criminal clearance and may

¹⁸ *Roe v. Lightbourne*, filed in Superior Court of California in the County of Alameda on April 8, 2014 (Case No. RG14720549).

¹⁹ *Id.*

begin employment immediately.” In other words, Roe has never applied nor experienced a delay or issue with either current or prior DSS investigation policies. The second plaintiff, George Galvis, seeks relieve based on a taxpayer action, based on the state’s expenditure of time and money on DSS policies.

Our team monitored daily the developments of *Roe v. Lightbourne* and reported developments to the office of Assembly Member Brian Maienschein and to Ed Howard of the Children’s Advocacy Institute through May 15, 2014. An Order to Show Cause Hearing regarding the Preliminary Injunction sought by plaintiffs is scheduled for May 16, 2014.

CONCLUSION

There remains work to be done on AB 2632, and the status of the pending lawsuit is uncertain. The cost of AB 2632 has not yet been established though it is expected to be minimal if any, and the language of the bill has not yet been resolved in a manner necessary to accomplish the objective of requiring DSS to conduct some investigation of arrest and other records rather than leaving them the discretion to conduct an investigation or do nothing at all.

ACKNOWLEDGEMENTS

We extend our gratitude to the following: Ed Howard²⁰, Senior Counsel, Children’s Advocacy Institute at the University of San Diego School of Law; Assembly Member Brian Maienschein (R), 77th Assembly District; Erin Donnette, Office of Assembly Member Brian Maienschein; Mary Bellamy, Principal Consultant, Assembly Office of Republican Policy; Sara Rogers, Senate Human Services Committee; Myesha Jackson, Chief Consultant, Assembly Human Services Committee; Chris Reefe, Consultant, Assembly Human Services Committee; Professor Rex Frazier, Director, McGeorge Legislative and Public Policy Clinic; and our student colleagues at the Clinic.

²⁰ Surname similarity notwithstanding, Ed Howard and Lexi Purich Howard are not related.