Health Care - Background Checks

January 1, 2008 to May 1, 2009
The Honorable Jon S. Corzine  
Governor of New Jersey

The Honorable Richard J. Codey  
President of the Senate

The Honorable Joseph J. Roberts, Jr.  
Speaker of the General Assembly

Mr. Albert Porrini  
Executive Director  
Office of Legislative Services

Enclosed is our report on the audit of Health Care - Background Checks for the period of January 1, 2008 to May 1, 2009. If you would like a personal briefing, please call me at (609) 292-3700.

Stephen M. Eells  
Assistant State Auditor  
July 29, 2009
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scope</td>
<td>1</td>
</tr>
<tr>
<td>Objectives</td>
<td>1</td>
</tr>
<tr>
<td>Methodology</td>
<td>1</td>
</tr>
<tr>
<td>Conclusions</td>
<td>2</td>
</tr>
<tr>
<td>Finding and Recommendation</td>
<td></td>
</tr>
<tr>
<td>Criminal History Background Checks</td>
<td>3</td>
</tr>
<tr>
<td>Auditee Responses</td>
<td>6</td>
</tr>
</tbody>
</table>
Health Care - Background Checks

Scope

We have completed an audit of Health Care – Background Checks for the period January 1, 2008 to May 1, 2009. The Department of Health and Senior Services (DHSS) and the Department of Law and Public Safety, Division of Consumer Affairs (DCA) oversees the various industries and practitioners by issuing licenses and certifications. A criminal history background check is part of the license/certification process to determine that no criminal history record information exists that would disqualify an individual from being licensed/certified.

Objectives

An objective of our audit was to determine whether all employees having direct one on one contact with patients have an adequate and current criminal history review. Another objective was to determine if required licenses and certifications had been obtained by the various health care businesses and individuals.

This audit was conducted pursuant to the State Auditor’s responsibilities as set forth in Article VII, Section 1, Paragraph 6 of the State Constitution and Title 52 of the New Jersey Statutes.

Methodology

Our audit was conducted in accordance with Government Auditing Standards, issued by the Comptroller General of the United States.

In preparation for our testing, we studied legislation, the administrative code, and policies of the departments. We also interviewed DHSS and DCA personnel to obtain an understanding of the criminal history review process and to determine whether individuals employed by health care facilities have background checks performed. In addition, we interviewed Department of Human Service personnel at three facilities to obtain an understanding of the state facilities background check process for candidates for employment.
A nonstatistical sampling approach was used. Our sample consisted of employees at two hospitals, one rehabilitation center, and one health care service provider and was designed to provide a conclusion about whether all individuals having direct one on one contact with patients had a criminal background review that was adequate and current. Our audit included a comparison between the Department of Labor and Workforce Development’s wage reporting data files for health care facilities for the second quarter of calendar year 2008 and DHSS’ and DCA’s disqualified individual databases and the DISS Abuse, Neglect and Misappropriation of Nursing Home Resident Property database.

**Conclusions**

Current legislation mandates criminal background reviews for licensed/certified individuals having direct care with patients. However, other employees who also provide direct one on one patient care are not covered by existing statutes. We also found that there is no proactive monitoring to ensure that disqualified individuals are not employed in a position that has direct one on one contact with patients. In addition, DCA has no procedures to ensure that all industry service providers and practitioners are properly certified/licensed.
Criminal History Background Checks

Governing legislation has given the responsibility for criminal history background checks for individuals in the health care industry to the Department of Health and Senior Services (DHSS) and the Department of Law and Public Safety, Division of Consumer Affairs (DCA). N.J.A.C. 8:43I requires that all prospective individuals seeking certification in a long term care facility as a nurse’s aide, personal care assistant and/or certified assisted living administrator submit to a criminal history background check as a condition of certification through the DHSS. The Health Care Professional Responsibility and Reporting Enhancement Act requires that a criminal history background check be undertaken for all health care professionals licensed or certified by the Division of Consumer Affairs. Examples of the professionals licensed/certified by DCA are doctors, nurses, home health aides, pharmacists, and physical therapists. Other individuals having direct one on one contact with patients provide companionship, housekeeping, meal preparation, shopping, laundry, and transportation services.

Both oversight organizations require applicants to submit to fingerprints at the state-authorized vendor for fingerprint screening. This process determines whether the individual has a disqualifying criminal history on the Federal Bureau of Investigation, Identification Division or the State Bureau of Identification database at the Division of State Police. The comprehensive criminal history background check transcends state lines and jurisdictions and provides current updates of criminal activity. This process is also used for all employees at State facilities within the Department of Human Services.

DHSS and DCA maintain records of those individuals that have completed the criminal history background check and are licensed, certified, or disqualified. DHSS also maintains a
record of those individuals in the health care industry accused of abuse, neglect, or misappropriation of nursing home resident property. In addition, both organizations maintain records on the licensed health care industries overseen by their particular organization.

Our field visits to three health care facilities overseen by DHSS noted that there are individuals employed at facilities who have direct one on one contact with patients, who are not required by legislation to have criminal history background checks. It is the responsibility of the management of the facility to determine if a background check is to be done for these individuals, the type of background check to be performed, and whether or not they decide to hire the individual based on the results of the background check. Our review noted that the background checks for these employees are not as comprehensive as those required for licensing/certification from DHSS. Typically these background checks are not done by fingerprint screening, do not provide current updates of criminal activity, and do not always transcend state lines or current jurisdictions. One facility only had a background check performed by name, social security number, and date of birth in the county the prospective employee resided.

We also noted that individuals disqualified by DHSS or DCA for specific licensed or certified positions that require background checks are working at facilities in another capacity. Our field visits disclosed that four employees who can have direct one on one contact with patients were on the DHSS disqualified database and one additional employee who also can have direct one on one contact with patients was on the Abuse, Neglect, and Misappropriation of Nursing Home Resident Property database.

Our field visit to one health care service firm licensed by DCA noted criminal history background checks are not as comprehensive
as the background checks done for those employees licensed/certified by DCA, nor do they provide current updates of criminal activity. Our review noted one individual who had a clean background check based on the firm’s review, but this individual had a criminal record per the DHSS database. Seven employees at this firm were on the DHSS disqualified database. In addition, our review noted that the employees of the firm perform functions of a DCA certified health care position yet employees were not certified because they were classified by the firm in a different title thus circumventing the comprehensive background checks performed by DCA. A review of one county’s website noted 5 of 47 health care service firms listed were not on the DCA license list.

**Recommendation**

We recommend that the DHSS and DCA seek legislation that mandates comprehensive criminal background reviews similar to those done for licensed/certified positions for all employees having direct one on one contact with patients. We also recommend that the DHSS and DCA seek legislation that would allow them to implement proactive procedures to ensure that disqualified individuals are not employed in a position that has direct one on one contact with patients by obtaining the wage reporting data files from the Department of Labor and Workforce Development on a quarterly basis and matching these records with its database of disqualified individuals. Appropriate investigation and action should be taken for those disqualified individuals who are working in health care facilities. We further recommend that the DCA utilize available resources to ensure all health care service firms and staff are meeting the licensing/certification requirements.
July 28, 2009

Stephen M. Eells  
Assistant State Auditor  
NJ State Legislature  
Office of Legislative Services  
PO Box 067  
Trenton, NJ 08625-0067  

Dear Mr. Eells:

In response to the Office of Legislative Services Draft Report on criminal background checks for health care workers, the Department of Health and Senior Services (DHSS) submits the following comments:

1. **"Conclusions", page 2.:** The sentence “We also found that there is no proactive monitoring to ensure that disqualified individuals are not employed in a position that has direct contact with patients” is not fully correct and may be misleading. It implies that there is some authority to prohibit individuals from working in a position not covered by an authorizing statute. It is likely that, absent an authorizing statute, any attempt by DHSS to do so by regulations would be held *ultra vires*. In other words, it may seem like a good idea for the DHSS to give a practitioner a Breathalyzer test before permitting him to access a hospital ward, but the DHSS is not authorized to do so in the absence of an enabling law.

2. **Page 4, first full paragraph.:** The sentence reads “It is the responsibility of the management of the facility to determine if a background check is to be done for these individuals, the type of background check to be performed, and whether or not to hire the individual based upon the results of the background check.” This may be true of the facility types visited by the auditors, but is not correct for all licensed facility types. Depending on the nature of the facility, standards vary from requiring all persons to have cleared a DHSS background check (for example, pediatric day health care facilities) to requirements that the facility ask if the employee has a history and then conduct a contemplative review.

3. **Page 5, Recommendations.:** The first sentence reads “We recommend that the DHSS and DCA seek legislation that mandates comprehensive criminal background reviews similar to those done for licensed/certified positions for all employees having direct contact with patients. Without adequate financial and personnel resources to implement any such
legislation, expansion of the background investigation program consistent with that recommendation would fail. Currently, we are down investigators and clerical staff. We are unable to keep up with current workloads, and, at this time, clearance can take up to four months for individuals who have identified arrest records. We see anywhere from 17% to 25% reviewable records each month on our current clients. If a facility cannot put people to work until a background clearance is received, hiring would come to a virtual standstill with our current staffing and resources. Questions to be resolved include who pays for the records check (facility, employee or State)? If it is the employee, remember that many of the staff are lower income persons with limited means, and may be part of welfare-to-work programs. Do we charge an administrative fee to cover DHSS costs? Are we prohibited from charging some of the applicants (for example, certified nurse aides pursuant to Federal and State law)? We also would need good data on the number and types of positions to be covered. Obviously, an expansion of the CBI program as contemplated in the draft report would require a large budget appropriation for implementation.

4. The audit points to creating greater oversight and control over staff that provide care/services to those residents/patients using health care providers in NJ. One cannot argue that such extensive oversight has benefits. Again, it is a report written with the purpose of providing maximum control over staff; however, it lacks a cost benefit analysis to implement such plans. Such costs beyond the large staff complement needed by the Health Facilities Evaluation and Licensing’s Criminal Background Unit are the cost of not having sufficient staff to provide care in such a large and critical industry.

Sincerely,

Heather Howard
Commissioner
Mr. Stephen M. Eells, Assistant State Auditor  
Office of the State Auditor  
Office of Legislative Services  
125 South Warren Street  
P.O. Box 067  
Trenton, NJ 08625-0067

Dear Mr. Eells,

The following is the response by our Division of Consumer Affairs to the audit report on “Health Care - Background Checks.”

"We note that the report recommends that "DCA utilize available resources to ensure all health care service firms and staff are meeting the licensing/certification requirements." DCA’s mandate is to protect consumers and therefore agrees with this statement. As part of our ongoing initiative, DCA is currently actively investigating ten businesses providing home health aides. DCA recently entered into consent orders with one health care service firm, Preferred Health Mate, and anticipates entering into another consent order this week with Affinity Care and a third by mid summer. In addition, DCA is discussing regulatory changes regarding the education and testing of home health aides to further protect the public.

We note and appreciate the recommendation that DCA obtains access to the Department of Labor and Workforce Development records. Access to these records would prove a most useful investigative tool."

Please let me know if you need anything else.

Sincerely,

Elizabeth J. Mackay  
Deputy Director