

**BUREAU OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS
FINDING OF EMERGENCY**

Amend Title 16 California Code of Regulations as follows:

- **Add Sections 2504.1 and 2517.5 (Vocational Nursing Program)**
- **Add Sections 2564.1 and 2575.5 (Psychiatric Technician Program)**

- **Amend Sections 2537 and 2540.6; (Vocational Nursing Program)**
- **Amend Sections 2590 and 2592.6 (Psychiatric Technician Program)**

The Bureau of Vocational Nursing and Psychiatric Technicians (BVNPT) hereby specifically finds that adoption of emergency regulations requiring the submission of fingerprints and the disclosure of any convictions as a condition of renewal is necessary for the immediate preservation of public health and safety, and general welfare of the citizens of California. Additionally, to implement this consumer protection action, the BVNPT must raise its licensing and renewal fees to cover the staffing costs and enforcement activities associated with these emergency regulations.

Specific Facts Showing the Need for Immediate Action

Historical Information

The BVNPT currently maintains and tracks approximately 108,780 active and delinquent Vocational Nurse (VN) licenses and 12,950 active and delinquent Psychiatric Technician (PT) licenses. The BVNPT began to fingerprint its initial applicants for vocational nurse licensure in 1952. In 1959, the regulation of PT's was placed under the BVNPT's jurisdiction and initial applicants for licensure as a psychiatric technician were required to submit fingerprints as a requirement for licensure. The requirement was eliminated in 1981 due to the fact that:

- In 1979-1980, only 0.1% or 8 individuals out of 7,715 fingerprint cards processed required administrative action.
- DOJ was taking too long to provide fingerprint reports.
- Increasing costs paid by the VN & PT applicants for the fingerprint processing.

Consequently, effective March 5, 1981, the BVNPT ceased requiring its applicants for licensure to submit fingerprint cards.

The fingerprint requirement was reestablished on July 1, 1996 after a 15 year lapse, and all applicants for licensure were required to submit DOJ fingerprints, and out-of-state applicants were required to also submit fingerprints to the Federal Bureau of Investigation (FBI). Effective January 1, 1997, the BVNPT revised its license renewal forms to require licensees to report, under penalty of perjury, any convictions sustained since their last renewal. **The BVNPT required all applicants for licensure to submit both DOJ and FBI fingerprints beginning January 1, 1998.**

Problem Statement

When an applicant for initial licensure is fingerprinted, the BVNPT receives a criminal history report informing the BVNPT of the applicant's criminal history. For a licensee who has been fingerprinted, the BVNPT receives subsequent arrest notifications from the Department of Justice (DOJ), which allows the BVNPT to open a complaint file and track any possible current criminal actions against a licensee. The BVNPT has no fingerprints on record for over 47,785 active and delinquent VN licensees and 7,168 active and delinquent PT licensees who were licensed prior to January 1, 1998 – over 45 percent of its licensees. This means that the BVNPT did **not** receive information on these licensees' criminal histories during their application process for licensure and as such is **not** able to receive reports of current criminal activity. Without this knowledge, the BVNPT is unable to take action unless information about possible criminal activity is received from some other complaint source.

While the BVNPT has been aware that there were licensees who had never been fingerprinted, recent newspapers articles focused on the criminal history of several such licensees, and highlighted the degree of the problem. The researched articles packaged information in a different way and in a different light than the BVNPT had done in the past. Moreover, these articles raised the issue with respect to specific licensees with notable criminal histories that the BVNPT had never disciplined (see attached newspaper articles).

VNs and PTs care for the aged in nursing homes and at home; the developmentally disabled in state institutions and community care homes; the mentally disordered in facilities, including prisons; and infants/children in a variety of settings. As high-risk consumers, these patients/clients require the utmost protection, as they cannot defend themselves against sexually and physically abusive, incompetent, or grossly negligent licensees. It is, therefore, imperative that the BVNPT receive current information regarding a licensee's criminal activity for a group that comprises over 45% of its licensed population.

To ensure protection of public health and safety, the BVNPT must be allowed to promulgate emergency regulations to require those licensees who have never been fingerprinted to be fingerprinted as a condition of renewing of their license, activating their license, or reinstating an expired license. In addition, the BVNPT is including specific regulations requiring all licensees to answer the question whether they have been convicted of any violation of law since they last renewed their license. The BVNPT has been including this question on its renewal forms since January 1, 1997 but this regulatory change more specifically implements that requirement and imposes a consequence for not answering it. With the availability of Live Scan technology for submission of fingerprints, the impact on the licensees is truly minimal; yet the benefit to the public is great and necessary.

Furthermore, the BVNPT anticipates, based on its experience, that of the 55,000 licensees that need to be fingerprinted, about 7,500 will have conviction histories. As such, the BVNPT needs regulatory authority to ensure that licensees respond to the BVNPT's request for information in a timely manner. This is important because in order to take disciplinary action against a licensee for a conviction, the BVNPT must obtain certified court documents. The criminal history reports received from the DOJ and/or FBI do not always contain accurate and complete court information. In those instances, the BVNPT needs the licensee to provide it with the correct court information and case number. Failure to have accurate court record information will delay the processing of these cases.

Finally, the BVNPT must have the resources to fund this important consumer protection action. A concurrent fee change must be approved to ensure that sufficient funds are available to cover the projected costs.

Authority and Reference

Authority: Business and Professions Code sections 2841.1 and 2854 (Vocational Nursing Practice Act); 4501.1, 4503 and 4504 (Psychiatric Technicians Law).

Reference: Business and Professions Code sections 700, 701, 703, 704, 2841.1, 2847, 2854, 2867.5, 2875, 2878, 2878.6, 2878.7, 2892.1, 2892.3, 2892.5, 2895, 2895.1 and 2895.5 (Vocational Nursing Practice Act); 125.9, 152.6, 700, 701, 703, 704, 4503, 4510, 4511, 4515, 4517, 4521, 4521.2, 4523, 4544, 4545, and 4548 (Psychiatric Technicians Law); Government Code section 6157, and Penal Code section 11105.

Informative Digest

Business and Professions Code section 2854 (VN Program) and 4504 (PT Program) authorize the BVNPT to adopt, amend, or repeal, such rules and regulations as may be reasonably necessary to enable it to carry into effect the provisions of the Vocational Nursing Practice Act and the Psychiatric Technicians Law. The BVNPT is proposing the following changes:

(1) Add section 2504.1 (VN Program) and section 2564.1 (PT Program)

This proposal would require a licensee to provide timely and accurate responses to inquiries and provide necessary documents needed by the BVNPT to investigate and take appropriate actions against a licensee convicted of a criminal offense that is substantially related to the practice of a licensed vocational nurse or psychiatric technician.

To conduct an investigation on whether a conviction is substantially related to a licensee's scope of practice, the BVNPT must review "certified" police reports, "certified" court documents and review documentation that substantiates compliance with probationary terms and rehabilitation efforts. Without this information the BVNPT cannot make a final determination as to the appropriate action. In the past, licensees have ignored the BVNPT's request for information and purposely delayed the BVNPT's ability to make a final decision. This proposal would enable the BVNPT to issue a citation and fine for failure to provide the necessary documentation in a timely manner. Due to the enormous volume of conviction documents that must be obtained from the various court houses throughout California and other states, it is critical that the licensee provide accurate court house and case number information.

(2) Add section 2517.5 (VN Program) and section 2575.5 (PT Program)

Business and Professions Code Sections 2892 and 4544 provide that a renewal application shall be on the form provided by the BVNPT, accompanied by the fee and required information, and filed with the BVNPT. This proposal would also require a licensee who was never fingerprinted by the BVNPT or for whom a fingerprint record no longer exists, as a condition of renewal, to (a) furnish to the DOJ, as directed by the BVNPT, a full set of fingerprints for the purpose of conducting a criminal history record check and to undergo a state and federal criminal offender record information search conducted through the DOJ. Failure to do so would constitute a ground for disciplinary action by the BVNPT; (b) disclose on the renewal form whether he or she has been convicted of any violation of the law in this state or any other state;

and (c) failure to provide all required information may render the renewal application incomplete and therefore not eligible for renewal.

(3) Amend section 2537 (VN Program) and section 2590 (PT Program)

VN Program

The BVNPT needs to propose a fee change to ensure that sufficient funds are available to implement retroactive fingerprinting.

Specific Purpose:

Pursuant to Business & Professions (B&P) Code, section 2854, the BVNPT may adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable it to carry out the provisions of these chapters. Additionally, B&P Code, Sections 2892.6 and 2895, specify the current fee assessments and the statutory fee ranges for the VN Program.

The VN Program needs to amend Sections 2537 to reflect fee changes for the following revenue categories:

- Initial License Fees -- From \$120 to \$150
- Biennial License Renewal Fees -- From \$120 to \$150
- Delinquent Renewal Fees -- From \$60 to \$75

All of the other fee assessment amounts will remain the same. The fee change is needed to ensure the fiscal solvency of the VN Program as it implements retroactive fingerprinting.

Factual Basis:

The BVNPT is a “special fund agency” and is totally self-supporting. The BVNPT derives all of its revenue from its applicants and licensees through the collection of examination, licensing and renewal fees.

Protection of the health, safety, and welfare of California consumers is the BVNPT’s highest priority. To ensure such protection, the BVNPT is authorized to investigate complaints of unprofessional conduct and unsafe, incompetent practice by licensed vocational nurses and psychiatric technicians.

To implement retroactive fingerprinting of 55,000 licensees, the BVNPT must have sufficient revenue to support the expanded enforcement program requirement.

The BVNPT worked closely with the Department of Consumer Affairs’ (DCA) Budget Office to determine the minimum amount needed to fund this budget change proposal. Without a fee change, the BVNPT cannot fiscally support the implementation of this expanded consumer protection law.

PT Program

The existing regulations were superseded by statutory provisions that became effective January 1, 2000 and January 1, 2007. Consequently, the fee amounts cited in the *regulation* are obsolete and need to reflect current fees. In addition, the BVNPT needs to propose a fee change to ensure that sufficient funds are available to implement retroactive fingerprinting.

Specific Purpose:

Pursuant to Business & Professions (B&P) Code, section 4504, the BVNPT may adopt rules and regulations to carry out the provisions of these chapters. Additionally, B&P Code, Section 4548, specifies the current fee assessments and the statutory fee ranges for the PT Program.

The PT Program needs to amend Sections 2590 relative to its fees. The existing regulations cite fee amounts that became obsolete effective December 31, 1999. Since that time, changes to the fee amounts were established in statute on January 1, 2000.

The PT Program needs to amend Sections 2590 to reflect fee changes for the following revenue categories:

- Initial License Fees -- From \$200 to \$300
- Biennial License Renewal Fees -- From \$200 to \$300
- Delinquent Renewal Fees -- From \$100 to \$150

All of the other fee assessment amounts currently established in statute will remain the same in this regulatory proposal. The fee change is needed to ensure the fiscal solvency of the PT Program as it implements retroactive fingerprinting.

Factual Basis:

The BVNPT is a “special fund agency” and is totally self-supporting. The BVNPT derives all of its revenue from its applicants and licensees through the collection of examination, licensing and renewal fees

Protection of the health, safety, and welfare of California consumers is the BVNPT’s highest priority. To ensure such protection, the BVNPT is authorized to investigate complaints of unprofessional conduct and unsafe, incompetent practice by licensed vocational nurses and psychiatric technicians.

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The BVNPT worked closely with the Department of Consumer Affairs’ (DCA) Budget Office to determine the minimum amount needed to fund this budget change proposal. Without a fee change, the BVNPT cannot fiscally support the implementation of this expanded consumer protection law.

(4) Amend section 2540.6 (VN Program) and 2592.6 (PT Program)

Existing regulations specify that if a licensee wants to activate an inactive license, the licensee must submit a written request and evidence of 30 hours of approved continuing education taken during the two-year period immediately preceding the request for activation. This proposal would require, in addition to the above-mentioned requirement, that a licensee who was never fingerprinted by the BVNPT or for whom a fingerprint record no longer exists furnish a full set of fingerprints as a condition of activating an inactive license.

Local Mandate: None

Specific Agency Statutory Requirements: Business and Professions Code section 2541.1 (VN Program) and 4501.1 (PT Program) specify that protection of the public shall be the highest priority for the Bureau of Vocational Nursing and Psychiatric Technicians in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

Fiscal Impact Estimates

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funds to the State: Processing approximately 55,000 fingerprint records and the applicable disciplinary actions will necessitate adding 14.5 positions to the VN program and 2.5 positions to the PT program, as well as the related costs for the Office of the Attorney General and Office of Administrative Hearings. The current estimated cost per fiscal year is:

	<u>VN Program</u>	<u>PT Program</u>
FY 2009-10 =	\$2,068,000	\$518,000
FY 2010-11 =	\$3,137,000	\$896,000
FY 2011-12 =	\$1,621,000	\$400,000

Nondiscretionary Costs/Savings to Local Agencies: None

Costs to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: None

Significant Adverse Impact on Businesses: None

Impact on Jobs/New Businesses: None

Cost Impact on Private Persons or Businesses Directly Affected: VNs and PTs, who have not previously been fingerprinted for the BVNPT or for whom a fingerprint record no longer exists, will be required to be fingerprinted at the time of license renewal, reactivation, or reinstatement. The one-time cost for a person to get fingerprinted is approximately \$65.00. The fee breakdown includes \$51.00 to the DOJ for conducting the background check and providing the criminal record report for DOJ and FBI, and the remaining \$14.00 to the vendor for fingerprinting the individual. The vendor's fee ranges from \$5.00 to \$45.00 with the average fee being \$14.00.

Additionally, the VN and PT licensing fees will be raised to ensure that sufficient funds are available to fund this consumer protection action.

Effect on Housing Costs: None

Identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies: None

Additional Explanation Regarding the Need for Immediate Action in Order to Protect the Public: Historically, the BVNPT has known that there is a population of licensees that has not been fingerprinted. However, it was only recently that the BVNPT determined that approximately 45% of its licensee population had not been fingerprinted. Additionally, there have been recent

news articles describing the significant criminal history of several licensees who had not been fingerprinted. The seriousness of the crimes committed by the licensees in conjunction with the number of non-fingerprinted VNs and PTs affirmed the need to obtain arrests and criminal records for all licensees as soon as possible, to better enable the BVNPT to perform its public protection mandate.

The BVNPT obtains much more reliable and timely information regarding potential criminal activity and convictions for the licensees who have been fingerprinted. For a licensee licensed after January 1, 1998, the BVNPT automatically receives an electronic notification from the DOJ informing the BVNPT about a criminal conviction sustained by a licensee. Even before that report, however, the BVNPT typically receives a subsequent arrest notification. This allows the BVNPT to take any action necessary, including immediate action to suspend a licensee's license, if warranted by the behavior leading to the arrest. Without the automatic and immediate notification of an arrest or conviction, the BVNPT must rely upon complaints filed from other sources or self-disclosure by the licensee during the license renewal process every two years.

In a recent case, the BVNPT disciplined a licensee in 2008 for a sexual battery conviction that occurred in 2006. As the licensee was licensed prior to 1998, he was not required to submit his fingerprint records prior to licensure. The BVNPT only became aware of this conviction because a complaint was filed by the nursing facility. In other cases, the BVNPT only becomes aware of a violation if the licensee self-reports the conviction on his/her renewal form or through reports published by various newspapers. The BVNPT cannot adequately protect the public if it must rely upon a formal complaint being filed, self-disclosure of a conviction by the applicable licensee and/or newspaper reports about various VN and PTs.

The proposed fingerprinting requirement will affect approximately 55,000 VNs and PTs who were licensed prior to January 1, 1998 when the BVNPT began requiring criminal history checks conducted by the DOJ and FBI. As a condition of licensure, the BVNPT considered the alternative of requiring all licensees who had not been fingerprinted, or for whom the BVNPT no longer had a record of the fingerprinting, to undergo fingerprinting in the immediate future independent of any other action, such as license renewal. However, in discussions with the DOJ, it became clear that such a large influx of licensees all at once for fingerprinting would be fairly overwhelming to its system. Moreover, on November 24, 2008, the Board of Registered Nursing (BRN) received regulatory authority to implement retroactive fingerprinting. As such, if the BVNPT and the BRN required all 202,000 licensees (i.e., 147,000 for the BRN and 55,000 for the BVNPT) to be fingerprinted all at once, DOJ would need over 27 more staff on board and trained right away, which DOJ characterized as highly improbable. In addition, it would still take these staff members one year to process all of the transactions.

BVNPT records indicate that 12% of its VN applicants and 23% of its PT applicants for licensure typically have convictions that require enforcement review. This does not include the subsequent arrests that will occur during the licensee's lifetime which may be substantially related to their scopes of practice. This equates to almost 7,400 cases that will require BVNPT action. The BVNPT will need 16 additional staff members to process this workload and to handle the subsequent enforcement actions. Therefore, making the requirement a condition of renewal, so that it will take about 2 years to obtain all the DOJ reports, is much more reasonable to allow the BVNPT to process the reports as they arrive, rather than risk a large influx of reports that then cannot be timely processed by the staff.

In addition, lead time of approximately 90 days is required after the regulations are approved before a licensee can be subject to any new requirement as a condition of renewal. This is because the BVNPT mails renewal notices to its licensees approximately 90-days prior to their

license expiration dates. The earliest that the BVNPT can mail new renewal forms to licensees containing the new requirements is January, and those are for licenses that are due to expire in April 2009. This requires the BVNPT to wait until April 2009 before subjecting any licensee to the new requirement. Renewal notices for licenses that expire before April 2009 have already been mailed to licensees. The BVNPT is already delaying the mailing of those January notices in order to work with DCA's Office of Information Services to coordinate revising the forms that get mailed, and on-line forms. In addition, response letters addressing incomplete renewal forms and forms returned with positive responses must be similarly coordinated.

If the emergency regulation is approved, the BVNPT will notify all VNs and PTs licensed prior to January 1, 1998 of the new requirement. The letter will also indicate that fingerprints may be submitted any time **before** the licensee's renewal date to prevent delays in their renewal. The BVNPT will begin the process of notification as soon as it is informed by the Office of Administrative Law that the regulations are approved.

(12/17/2008)