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Date: May 10, 2007

To: Barbara Whitney, Specialist
Economic Development and Workforce Preparation

From: Steven Bruckman, Executive Vice Chancellor and General Counsel

Subject: Interpretation of Education Code section 87482
Legal Opinion O 07-04

ISSUE

You have asked the following questions concerning the interpretation of Education Code section 87482:

1. Who would qualify as "clinical nursing faculty" eligible for extended temporary employment under section 87482?
2. Is the hiring of clinical nursing faculty under section 87482 limited to those circumstances described in subdivision (a) of that section?
3. Does the exemption for extended temporary hiring of clinical nursing faculty under subdivision (c) apply only to persons first hired after July 1, 2007?
4. Can a district employ clinical nursing faculty on either a part-time or a full-time basis under this section?

CONCLUSIONS

1. Clinical nursing faculty eligible for extended temporary hiring under subdivision (c) of section 87482 may teach academic nursing courses so long as they spend a majority of their time supervising students in a clinical setting.
2. Expanded temporary hiring of clinical nursing faculty under subdivision (c) of section 87482 remains subject to the requirements of subdivision (a), including that such hiring is only allowed to deal with a spike in enrollment or the long-term absence of a faculty member.
3. A community college district may employ a person pursuant to subdivision (c) of section 87482 to serve as a clinical nursing faculty on a temporary basis for four semesters or six quarters during any three consecutive years between July 2007, and June 30, 2014, provided that the individual has not worked for that same district since June 30, 2005.

4. Clinical nursing faculty may be hired on either a full-time or a part-time basis pursuant to subdivision (c) of section 87482.

ANALYSIS

Education Code section 87482 permits a community college district, under certain circumstances, to employ faculty on a temporary basis for not more than two semesters or three quarters during any three consecutive year period. However, Senate Bill 1309 (Stats. 2006, ch. 837) amended the statute to allow greater flexibility for hiring of clinical nursing faculty. Your questions raise several issues about when districts can utilize this additional flexibility.

We will begin by setting forth the text of the section and then address the specific questions. Section 87482 provides:

"87482. (a)(1) Notwithstanding Section 87480, the governing board of a community college district may employ any qualified individual as a temporary faculty member for a complete school year but not less than a complete semester or quarter during a school year. The employment of those persons shall be based upon the need for additional faculty during a particular semester or quarter because of the higher enrollment of students during that semester or quarter as compared to the other semester or quarter in the academic year, or because a faculty member has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

(2) Employment of a person under this subdivision may be pursuant to contract fixing a salary for the entire semester or quarter.

(b) No person, other than a person serving as clinical nursing faculty and exempted from this subdivision pursuant to subdivision (c), shall be employed by any one district under this section for more than two semesters or three quarters within any period of three consecutive years.

(c)(1) Notwithstanding subdivision (b), a person serving as clinical nursing faculty may be employed by any district under this section for up to four semesters or six quarters within any period of three consecutive academic years between July 1, 2007, and June 30, 2014, inclusive.

(2) A district that employs faculty pursuant to this subdivision shall provide data to the chancellor's office as to how many faculty members were hired under this subdivision, and what the ratio of full-time to part-time faculty was for each of the three academic years prior to the hiring of faculty under this subdivision and for each academic year for which faculty is hired under this subdivision. This data shall be submitted, in writing, to the chancellor's office on or before June 30, 2012.

(3) The chancellor shall report in writing, to the Legislature and the Governor on or before September 30, 2012, in accordance with data received pursuant to paragraph (2), how many districts hired faculty under this subdivision, how many faculty members were hired under this subdivision, and what the ratio of full-time to part-time faculty was for these districts in each of the three academic years

prior to the operation of this subdivision and for each academic year for which faculty is hired under this subdivision.

(4) A district may not employ a person pursuant to this subdivision if the hiring of that person results in an increase in the ratio of part-time to full-time nursing faculty in that district."

Your first question is how to define "clinical nursing faculty" eligible for four semesters or six quarters of temporary employment pursuant to subdivision (c). Clearly, the statute does not provide an explicit definition of the term "clinical nursing faculty." However, SB 1309 also added section 78260 to the Education Code creating a new program for recruitment and retention of "nursing faculty" at community colleges. Because the Legislature passed a bill which refers to "nursing faculty" in one section and "clinical nursing faculty" in another, we must conclude that the addition of the word "clinical" in subdivision (c) of section 87482 was deliberate.¹

The real issue is whether "clinical nursing faculty" are those who work exclusively in the clinical setting or whether they may teach non-clinical academic courses in the nursing program in addition to spending some time supervising students in a clinical setting. On the one extreme we might maintain that a faculty member must work exclusively in the clinical setting in order to be covered by subdivision (c) of section 87482. On the other hand we might say that so long as they spend even some de minimis time in the clinical setting, a faculty member could still be hired pursuant to that provision.

In considering this question we are mindful that "because temporary employees are not afforded certain important procedural rights enjoyed by probationary and regular employees, the courts have strictly interpreted the statutes authorizing their employment." (*Kalina v. San Mateo Community College Dist.* (1982) 132 Cal.App.3d 48, 54; citing *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 826 and *Santa Barbara Federation of Teachers v. Santa Barbara High Sch. Dist.* (1977) 76 Cal.App.3d 223, 228, 240.)

However, it is also true that "The words of the statute must be construed in context, keeping in mind the statutory purpose . . ." (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 763.)

Section 1 of SB 1309 sets forth the findings and declarations made by the Legislature in enacting the bill. Subdivision (d) of section 1 provides in pertinent part:

"the Legislature declares its intent to establish the Nursing Education Pipeline Act of 2006 to expand the number of nurses educated in California over the next five years by accomplishing all of the following:

. . . .

¹ "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . ." (*Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.)

- (2) Increasing nursing education enrollment in community colleges and the California State University system.
- (3) Recruiting and retaining nursing faculty."

Balancing the two above cited principles of statutory construction, we strive to construe the undefined term "clinical nursing faculty" in a way which will best promote the Legislature's stated objectives of recruiting additional nursing faculty and increasing student enrollment in nursing programs without stretching the term so far that it could apply to virtually any nursing faculty member. We thus arrive at what appears to be a defensible middle ground--that "clinical nursing faculty" may teach academic nursing courses so long as they spend a majority of their time supervising students in a clinical setting. This gives districts some flexibility to further the purposes of the statute while avoiding possible abuses which could arise if we held that a person may qualify as clinical nursing faculty by spending only some token amount of time working in the clinical setting. Clearly, reasonable minds may differ on this point and future legislation may be needed to definitively resolve the matter, but we think it highly likely that a district which adheres to this interpretation would be found to be operating within the confines of the statute.

Your second question is whether the hiring of clinical nursing faculty is restricted to those circumstances described in subdivision (a) of section 87482. That subdivision provides that a district may hire faculty on a temporary basis, "for a complete school year but not less than a complete semester or quarter" and where (1) there is a "need for additional faculty during a particular semester or quarter because of the higher enrollment of students during that semester or quarter as compared to the other semester or quarter in the academic year" or (2) "a faculty member has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board."

Subdivision (b) sets forth the general rule that those hired pursuant to subdivision (a) may only be employed for two semesters or three quarters within any consecutive three year period. As we have seen, subdivision (c) then grants an exception to the two semester or three quarter rule for clinical nursing faculty hired during the next several years. However, since subdivision (c) is an exception to (b), it only relaxes the numerical limits on the number of terms for which clinical nursing faculty can be employed. It does not relax the requirements of subdivision (a) that such hiring is only allowed to deal with a spike in enrollment or the long-term absence of a faculty member.

Your third question has to do with the timing of hires under subdivision (c). Paragraph (1) of subdivision (c) provides in pertinent part:

"Notwithstanding subdivision (b), a person serving as clinical nursing faculty may be employed by any district under this section for up to four semesters or six quarters within any period of three consecutive academic years between July 1, 2007, and June 30, 2014, inclusive."

It is evident that a person who is first hired on or after July 1, 2007, may serve for four semesters or six quarters in any consecutive three year period through and including June 30, 2014.

However, the statute does not clearly address the situation of a person who has already served for one or more semesters or quarters prior to July 2007. Nevertheless, we conclude that a district may employ a person pursuant to subdivision (c) of section 87482 to serve as clinical nursing faculty on a temporary basis for four semesters or six quarters during any three consecutive years between July 2007, and June 30, 2014, provided that the individual has not worked for that same district under section 87482 since June 30, 2005.

To explain this conclusion, consider the following example. A district first hires a particular person to serve as a clinical nursing faculty member on a temporary basis under section 87482 in Fall 2006. He or she does not work for the district in Spring 2007, but is again hired by the district to work in a clinical nursing setting during Fall 2007 and Spring 2008. The person in this example has only worked for three semesters within a three year period and subdivision (c) allows for four semesters of temporary work by clinical nursing faculty, but the three consecutive year period in this example would run from July 2006 through June 2009. This is not within the range specified in subdivision (c), so that subdivision does not apply and the situation must be analyzed under subdivision (b) which only allows serving for two semesters during any consecutive three year period.²

Thus, the district in this example would exceed the number of terms of temporary employment permissible under subdivision (b) if it hires the individual to work in both Fall 2007 and Spring 2008. The same reasoning would apply to any person who worked even one semester or quarter during either academic year 2005-06 or academic year 2006-07. However, a qualified person who worked within the constraints of subdivision (b) prior to that time could take full advantage of the new provisions for clinical nursing faculty, provided that he or she has not worked pursuant to this section for the same district since June 30, 2005.

Finally, you have asked whether a district may use the authority of subdivision (c) of section 87482 to hire temporary clinical nursing faculty on either a full-time or a part-time basis. The answer to this question requires an understanding of how section 87482 interacts with other provisions related to hiring temporary faculty.

The general rule, set forth in Education Code section 87482.5, is that a faculty member who consistently works "not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee . . ." Thus, a district need not rely on section 87482 to hire clinical nursing faculty who will consistently work less than 60 percent of a full-time assignment because these individuals will remain temporary faculty under section 87482.5 regardless of how many semesters or quarters they work.

² We recognize that subdivision (b) of section 87482 refers to a "consecutive three year period" and does not specify whether this means calendar years or academic years. However, the remainder of the section refers to "academic years" and we assume subdivision (b) should be construed to also refer to academic years. Indeed, the Attorney General appears to have reached this same conclusion in considering language substantially similar to current subdivision (b) which was contained in an earlier version of the statute. (62 Ops. Cal. Atty. Gen. 49 (1979).)

However, a district which is not prepared to hire someone on the tenure track will need to find another statute authorizing the temporary hiring of any faculty member who works full-time or part-time for more than 60 percent of a full-time assignment. While other provisions may apply, for the purposes of this discussion we will now examine section 87480. That section provides:

"87480. Governing boards of community college districts shall classify as temporary employees faculty members, who are employed to serve from day to day during the first three school months of any school term to instruct temporary classes not to exist after the first three school months of any school term or to perform any other duties which do not last longer than the first three school months of any school term, or to instruct in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term. If the classes or duties continue beyond the first three school months of any school term or four school months for special day and evening classes for adults, or schools for migratory population, the employee, unless a regular employee, shall be classified as a contract employee. The school year may be divided into not more than two school terms for the purposes of this section.

In any district, the governing board may, to prevent the stoppage of district business when an actual emergency arises and persons are not immediately available for contract classification, make an appointment to a position on a temporary basis for a period not to exceed 20 working days. The person so appointed shall be deemed to be a temporary employee who is employed to serve from day to day. Service by a person in such an appointment on a temporary basis shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a regular employee of a community college district."

Clearly, the temporary hiring authorized by section 87480 is quite limited in terms of the length of time, but it is not restricted in terms of the load the employee carries. Thus, a person may be hired on either a full-time or a part-time basis to serve as a temporary faculty member under section 87480 for the limited periods described in that section.

The first sentence of section 87482 begins with the phrase "Notwithstanding Section 87480" Thus, section 87482 is intended to carve out an exception to the restrictions on temporary hiring established in section 87480. In particular, section 87482 creates exceptions to the time limits on temporary service set forth in section 87480, but like section 87480, it does not address faculty workload.

We also note that subdivision (c) of section 87482 includes the important proviso that: "A district may not employ a person pursuant to this subdivision if the hiring of that person results in an increase in the ratio of part-time to full-time nursing faculty in that district." If subdivision (c) only authorized hiring full-time temporary clinical nursing faculty, there would be no need for this prohibition because hiring a temporary full-time nursing person could never increase the ratio of part-time to full-time nursing faculty.

Accordingly, we conclude that clinical nursing faculty may be hired on either a full-time or a part-time basis pursuant to subdivision (c) of section 87482, although this authority will normally be relevant only for those who are employed for more than 60 percent of a full-time assignment.

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