

**State of California
Office of Administrative Law**

In re:

Physical Therapy Board of California

**Regulatory Action: Title 16
California Code of Regulations**

Amend sections: 1399.25

Repeal sections: 1399.26

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2008-0710-05 S

SUMMARY OF REGULATORY ACTION

The Physical Therapy Board of California (“Board”) proposed changes to title 16 of the California Code of Regulations related to the monetary fine associated with violations of licensing regulations. The Board proposed changes to establish factors the Board may consider when determining the amount of a fine to impose. The Board also proposed additional circumstances that would allow for the imposition of an enhanced fine for particularly egregious violations. The Board submitted the proposed regulations to the Office of Administrative Law (“OAL”) for review in accordance with the Administrative Procedure Act (“APA”) on July 10, 2008. OAL disapproved the proposed regulations on August 21, 2008. This Decision of Disapproval explains the reasons for OAL’s action.

DECISION

OAL disapproved the proposed regulations because the rulemaking file does not meet the necessity standard, the proposed regulation does not meet the clarity standard and the correct APA procedure was not followed.

DISCUSSION

Regulations adopted, amended or repealed by the Board must be adopted pursuant to the APA. (Bus. and Prof. Code, sec. 2615.) Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless statutorily exempt or excluded. (Gov. Code, sec. 11346.) As no exemption applies in this instance, OAL must review this regulatory action for compliance with both the procedural and substantive requirements of the APA. (Gov. Code, sec. 11349.1.)

1. *Necessity Not Adequately Shown in the File.*

OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. This standard is defined in section 11349(a):

“Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Government Code section 11346.2 (b)(1) provides that an Initial Statement of Reasons for a proposed regulatory action shall include a “statement of the specific purpose of the adoption amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary...” Thus, the evidence of necessity is first presented in the Initial Statement of Reasons. The notice published pursuant to Government Code section 11346.4 includes information regarding the availability of the Initial Statement of Reasons for inspection required by Government Code section 11346.5(a)(16) specifically so interested persons may review and offer comments on the basis for the proposed action. The Initial Statement of Reasons for these regulations implementing substantial new factors to be considered when the Board assesses fines is one page plus a paragraph on a second page. It describes in general terms the motivation for the regulations and what the Board believes the regulations will do.

California Code of Regulations, title 1, section 10, subdivision (b) further details how OAL applies, and how the Board must meet, the necessity standard of Government Code section 11349.1:

In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) A statement of the *specific purpose of each* adoption, amendment or repeal; and
- (2) Information explaining *why each provision* of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. [Italics added.]

The Initial Statement of Reasons prepared for this rulemaking by the Board and the record of the rulemaking does not include substantial evidence of *why* the Board believes there is a need for most of the specific provisions included in these regulations. This oversight may be corrected by the Board through either the preparation of a supplement to the statement of reasons that includes a discussion of all the substantive provisions of these regulations and a description of *why* the amendments are needed, or the Board may include this explanation in a notice prepared pursuant to Government Code section 11347.1 if the Board makes additional changes to the text consistent with this Disapproval Decision (see *infra*, sections 2 and 3). In either case, this explanation must be made available for 15 days, consistent with Government Code section 11347.1.

2. *Portions of the Regulation Do Not Meet the Clarity Standard.*

OAL also reviews regulations for clarity, as defined in Government Code section 11349(c):

“Clarity” means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

California Code of Regulations, Title 1, section 16 provides further guidance on the meaning of “clarity,” stating:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute....

The proposed amendment to California Code of Regulations, Title 16, section 1399.25 does not meet the clarity standard in two specific instances. First, section 1399.25 (a)(3) indicates that a citation may be issued for violation of “statutes or regulations for which the board may issue a citation.” It would be more clear if the Board specified that it will only issue citations pursuant to statutes or regulations for which the Board has authority to issue a citation.

Second, proposed section 1399.25(c)(7) also does not meet the clarity standard because it provides that one factor to be considered in determining the amount of an administrative fine shall be “other matters as justice may require,” but there is no additional information in the rulemaking record as to what these “other matters” might be. Similarly, it is not clear who may submit these “other matters.” As written, it is possible the Board or the licensee may provide these other matters for consideration, but the proposed regulation is unclear what these other matters might be. These provisions should be clarified in the text and made available for 15 days for public comment pursuant to Government Code section 11347.1. The Board should provide

in its 15-day notice, as much information as possible so both licensees and the Board know what "other matters" might be considered.

3. *Incorrect Procedure.*

The Board must re-approve the regulations in their final form because substantive changes were made to the proposed regulations after the Board first approved them. The Board approved the regulations at its meeting on October 25, 2007. Substantive changes were subsequently made to the approved regulations and were made available, pursuant to Government Code section 11347.1, for public comment from May 27 through June 16, 2008. The minutes from the October 25, 2007 meeting at which these regulations were first approved indicated a delegation to the Executive Officer to make only nonsubstantive changes. However, these substantive changes were not presented for approval to the Board. Additional substantive changes are required in accordance with this Disapproval Decision. The Board must re-approve these regulations prior to re-submission to OAL.

Finally, when the Board undertakes these changes, the Notice of Modification must also include the first date on which the Board will accept comments on the proposed changes. (See Title 1, Cal. Code Regs., sec 44(a).)

CONCLUSION

For the foregoing reasons, OAL disapproved the proposed regulations.

Date: August 28, 2008



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