

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
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PHYSICAL THERAPY BOARD)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
Title 16, California Code of Regulations)	(Gov. Code, sec. 11349.3)
)	
AMEND SECTION 1399.15)	OAL File No. 2009-0309-03 S
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SUMMARY OF REGULATORY ACTION

The Physical Therapy Board (“Board”) proposed to amend section 1399.15 of title 16 of the California Code of Regulations and the Model Guidelines for Issuing Citations and Imposing Discipline (“Guidelines”) which are incorporated by reference therein.¹ The Guidelines are used by Administrative Law Judges, Deputy Attorneys General, Board members and staff in reviewing the conduct of physical therapists and physical therapy assistants for the possible imposition of discipline and citations. The amendments would also make changes to the Probation Conditions in the Guidelines. The Board submitted the proposed regulatory action to the Office of Administrative Law (“OAL”) on March 9, 2009.

DECISION

On April 20, 2009, the Office of Administrative Law disapproved the above referenced regulatory action because the Guidelines fail to comply with the clarity and necessity standards of Government Code section 11349.1. This disapproval decision contains examples of some of the identified issues, but is not exhaustive. Upon resubmission of this matter, OAL reserves the right to conduct a complete review pursuant to the Administrative Procedure Act (“APA”) for compliance with the procedural and substantive requirements of Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2, of the Government Code. All APA issues must be resolved prior to OAL’s approval.

¹ Pursuant to section 20 of title 1 of the California Code of Regulations (“CCR”), material proposed for “incorporation by reference” shall be reviewed in accordance with the procedures and standards for a regulation published in the CCR. The Guidelines incorporated by reference into section 1399.15 of title 16 of the CCR are subject to the same procedures and standards as a regulation.

DISCUSSION

Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from the APA (Gov. Code, sec. 11346).

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural and substantive requirements of the APA. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective (Gov. Code, sec. 11349.1).

A. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of title 1 of the California Code of Regulations provides:

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 regulations 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.

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons (Gov. Code, sec. 11346.2(b)). The Initial Statement of Reasons is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the "necessity" standard. The Initial Statement of Reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed; or, simply restated, "*why*" a regulation is needed and "*why*" the particular provisions contained in the regulation were chosen to fill that need (Gov. Code, sec. 11346.2(b)(1)).

The Initial Statement of Reasons must be submitted to OAL with the Notice of the Proposed Action and be made available to the public during the public comment period, along with all the information upon which the proposal is based (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) This information is essential in order to allow the public to comment knowledgeably. The Initial Statement of Reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file (Gov. Code, sec. 11347.3(b)(2) and (7).)

The Initial Statement of Reasons provided with this regulatory action is inadequate. For the most part, it describes *what* the regulations do, not *why* each particular change is being made to the Guidelines. The Guidelines are adding and changing requirements for licensees regarding disciplinary actions without explanation as to why each change is necessary. The Initial Statement of Reasons fails to provide the public with the rationale for the determinations by the Board as to why the specific regulatory changes are needed to carry out the purpose for which they are proposed. This vital information should have been made available to the public during the rulemaking process so that the public is informed of the basis of the proposed action and can comment knowledgeably during the public comment period.

The following sections of the Guidelines provide for new citations (fines) and/or disciplinary action or probation conditions, with inadequate or no statement in the Initial Statement of Reasons as to how the particular fine or citation was determined to be appropriate for the relevant violation or why the particular provision was necessary. Other regulatory provisions that need further explanation were discussed with Board personnel. This decision provides examples of the types of issues to be addressed by the Board prior to the resubmission. However, all issues discussed with the Board will have to be resolved prior to approval by OAL.

Example No. 1: Restriction of Practice – Temporary Services Agencies (p.40)²

This probation condition is proposed to be amended as follows:

The respondent shall not work for a temporary services agency or registry.

OR:

² In the examples provided, proposed amendments to the CCR are indicated in underline and deletions are indicated in strike-out.

NOTE: If respondent's restrictions are limited to a certain number of registries and/or temporary service agencies:

The respondent's work for a temporary services agency or registry shall be limited as follows:

- 1) Respondent shall be limited to work for (indicate # of temporary services or registries) temporary service agency or registry
- 2) This work must be approved by the probation monitor
- 3) Respondent must disclose this disciplinary proceeding as described above in Condition # [include appropriate term] to the temporary service agency or registry
- 4) Respondent must disclose this disciplinary proceeding, as described above in Condition # [include appropriate term] to the supervisor at the facility where physical therapy care is being performed.

Respondent must notify his/her probation monitor or board's designee, in writing, of any change in registry or temporary service. The Respondent must have written approval by the probation monitor prior to commencing work at a new registry or temporary service agency.

The Initial Statement of Reasons states: "Condition #12, specifies conditions for working with a registry or temporary service agency." The statement merely states *what* the change does, not *why*. The necessity must be articulated for why this new alternative is being added and why these specific requirements are being mandated.

Example No. 2: Restriction of Practice – Monitoring (p. 45)

...

If there is no practice monitor available from the pool of physical therapists, the Respondent may provide the probation monitor with the name and license number of a licensed physical therapist for approval if deemed appropriate. The professional practice monitor shall not be someone with a conflict of interest in reviewing the licensee's practice. A conflict of interest is one that may interfere with the ability to fairly assess the licensee's practice and provide the probation monitor with a non-biased report. This includes, but is not limited to, a business partner or family member of the licensee.

...

The Initial Statement of Reasons states: "Condition H, allows respondent to gain approval of a licensed physical therapist to act as a probation monitor when there is no practice monitor from the approved pool of physical therapists available. . . ." This statement does not provide *why* this provision is being proposed.

Example No. 3: Completion of Probation (p. 42)

Respondent shall comply with all financial obligations required by this Order (e.g., cost recovery, restitution, probation costs) not later than 180 calendar days prior to completion of probation unless otherwise specified in Order. Upon successful completion of probation, respondent's license shall be fully restored.

The Initial Statement of Reasons must indicate why this particular requirement is proposed for adoption. Why 180 days?

Example No. 4: Restriction of Practice – Supervision Required (p.44)

(Optional) After one year of full compliance of probation, Respondent may request in writing for the approval by the board or its designee, to remove this condition entirely or modify the requirement.

This option is being added to a number of conditions, but the Initial Statement of Reasons does not indicate why it is proposed, or why some conditions have this option while others do not.

Example No. 4: Probation Conditions Specific to Violation (p. 49)

Notification of Probationer Status to Employees

If respondent is an employer of other physical therapist or physical therapist assistants, respondent shall notify all present or future employees of the reason for and terms and conditions of the probation. Respondent shall do so by providing a copy of the Initial Probationary License, Statement of Issues, Accusation, and Decision and Order to each employee and submit confirmation of employee receipt to the Board within 10 days. The confirmation(s) provided to the board shall include the name, address and phone number of the employee.

This provision was added pursuant to a 15-day notice and public comment period. Although the Board did indicate in the notice that they were revising the Guidelines, the notice did not clearly indicate the types of changes being made. In addition, the Board did not mail or post on their website the modifications to the Guidelines. Section 44 of title 1 of the CCR requires that the Board have the proposed changes clearly indicated and make them available to the public for comment for at least 15 days prior to their adoption. In that the 15-day notice did not articulate the changes that were being made and the Guidelines themselves were not provided to the public, the public did not have an informed opportunity to knowledgeably comment.

It is statutorily mandated that the Board articulate its reasons for adopting, amending or repealing a regulatory provision so that the public has an opportunity to comment on the process and the reasoning of the Board.

B. CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with them (Gov. Code, sec. 11340(b)). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the “clarity” standard. Government Code section 11349(c) defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.”

Section 16 of title 1 of the CCR declares in relevant part that:

In examining a regulation for compliance with the ‘clarity’ requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exist:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or ...
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons ‘directly affected;’ ...

In this rulemaking, OAL determined that several regulatory provisions did not satisfy the “clarity” standard. Other regulatory provisions that need further clarification were discussed with Board personnel. This decision provides examples of the clarity issues that exist in the Guidelines and that were discussed with the Board. All clarity issues raised by OAL to the Board personnel must be addressed prior to approval by OAL.

Example No. 1: Citation (p. 8)

~~A Citations and Fine Order typically contains a description of the violation, an Order of Abatement which directs the subject to discontinue the illegal activity, a fine (based on the gravity of the violation, intent of the subject, and the history of previous violations), and procedures for appeal. shall be in writing and shall describe with particularity the nature and facts of the violation, including a reference to the statute alleged to have been violated.~~

In that the Guidelines provide for citations for violation of a *regulation* in addition to a citations for a violation of a *statute*, the regulatory provision is unclear as to whether the conditions of being “in writing” and describing “with particularity” apply to *regulatory* violations as well as to *statutory* violations.

Example No. 2: Restriction of Practice (p.40)

Respondent shall not supervise any physical therapy student interns, foreign educated physical therapist license applicants or other individuals accumulating hours or experience in a learning capacity during the entire period of probation.

It is unclear as to whether the provision is just restricting the probationer from supervising individuals involved in physical therapy related activities or if it is meant to restrict the probationer from any supervision of anyone, whether or not it is related to physical therapy.

Example No. 3: Notification of Probationer Status to Employees (p.49)

If respondent is an employer of other physical therapist or physical therapist assistants, respondent shall notify all present or future employees of the reason for and terms and conditions of the probation. Respondent shall do so by providing a copy of the Initial Probationary License, Statement of Issues, Accusation, and Decision and Order to each employee and submit confirmation of employee receipt to the Board within 10 days. The confirmation(s) provided to the board shall include the name, address and phone number of the employee.

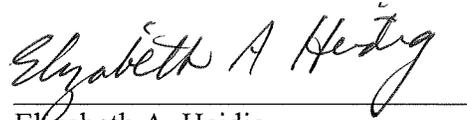
“[R]espondent shall notify all present *or* future employees [bolding added]” is unclear. Which employees need to be notified and for what length of time? When does the notification have to occur? Confirmation must be submitted to the Board “within 10 days,” but ten days of what? “[C]onfirmation of employee receipt” is also unclear. What constitutes confirmation?

The foregoing three examples are some of the clarity issues discussed with Board personnel. Before OAL will approve the regulatory submission, each and every regulatory provision contained in the Guidelines must meet the clarity standard of Government Code section 11349.1.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action.

Date: April 27, 2009



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