

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:

BOARD OF PSYCHOLOGY

REGULATORY ACTION:  
Title 16, California Code of  
Regulations  
AMEND SECTION 1397.12  
(RENUMBERED TO 1395.2)

DECISION OF DISAPPROVAL  
OF REGULATORY ACTION  
(Gov. Code, sec. 11349.3)

OAL File No. 2015-0925-01S

**SUMMARY OF REGULATORY ACTION**

The Board of Psychology (Board) proposed to amend section 1397.12 (and renumber the section to 1395.2) of title 16 of the California Code of Regulations and incorporate by reference the Board's "Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees (4/15)" and the Department of Consumer Affairs' Substance Abuse Coordination Committee's "Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011)." On September 25, 2015, the Board submitted the proposed adoption to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On November 6, 2015, OAL sent a Notice of Disapproval of the proposed adoption. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to comply with the clarity and consistency standards of Government Code section 11349.1, incorrect procedure, and missing and/or defective documents.

## **DISCUSSION**

The adoption of regulations by the Board must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any 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 APA coverage. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a 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 regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

### **1. CLARITY**

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The following provisions fail to comply with the clarity standard:

- a. The first sentence of subdivision (a) of section 1395.2 as amended by this rulemaking provides:

In reaching a decision on a disciplinary action under the administrative adjudication provisions of the Administrative Procedure Act (Government Code section 11400 et seq.), the Board of Psychology shall consider and apply the “Disciplinary Guidelines and

Uniform Standards Related to Substance Abusing Licensees (4/15)” which is hereby incorporated by reference.

The second sentence of subdivision (a) of section 1395.2 as amended by this rulemaking provides:

The Board shall also apply as required the Department of Consumer Affairs’ Substance Abuse Coordination Committee’s Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011), which is hereby incorporated by reference.

In that the Board’s incorporated document also includes uniform standards and differs in some elements from the Substance Abuse Coordination Committee’s document, a person directly affected would not easily understand which uniform standard is to be applied where the two vary.

- b. The third sentence of subdivision (a) of section 1395.2 as amended by this rulemaking provides:

The Disciplinary Guidelines apply to all disciplinary matters; the Uniform Standards describe the mandatory conditions that apply to a substance-abusing licensee, except that the Board may impose more restrictive conditions if necessary to protect the public.

A person directly affected by this rulemaking would not easily understand from the regulation if the “Uniform Standards” referred to in the above sentence are the uniform standards adopted by the Board, or the Substance Abuse Coordination Committee (Committee), or both. Also, a person directly affected by this regulation would not easily understand if this regulation is only intended to give the Board the ability to impose more restrictive conditions than the uniform standards adopted by the Committee by way of the uniform standards adopted in the first sentence of this subdivision, or if this provision is intended to give the Board the ability to impose even more restrictive standards without going through the rulemaking process. If the latter, this provision may be not be in compliance with section 11340.5 of the Government Code.

- c. The second sentence of the second paragraph of the “Drug Testing Standards” in the “Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees” provides:

If the Board finds or has suspicion that a licensee has committed a violation of the Board's testing program or who has committed a Major Violation, as identified in Uniform Standard 10.

In that the rest of the sentence has been omitted, a person directly affected by the regulation would not easily understand the consequences of such a violation.

- d. The "Penalty Guidelines for Disciplinary Actions" in the "Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees" provides penalty guidelines for violations of Business and Professions Code section 2960 and its subdivisions. The multiple cross-references to terms and conditions by their numbers for terms and conditions 7 through 14 for unprofessional conduct described for sections 2960, 2960(a), 2960(b), 2960(d), 2960(f), 2960(h), 2960(i), 2960(j) 2906(l), 2960(n), 2960(p) and 2960(r) are inaccurate as the numbering was been changed by this rulemaking action.
- e. The "Drug Testing Standards" in the "Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees" has the following entry:

(Reflected in Optional Term #13)

This applicable optional term was renumbered to 12 in this rulemaking action.

## **2. CONSISTENCY**

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "consistency" standard. (Gov. Code, sec. 11349.1(a)(4).) "Consistency" as defined by Government Code section 11349(d) means "...being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, and other provisions of law."

Business and Professions Code section 315 provides in pertinent part:

(a) For the purpose of determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees, there is established in the Department of Consumer Affairs the Substance Abuse Coordination Committee. The committee shall be comprised of the executive officers of the department's healing arts boards established pursuant to Division 2 (commencing with Section 500), the State Board of Chiropractic Examiners, the Osteopathic Medical Board of California, and a designee of the State Department of Health Care Services. The Director of Consumer Affairs shall chair the committee and may invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee.

(b) The committee shall be subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2 of the Government Code).

(c) By January 1, 2010, **the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees....** [Emphasis added.]

The Committee's "Uniform Standards Regarding Substance-Abusing Healing Arts Licensees" includes five exceptions to the testing frequency schedule on pages 8 and 9, entitled "Exceptions to Testing Frequency Schedule," and on page 16, the following provision when a licensee tests positive for a banned substance:

In determining whether the positive test is evidence of prohibited use, the board should, as applicable:

1. Consult the specimen collector and the laboratory;
2. Communicate with the licensee and/or any physician who is treating the licensee; and
3. Communicate with any treatment provider, including group facilitator/s.

This reviewer did not find the five exceptions to the testing frequency schedule on pp. 8 and 9, or the above-quoted language regarding positive test results on p. 16, from the Committee's "Uniform Standards Regarding Substance-Abusing Healing Arts Licensees" in the Board's "Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees." For this reason the Board's "Disciplinary Guidelines and

Uniform Standards Related to Substance Abusing Licensees” appears to be inconsistent with subdivision (c) of Business and Professions Code section 315 which requires each healing arts board to use the uniform standards adopted by the Committee.

**3. THE REGULATION TEXT SUBMITTED FOR REVIEW AND FILING WITH THE SECRETARY OF STATE CONTAINS A CHANGE THAT WAS NOT PROPERLY MADE AVAILABLE TO THE PUBLIC DURING THE PUBLIC COMMENT PERIODS**

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). Subdivision (c) of Government Code section 11346.8 provides:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public** for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. [Emphasis added.]

The second paragraph of the “Worksite Monitor Requirements [Uniform Standard #7]” on page 37 of the “Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees” as submitted to OAL for filing with the Secretary of State provides in part:

The worksite monitor shall not have a **current or former** financial, personal, or familial relationship with the licensee, or other relationship that could reasonably be expected to compromise the

ability of the monitor to render impartial and unbiased reports to the Board.... [Emphasis added.]

The words “current or former” were not present in the initial text made available to the public for 45 days. Although these three words were present in the subsequent 15 day availability period conducted by the Board, they were shown only in single underline and were not properly highlighted as subsequent changes being made available for the additional 15 day comment period. This change should be properly highlighted and made available to the public for comment for at least 15 days pursuant to Government Code section 11346.8 and section 44 of title 1 of the California Code of Regulations.

#### **4. MISSING AND/OR DEFECTIVE DOCUMENTS**

- a. “Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees” Text: Minor discrepancies from 2/07 version on pp. 18 and 31.
- b. Updated Informative Digest: missing clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the amended regulation (Gov. Code, sec. 11346.9(b)).
- c. The two documents incorporated by reference were not included with the rest of the regulation text attached to the seven copies of the STD Form 400.

Any changes made to the text of the regulation or to the documents incorporated by reference to address the concerns discussed above must be made available to the public for comment for at least 15 days pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

#### **CONCLUSION**

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

Date: November 10, 2015



---

CRAIG S. TARPENNING  
Assistant Chief Counsel

For: DEBRA M. CORNEZ  
Director

Original: Antonette Sorrick  
cc: Kelli Okuma