

**State of California
Office of Administrative Law**

**In re:
Board of Optometry**

Regulatory Action:

Title 16, California Code of Regulations

Adopt section: 1582

Amend section: 1516

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-1012-01S

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This regular rulemaking by the Board of Optometry (the "Board") proposes to both amend section 1516 and adopt section 1582 in title 16 of the California Code of Regulations. The Board is proposing to amend Section 1516 to give the Board the authority to require an applicant to be examined by one or more physicians and surgeons or psychologists designated by the Board if it appears that the applicant is unable to practice optometry safely due to a mental or physical illness. The Board proposes to adopt Section 1582 to define certain actions as unprofessional conduct.

On October 12, 2015, the Board submitted the above-referenced rulemaking action to the Office of Administrative Law ("OAL") for review. On November 24, 2015, OAL notified the Board of OAL's decision to disapprove the proposed rulemaking. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced rulemaking action because the proposed regulations fail to comply with the clarity and necessity standards of Government Code section 11349.1. Additionally, there is one miscellaneous issue with the proposed regulations. All of these issues must be resolved prior to OAL's approval of any regulations.

DISCUSSION

The Board's regulatory action must satisfy requirements established by the part of the Administrative Procedure Act (the "APA") that governs rulemaking by a state agency. (See Gov. Code, sec. 11340 et seq.) Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 both the procedural requirements of the APA and the standards for administrative regulations set forth in Government Code section 11349.1. (See Gov. Code, sec. 11340.1, subd. (a).) Generally, to satisfy the APA 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. (*Ibid.*) 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. Necessity

OAL reviews proposed regulations for necessity. (Gov. Code, sec. 11349.1, subd. (a)(1).) “Necessity” is defined in Government Code section 11349, subdivision (a), as follows:

“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.

This necessity must be provided in the initial statement of reasons (the “ISR”) for substantive changes proposed in the original regulation text. Specifically, the ISR must include “[a] statement of the specific purpose of each adoption, amendment, or repeal, . . . and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed.” (Gov. Code, sec. 11346.2, subd. (b)(1); see also Cal. Code Regs., tit. 1, sec. 10.)

Both instances of non-compliance with the necessity standard of the APA are explained below:

1.1. Requirement that Applicants Pay the Full Cost of the Examination

One of the requirements proposed through this rulemaking is that, when the Board determines that an examination “by one or more physicians and surgeons or psychologists” is required, the applicant must “pay the full cost of the examination.” (Cal. Code Regs., tit. 16, sec. 1516, subd. (a).) The Board did not provide any necessity in the ISR for the requirement that the applicant pay the full cost of an examination. The Board must resolve this issue through an addendum to the ISR and make this document available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1 before the Board adopts the regulations and resubmits this regulatory action to OAL for review. Any comments made regarding this addendum must be presented to the Board for consideration and be summarized and responded to in the final statement of reasons (the “FSR”). (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

1.2. Addition of “Reasonably” in the Modified Regulation Text

During the 15-day public availability and comment period, the Board made the following change (indicated in bold and double-underline) to the proposed Section 1516, subdivision (a):

In addition to any other requirements for licensure, whenever it **reasonably** appears that an applicant may be unable to practice optometry safely because his or her ability to practice may be impaired due to mental or physical illness affecting competency, the Board may require the applicant to be examined by one or more physicians and surgeons or psychologists designated by the Board.

The Board did not provide any necessity in the final statement of reasons (the “FSR”) for the addition of the word “reasonably” to Section 1516, subdivision (a). The Board must resolve this issue by adding necessity for this proposed regulatory change in the FSR when they update information contained in the ISR. (See Gov. Code, sec. 11346.9, subd. (a)(1).)

2. Clarity

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c) defines “clarity” to mean that regulations are “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.” The “clarity” standard is further defined in section 16 in title 1 of the CCR, OAL’s regulation on “clarity”, which provides the following:

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:

....

- (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation[.]

The sole instance of non-compliance with the clarity standard of the APA concerns one of the proposed changes to Section 1516, subdivision (a). The last sentence in subdivision (a) states, “If after receiving the report of the evaluation the Board determines that the applicant is unable to safely practice, the Board **may** deny the application.” (Cal. Code Regs., tit. 16, subd. (a) [emphasis added].) However, the ISR states, “If the examination determined that their fitness to practice was comprised [sic], then the individual **would be denied** a license.” (ISR, pg. 2 [emphasis added].) It is unclear whether denial of an application is automatic when an evaluation concludes that an applicant is unfit to practice. The proposed regulation text gives the Board discretion regarding whether or not to deny an application when the Board determines that

the applicant is unfit to practice, while the ISR states that, when this occurs, denial is automatic. Therefore, “the language of the regulation conflicts with the agency’s description of the effect of the regulation[.]” (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

Resolution of this issue depends on whether denial of an application is automatic when the Board determines that an applicant is unfit to practice. If it is, then the Board must revise the regulation text and make the modified text available for at least 15 days for public comment. (See Gov. Code, sec. 11346.8, subd. (c); see also Cal. Code Regs., tit. 1, sec. 44.) If denial of an application is not automatic, then the Board must address the inconsistency between the originally proposed text and the ISR in an addendum to the ISR. Any addendum to the ISR must be made available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1 before the Board adopts the regulations and resubmits this regulatory action to OAL for review. Any comments made in relation to this addendum and/or modified regulation text must be presented to the Board for consideration and be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

3. Miscellaneous

OAL also notes the following miscellaneous issue that must be addressed prior to any resubmission of this rulemaking action:

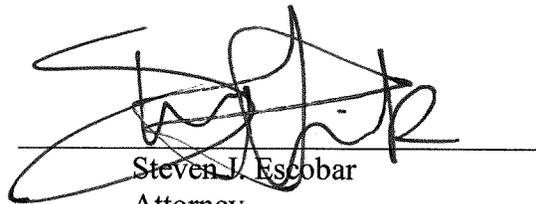
3.1. Authority

Business and Professions Code section 3023.1, which is an existing source of authority cited in Section 1516, was repealed by Statutes of 2004, chapter 426 (Assembly Bill 2464), section 19, and replaced by Business and Professions Code sections 3025.1 and 3025.2. The Board should revise the final regulation text accordingly.

CONCLUSION

OAL disapproved the above-referenced rulemaking action for the foregoing reasons. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit revised regulations and/or rulemaking documents within 120 days of their receipt of this Decision of Disapproval. If you have any questions, please contact me at (916) 324-6948.

Date: November 30, 2015



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