

**State of California
Office of Administrative Law**

In re:
**Speech-Language Pathology and
Audiology and Hearing Aid Dispensers
Board**

Regulatory Action:

Title 16, California Code of Regulations

**Adopt sections: 1399.140.1
Amend sections: 1399.140, 1399.141,
1399.142, 1399.143,
1399.144**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0211-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

The Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board) proposed this action to amend five sections and adopt one section in title 16 of the California Code of Regulations that set forth continuing education requirements for hearing aid dispenser licensees as a condition of license renewal, and eligibility and application requirements for continuing education courses offered by providers. The originally proposed text was approved by the Board on January 10, 2013, but was not put out for public comment until December 5, 2014. The originally proposed text was modified in a 15-day availability on September 21, 2015.

On February 11, 2016, the Board submitted the above-referenced rulemaking action to the Office of Administrative Law (OAL) for review. On March 17, 2016, OAL notified the Board that OAL disapproved the proposed regulations because the Board failed to follow procedures required by the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons:

1. The Board failed to follow required APA procedures by not considering and approving a substantial change made to the final version of the regulation text, and by not considering public comments received during the 45-day and 15-day comment periods, as required by Government Code section 11346.8(a); and
2. The Board failed to follow the following additional required APA procedures:

- a. the STD. 399 form originally submitted with the rulemaking was not signed by the Department of Finance (Finance) when Finance signature was required pursuant to State Administrative Manual section 6615; and the STD. 399 form that was in the rulemaking file had holes punched through many of the boxes, making unclear what the Board's responses were on the STD. 399 form;
- b. the regulation text attached to the STD. 400 form did not comply with the requirements of title 1, California Code of Regulations, section 8;
- c. the rulemaking file did not include all documents that the Board relied upon for this rulemaking action, as required by Government Code section 11347.3(b)(7);
- d. the summary and response to public comments in the final statement of reasons did not show that each issue raised by the commenters was considered, as required by Government Code section 11346.9(a)(3); and,
- e. the Board did not identify an incorporated by reference form by title and date of publication or issuance in the informative digest of the 45-day notice, as required by title 1, California Code of Regulations, section 20(c)(3); and, the Board did not include seven copies of the incorporated by reference form with the regulation text attached to the STD. 400 form, as required by Government Code section 11343 and title 1, California Code of Regulations, section 6(a).

All APA issues must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

The Board's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. 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 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 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. 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.

A. Failure to Follow APA Procedures – Board Approval of Final Regulation Text After Consideration of Public Comments.

The rulemaking file submitted to OAL for this action includes documentation that the members of the Board voted upon and approved the originally-noticed version of the regulation text at the Board's January 10, 2013, meeting. However, subsequent to the 45-day comment period, the

regulation text was modified, which included a change that was substantial in nature. The Board staff provided notice to the public of the modified regulation text during a 15-day notice period on September 21, 2015.

The rulemaking file submitted to OAL did not include documentation that the members of the Board voted upon and approved the final version of the regulation text with the substantial change. Since the Board is the governing body and the entity granted the rulemaking authority in this matter (Bus. & Prof. Code, sec. 2531.95), the rulemaking file must include documentation that the Board approved the final version of the regulation in all substantial respects. Government Code section 11347.3(b)(8) specifically requires that the rulemaking file include “[a] transcript, recording, or minutes of any public hearing connected with the adoption, amendment or repeal of the regulation.” The rulemaking file for this action needs to include the transcript, recording, or minutes of a public hearing or hearings where the Board approves the *final* version of the regulation text.

Additionally, since Government Code section 11346.8(a) provides “[t]he State agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation,” the Board must consider all public comments received during the 45-day and 15-day comment periods prior to approving the final text.

B. Failure to Follow Other APA Procedures.

1. STD. 399 Form. The STD. 399 form in this action required concurrence from Finance in that State Administrative Manual section 6615 requires Finance signature whenever the “Other” box is marked in section B.4. of the Fiscal Impact Statement portion of the form, as it was on the Board’s STD. 399 form. The STD. 399 form in the rulemaking file submitted to OAL did not have a signature from Finance. The Board provided a copy of the STD. 399 form with a Finance signature during OAL’s review of this action. On resubmission, the Board should make sure this version of the STD. 399 form is in the rulemaking file. Additionally, the copy of the STD. 399 form that was submitted with the rulemaking file had holes punched through many of the boxes, making unclear what the Board’s responses on the STD. 399 form were. On resubmission, the Board should take care not to punch holes through boxes on the STD. 399 form when placing it in the rulemaking file.

2. Final Regulation Text not in Compliance with Title 1, California Code of Regulations, Section 8. Title 1, California Code of Regulations, section 8 sets forth the requirements for the “final text” of regulations submitted to OAL for filing with the Secretary of State. Section 8(b) provides, “The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations....” The final regulation text attached to the STD. 400 form was the initial text approved by the Board in 2013. Since 2013, the Board submitted to OAL an action without regulatory effect, pursuant to title 1, California Code of Regulations, section 100, that made changes to the regulations in this action, such as changing “bureau” to “Board,” and changing cross-references and authority and reference citations, all of which resulted in changes to the subject regulations in the California Code of Regulations. Consequently, the regulation text attached to the STD. 400 form was not in conformity with existing California Code of

Regulations text. There were also errors in the underlining and strikeout, punctuation, and grammar of the text. OAL discussed all of these errors with the Board's staff so they would be corrected for the resubmission of this action.

3. Documents Relied Upon Omitted. The rulemaking file submitted to OAL did not include five documents that the Board relied upon for this rulemaking action. Government Code section 11347.3(b)(7) requires "All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, including any economic impact assessment or standardized regulatory impact analysis as required by Section 11346.3" be placed in the rulemaking file. The rulemaking file for this action included most of the documents that the Board indicated they were relying upon, except for the following:

a. In making fiscal and business impact statements in the 45-day notice, the Board stated it was relying on "The existing CE [continuing education] provider/course list and a record of denied courses." (Note there are two documents identified here.)

b. In the initial statement of reasons, the Board included the following as "Underlying Data," which should be included with other documents identified under this heading as "Materials Relied Upon" in the rulemaking file:

- i. May 19-20, 2011 Draft Audiology Practice Committee Meeting Minutes.
 - ii. June 12, 2013 Hearing Aid Dispensers Committee Meeting Minutes; and, June 13, 2013 Speech-Language Pathology & Audiology & Hearing Aid Dispensers Board Meeting Minutes.
- (Note there are three sets of minutes identified here.)

The five documents identified above need to be included in the rulemaking file with other documents already included and identified in the rulemaking file table of contents as "Materials Relied Upon."

4. Summary and Response to Comments. The summary and response to public comments in the final statement of reasons does not show that each issue raised by the commenters was considered, as required by Government Code section 11346.9(a)(3). The primary example of this is related to an e-mail comment submitted by Joanne Slater on January 16, 2015. In her comment, Ms. Slater states:

In the cost/benefit analysis of this proposed rule change, the Board failed to take into account a few financial aspects related to reducing the number of continuing education hours allowed through self-study. Self-study courses are usually available to the learner 24/7. By requiring 9 of 12 hours to be earned through live coursework, licensees are forced to attend events offered on a CE provider's schedule, potentially resulting in interruption of patient care. There may be a financial impact resulting from higher registration fees, lost time providing billable patient services, and/or travel expenses. Furthermore, if a licensee's funding is limited, they may be forced to attend courses that are available at

affordable prices or at times that have the least impact on their business, rather than to select courses on topics that may be more relevant to their learning needs.

The Board needs to supplement the summary and response to this comment and clearly respond to the issues raised. While the Board's summary and response to comments respond to most of the comments received, the summary and response are written very generally and are not responsive to the comments of Ms. Slater.

Moreover, there is no indication in the summary and response to comments as to which comment is being summarized and responded to. OAL suggests that the Board indicate which commenter is being summarized and responded to in the summary and response to comments to avoid this confusion.

Ms. Slater also included the following comment:

For example, a self-study course which is initially approved in September of any given year must be registered for \$50.00. To continue to offer the exact same course the following year, the Board charges a provider another \$50.00 because it interprets this as a "new course." However, it is not a new course - it is a continuation of an existing course. The verbiage in the rules needs to differentiate between new courses versus renewal of an identical self-study course, the latter of which does not require the same level of review from staff, and therefore does not incur the same expenses. Also, the course approved in September is offered for California credits for only 4 months (until December of that year), whereas a course approved in January may be offered for 12 months. This policy is unattractive to self-study providers, and may result in limited self-study offerings for California licensees, particularly new offerings toward the end of the calendar year. I suggest the Board consider a) annual approval based on the anniversary of the course, rather than the calendar year, or b) make other financial accommodations for approval of activities registered later in the calendar year, or c) adopt a new pricing structure that applies to providers of self-study coursework.

Similarly, the Board's summary and response to this comment need to clearly show that each issue raised by the commenter was considered and was either accommodated by modifying the proposed regulations in response to the comment, or rejected stating the reasons for rejecting the comment. (Gov. Code, sec. 11346.9(a)(3).)

5. Incorporated by Reference Form. Title 1, California Code of Regulations, section 20(c)(3) requires an agency that is incorporating by reference a document or form into the proposed regulation to identify the document or form by title and date of publication or issuance in the informative digest of the 45-day notice. The Board's proposed amendment to section 1399.141(a) adds a new application form, the "Continuing Education Course Approval Application form CEP 100 (Rev. 1/2015)." This form was not identified in the informative digest of the 45-day notice by title and date of publication or issuance, as required by title 1, California Code of Regulations, section 20(c)(3). To resolve this, the Board must identify the form by title

and date of publication or issuance in the updated informative digest prior to resubmission to OAL. (Gov. Code, sec. 11346.9(b).)

Additionally, the incorporated by reference form was not included with the final regulation text submitted for filing with the Secretary of State as required by Government Code section 11343. On resubmission of this action, the Board must include seven copies of the incorporated by reference form, along with seven copies of the final regulation text that is attached to the STD. 400 forms.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Board may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval.

The Board must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this Decision of Disapproval.

If you have any questions, please contact me at (916) 323-6809.

Date: March 24, 2016



Richard L. Smith
Senior Attorney

For: Debra M. Cornez
Director

Original: Paul Sanchez
Copy: Karen Robison