

**State of California  
Office of Administrative Law**

**In re:**  
**Board of Registered Nursing**

**Regulatory Action:**

**Title 16, California Code of Regulations**

**Adopt sections: 1423.1, 1423.2**

**Amend sections: 1418, 1424, 1426, 1430**

**Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2017-0724-02**

**OAL Matter Type: Regular (S)**

---

**SUMMARY OF REGULATORY ACTION**

This rulemaking action proposes to implement Senate Bill 466 (Chapter 489, Statutes of 2015) by expanding requirements for registered nursing education programs (hereafter “nursing programs”) to award students credit for military education and experience toward the education requirements for licensure as a Registered Nurse.

**DECISION**

The Office of Administrative Law (OAL) disapproved the proposed rulemaking action for failure to comply with the clarity and necessity standards of the Administrative Procedure Act (APA) and for failure to comply with certain procedural requirements of the APA, pursuant to Government Code sections 11349, 11349.1, and 11346.2.

**DISCUSSION**

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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, secs. 11340.5 and 11346.) OAL reviews regulatory actions 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 its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that required procedures are followed in order to provide a meaningful opportunity for public participation in the rulemaking process before regulations become effective.

## **A. 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(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 easily understood by those persons directly affected by them.” Moreover, it is presumed that a regulation does not comply with the clarity standard if any of the following conditions exist: the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; the language of the regulation conflicts with the agency’s description of the effect of the regulation; or the regulation uses language incorrectly. (Title 1, Cal. Code Regs., sec.16(a).) As a result of its review, OAL found that the following proposed provisions failed to meet the clarity standard.

### **(1) Section 1418.**

As proposed, section 1418 states:

An applicant who presents with relevant military education and experience, and who presents documentation from a board-approved registered prelicensure nursing program of equivalency credit evaluation that provides evidence of meeting the minimum standards for competency set forth in Section 1443.5 and the minimum education requirements of licensure listed pursuant to Sections 1426(c)(1) to (3), utilizing challenge examination or other evaluative methods, will be considered to meet the education requirements for licensure.

Section 1418 could be interpreted two ways. By stating “the minimum standards” and “the minimum education requirements” and “the education requirements for licensure,” the section could be interpreted as only applying to veterans who present their military education/experience to satisfy all of the competency standards and curriculum requirements for licensure. Or, it could be interpreted as also applying to veterans who present some military education and experience for evaluation to satisfy some of the education requirements for licensure and complete courses and clinical hours to satisfy the rest of the requirements.

### **(2) Section 1423.2(a).**

As proposed, section 1423.2(a) states:

Upon sufficient evidence of noncompliance and lack of demonstrated corrective actions to remove noncompliance, the board may take actions to: ...

The words “sufficient” and “noncompliance” are unclear. How much evidence of noncompliance is enough to cause the Board of Registered Nursing (hereafter “Board”) to act? There must be “sufficient” evidence, but it is unclear at what point any evidence becomes sufficient evidence to enable the Board to act. “Noncompliance” was found to be unclear because the word could be interpreted to mean noncompliance with subdivision (d) of section

1423.1, or with any provision in section 1423.1, or with any requirement enforced by the Board under chapter 3 of its regulations, or with any requirement in the Business and Professions Code, or with some combination of these.

**(3) Section 1423.2(d).**

As proposed, section 1423.2(d) states:

The board may immediately revoke approval in situations that require immediate action, including but not limited to the loss of school's accreditation or lack of effective nursing program leadership.

Section 1423.2(d) enables the Board to immediately revoke a nursing program's approval for lack of effective nursing program leadership. The proposed regulation fails to define what a lack of effective nursing program leadership is or what standards the Board will use to make that determination.

**(4) Section 1424(b)(3).**

As proposed, section 1424(b)(3) states:

The program shall have policies and procedures that demonstrate consistent granting of credit for military education and acquired knowledge by providing opportunity to obtain credit by the following methods, including but not limited to the listed methods:

- (a) the use of challenge examinations ; or
- (b) the use of evaluative methods to validate achievement of course objectives and competencies.

The word "consistent" was found to be unclear, because it could be interpreted to mean policies and procedures that result in consistent granting of credit by a particular nursing program, or it could be interpreted to mean consistent with other nursing programs across the state pursuant to Business and Professions Code section 2786.1(c).

**(5) Section 1424(b)(4).**

As proposed, section 1424(b)(4) states:

The program shall make available the policies and procedures, including the acceptance of military coursework and experience, on the school's website, in a manner that allows access to the information via the board's posted list of approved Registered Nursing Programs.

The latter portion of this subdivision was found to be unclear because it could mean that a person must be able to click on a nursing program's name on the Board's website's list of approved

nursing programs and be taken directly to that program's policies and procedures, including acceptance of military coursework and experience. Or it could mean that a person must be able to click on a nursing program's name on the Board's website's list of approved nursing programs and be taken directly to that nursing program's homepage, and that there must be an obvious tab on that homepage for the nursing program's policies and procedures, including acceptance of military coursework and experience.

OAL also notes that the regulations are unclear as to how a nursing program will know that its policies and practices regarding the acceptance of military education and experience are consistent in evaluation and application across schools statewide pursuant to Business and Professions Code section 2786.1(c). If the Board first reviews a nursing program's policies and practices at the end of the five-year period allowed under section 2786.1(c), and if the policies and practices are found to be significantly inconsistent with other nursing programs in the state regarding the acceptance of military education and experience, it is unclear whether such a finding could adversely affect licenses granted on the basis of the military education and experience inappropriately accepted.

**(6) Section 1426(d)(1).**

As proposed, section 1426(d)(1) states:

Theory and clinical practice requirements of the curriculum will be adjusted in recognition of military education and experiences of the student, when applicable, through an individualized instructional plan that results in meeting the same course objectives and competency standards.

The term "individualized instructional plan" was found to be unclear because the description of the effect of the regulation conflicts with the language of the regulation. In response to comments by the California State University system, the Board stated that the term "individualized instructional plan" refers to a student's demonstration that some required elements of the approved curriculum have already been met, and that the student will not be required to complete those elements. In other words, the term does not involve any requirement of individualized instruction by a nursing program. As stated above, clarity of regulations means that they will be easily understood by those persons directly affected by them. (Gov. Code, sec. 11349(c).) The Board's use of the term "individualized instructional plan" to describe a student's demonstration that no instruction is necessary conflicts with the understanding of that term by educators who are affected by these regulations. The Board's use of this term also does not align with Senate Bill 466, which concerns procedures for the granting of educational credit for military education and experience in lieu of instruction, individualized or otherwise.

**B. Necessity.**

The Necessity standard of the APA is primarily addressed in an agency's Initial Statement of Reasons (ISR). Government Code section 11346.2(b)(1) requires that the ISR contain, among other things, the rationale for the determination by the agency that each adoption, amendment, or repeal of a regulation is reasonably necessary to carry out the purpose and address the problem

for which it is proposed. Government Code section 11349.1(a) defines “necessity” for purposes of the APA as meaning that the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the law being implemented, interpreted, or made specific, taking into account the totality of the record. In this action, the Board’s ISR and its rulemaking record lacked the agency’s rationale for the determination that certain provisions were reasonably necessary to carry out the purpose and address the problem for which the provisions were proposed.

Both the Board’s Notice and its ISR describe the primary purpose of this action as implementation of Senate Bill 466 (Chapter 489, Statutes of 2015), which requires the Board to adopt regulations requiring each nursing program to have a process to evaluate and grant credit for military education and experience. The Notice and ISR describe Senate Bill 466 as including expanded requirements for nursing programs specific to awarding student applicants credit in the field of nursing for military education and experience. The Notice and ISR further state that Senate Bill 466 requires nursing programs to post information regarding credit for military education and experience on the internet. OAL notes, however, that Senate Bill 466 does not require nursing programs to post any information on the internet.

The following proposed provisions lacked explanations of their necessity to implement Senate Bill 466 as described above or of their relevance to that purpose.

**(1) Section 1423.1(a).**

As proposed, new section 1423.1(a) states:

The board shall deny approval and shall remove approval of a prelicensure nursing program that:

(a) Fails to provide evidence of granting credit, in the field of nursing, for previous education, ***including military education and experience***, through an established policy and procedure, to evaluate and grant credit.

(1) Each prelicensure program shall have a policy and procedure that describe the process to award credits for specific course(s), ***including the prior military education and experience***, through challenge examinations or other methods of evaluation for meeting academic credit and licensure requirements.

(2) Each program shall make information regarding evaluation of and granting credit in the field of nursing for previous education, ***including military education and experience***, for purpose of establishing equivalency or granting credit, available to applicants in published documents, such as college catalog or student handbook and online, so that it is available to the public and to the board.

(3) Each program shall maintain a record that shows applicants and results of transferred/challenged credits, ***including applicants who applied for transfer of military education and experience***. [Emphasis added.]

Senate Bill 466 only requires the Board to deny the application for approval made by, and to revoke the approval given to, any nursing program that does not give student applicants credit in the field of nursing for military education and experience and to adopt regulations which require each nursing program to have a process to evaluate and grant credit for military education and experience. Senate Bill 466 did not address education and experience other than that obtained in the military. It did not require each nursing program to have a policy and procedure that describe the process to award credits for specific courses other than prior military education and experience. It did not require that nursing programs ensure the availability of information regarding evaluation of and granting credit in the field of nursing for previous education other than military education and experience. It did not require that each nursing program maintain a record that shows applicants and results of transferred/challenged credits other than for those who applied for transfer of military education and experience.

By using the “including” clauses highlighted above, the Board has expanded the requirements for evidence, policies and procedures, information, and applicant records beyond the scope of military education and experience addressed by Senate Bill 466. Nursing programs would be required to comply with section 1423.1(a) with respect to all prior education and experience and all transferred/challenged credits which any applicant might submit for evaluation and the granting of credit toward licensure by the Board. The necessity for the expansion of the requirements of Senate Bill 466 beyond the context of military education and experience is not explained in the ISR or rulemaking record. In addition, the necessity for the requirement in subdivision (a)(3) that schools maintain records of applicants and results of transferred or challenged credits was not explained in the ISR or rulemaking record.

**(2) Section 1423.1(c).**

As proposed, new section 1423.1(c) states:

The board shall deny approval and shall remove approval of a prelicensure nursing program that:

(c) Discriminates against an applicant solely on the grounds that an applicant is seeking to fulfill the units of nursing required by Section 2736.6.

Section 2736.6, presumably of the Business and Professions Code, provides:

The board shall determine by regulation the additional preparation in nursing, in a school approved by the board, which is required for a vocational nurse, licensed under Chapter 6.5 (commencing with Section 2840) of this division, to be eligible to take the examination for licensure under this chapter as a registered nurse. The board shall not require more than 30 units in nursing and related science subjects to satisfy such preparation.

The necessity of including this anti-discrimination provision, that concerns students seeking to bridge from Licensed Vocational Nurse to Registered Nurse, was not explained in the ISR or

rulemaking record. Senate Bill 466 does not address Business and Professions Code section 2736.6 or discrimination against students who seek to apply nursing and related science subject units from a licensed vocational nurse program toward satisfying requirements for registered nurse licensure.

**(3) Section 1423.1(d).**

As proposed, new section 1423.1(d) states:

The board shall deny approval and shall remove approval of a prelicensure nursing program that:

(d) Fails to demonstrate continuous improvement to correct deficient findings, including but not limited to the following:

(1) Deferred Action to Continue Approval status lasting longer than two years;

(2) Inconsistent pattern of noncompliance findings between regularly scheduled continuing approval school visit cycle[;]

(3) Repeated findings of the same noncompliance from one approval evaluation visit to the next scheduled approval visit.

The findings of deficiency, which can result in the Board denying or removing a nursing program's approval, are not limited to deficiencies concerning a nursing program's failure to adopt and implement a process to award credit for an applicant's prior military education and experience could include any deficiencies discovered by the Board. The necessity of adopting a provision which is broader than the scope of the regulations required by Senate Bill 466 was not explained in the ISR or rulemaking record.

**(4) Section 1423.2(a).**

As proposed, new section 1423.2(a) states:

(a) Upon sufficient evidence of noncompliance and lack of demonstrated corrective actions to remove noncompliance, the board may take actions [sic] to:

(1) Deny approval of a nursing program; or

(2) Revoke approval from a nursing program; or

(3) Place a nursing program on a warning status with intent to revoke approval; or

(4) Revoke approval when a program has been on a warning status for one year and the program fails to show substantive corrective changes.

To the extent subdivision (a) refers to any noncompliance by a nursing program with any regulatory or statutory requirement enforced by the board, the necessity of adopting a provision which is broader than the scope of the regulations required by Senate Bill 466 was not explained in the ISR or rulemaking record. In addition, the necessity of adopting the four options for Board action listed in subdivision (a) was not explained in the ISR or rulemaking record.

**(5) Sections 1423.2(b)(c)&(d) and 1424(b)(4).**

As proposed, new sections 1423.2(b)(c) and (d) and 1424(b)(4) state:

(b) The board shall provide specific requirements for correction of noncompliance findings and a return date for review of the program's approval status.

(c) The board shall place a school on a warning status with intent to withdraw approval when a nursing program shows conditions pursuant to Section 1423.1(d).

(d) The board may immediately revoke approval in situations that require immediate action, including but not limited to the loss of school's accreditation or lack of effective nursing program leadership.

(4) The program shall make available the policies and procedures, including the acceptance of military coursework and experience, on the school's website, in a manner that allows access to the information via the board's posted list of approved Registered Nursing Programs.

Neither the ISR nor the rulemaking record explains the necessity for adoption of these subdivisions.

Prior to resubmission of this rulemaking action to OAL for review, the Board must prepare an addendum to the ISR which includes an explanation of why the provisions discussed above are necessary to carry out the purposes for which they were proposed and must make the document available for at least 15 days for public comment pursuant to Government Code section 11347.1.

**C. Administrative Procedure Act Procedural Requirements.**

The Board failed to comply with the APA procedural requirements discussed below.

**(1) Failure to comply with Government Code section 11346.5(a)(3)(A).**

The Board's notice failed to include a clear summary of the effect of the proposed action. The notice described the effect of the proposed action as implementation of Senate Bill 466, which is limited to processes to evaluate and grant credit for military education and experience. The proposed regulations are broader than Senate Bill 466 as discussed above in section B. In its 15-day notice of availability of the revised text and addendum to the Initial Statement of Reasons, the Board must provide a clear summary of any effects of the proposed regulations which exceed the scope of Senate Bill 466.



**(2) Failure to comply with Government Code section 11346.2(a)(2).**

The Board failed to specify Reference citations following sections 1423.1 and 1423.2. In addition, the Board should have listed Business and Professions Code section 2786.1 as a Reference citation for amended section 1430.

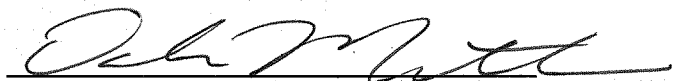
**(3) Failure to comply with Title 1 CCR Section 44(b).**

The Board failed to include in the rulemaking record a certification regarding the availability of modified text which confirmed the Board's compliance with Title 1 CCR Section 44, pursuant to Title 1 CCR Section 44(b).

**CONCLUSION**

For the foregoing reasons, OAL disapproved the proposed rulemaking action. Pursuant to Government Code section 11349.4(a), the Board may resubmit this action within 120 days of its receipt of this Decision of Disapproval. Prior to that, the Board shall mail a notice, as described in section C(1) above, together with all substantial regulatory text changes which are sufficiently related to the originally proposed text, and shall make available for at least 15 days an addendum to the Initial Statement of Reasons pursuant to Government Code sections 11347.1 and 11346.8 and Title 1 CCR section 44. OAL reserves the right to review the Board's resubmitted regulations and the rulemaking record for compliance with all substantive and procedural requirements of the APA. A copy of this Decision will be emailed to the Board on the date indicated below.

Date: September 12, 2017

  
Dale P. Mentink  
Senior Attorney

For: Debra M. Cornez  
Director

Original: Joseph Morris  
Copy: Ronnie Whitaker