

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
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AGENCY: DEPARTMENT OF DEVELOPMENTAL SERVICES)	DECISION REGARDING DISAPPROVAL OF A RULEMAKING ACTION
)	
RULEMAKING ACTION: Amend Section 54342 of Title 17 of the California Code of Regulations)	(Gov. Code Sec. 11349.3) OAL File No. 00-1121-03 S

SUMMARY OF RULEMAKING ACTION

This rulemaking action authorizes regional centers for the developmentally disabled to purchase for individual clients the design and/or implementation of behavior modification intervention services from unlicensed behavior analysts certified by the national Behavior Analyst Certification Board. Currently only the following licensed professionals are qualified vendors for this purpose: licensed psychologists, licensed clinical social workers, licensed marriage, licensed family and child counselors, and "any other licensed professional whose California licensure permits the design and /or implementation of behavior modification intervention services."

SUMMARY OF DECISION

On January 8, 2001, the Office of Administrative Law (OAL) disapproved the above-referenced rulemaking action, which was adopted by the Department of Developmental Services (Department). The reasons for the disapproval are summarized here and explained in detail below.

- A. The authorization to purchase behavior modification intervention services from an unlicensed behavior analysts certified by the national Behavior Analyst Certification Board conflicts with the prohibition on the unlicensed practice of psychology in Business and Professions Code Section 2903.**

- B. The rulemaking record is incomplete. It does not contain a copy of the petition from the California Association of Behavior Analysis which resulted in this rulemaking action, and does not contain a copy of the procedures and criteria used by the national Behavior Analyst Certification Board to recognize a Board Certified Behavior Analyst.**

DISCUSSION

The adoption of regulations by the Department of Developmental Services must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency (APA). 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 APA coverage.

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 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 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 executive branch check on the exercise of rulemaking powers by executive branch agencies and is 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.

A.

The authorization to purchase behavior modification intervention services from an unlicensed behavior analysts certified by the national Behavior Analyst Certification Board conflicts with the prohibition on the unlicensed practice of psychology in Business and Professions Code Section 2903.

A regulation must satisfy the Consistency standard. (Government Code Section 11349.1.) “‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Government Code Section 11349.)

In this rulemaking action the Department amends subsection (a)(11)(A) of Section 54342 of Title 17 of the California Code of Regulations as follows:

A regional center shall classify a vendor as a behavior management consultant if the vendor designs and/or implements behavior modification intervention services and meets one of the following requirements.

1. Possesses a valid license as a psychologist from the Medical Board of California or Psychology Examining Board;
2. Is a Licensed Clinical Social Worker pursuant to Business and Professions Code, Sections 4996 through 4998.7;

3. Is a Licensed Marriage, Family, and Child Counselor pursuant to Business and Professions Code, Sections 4980 through 4894.7; ~~or~~
4. Is any other licensed professional whose California licensure permits the design and/or implementation of behavior modification intervention services; ~~;~~
or
5. Is recognized by the national Behavior Analyst Certification Board as a Board Certified Behavior Analyst. [Underline indicates text added by this amendment.]

The Department has no specific statutory authorization to establish or recognize a certification program for behavior analysts.¹ Statutes cited by the Department as Authority and Reference for this rulemaking action concern the prescription of a uniform reporting system for services purchased by regional centers (Welfare and Institutions Code Section 4631), the purchase of services from authorized vendors to achieve the objectives of a consumer's individual program plan (Welfare and Institutions Code Section 4648), and the establishment of program standards for community-based day programs (Welfare and Institutions Code Section 4691). Behavior analysts are not specifically addressed in these provisions.

The authorization to purchase behavior modification intervention services from unlicensed behavior analysts seemingly ignores the provisions of California's Psychology Licensing Law, Business and Professions Code Section 2900, *et seq.* Business and Professions Code Section 2903 specifically prohibits any person from engaging in the practice of psychology without a license and defines the practice of psychology, in part, as rendering for a fee "*any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as . . . the methods and procedures of . . . behavior modification, . . .*" (Italic added.) In contrast, the amendment adopted by the Department authorizes the design and/or implementation of behavior modification intervention services by unlicensed individuals. Under specified conditions, other parts of the Psychology Licensing Law exempt from the unlicensed practice prohibition certain specified individuals, including the following: "qualified members of other recognized professional groups licensed to practice in the State of California" (notably, specifically including clinical social workers and marriage, family and child counselors), duly ordained members of the clergy, credentialed school psychologists, and salaried employees of accredited or approved academic institutions, public schools or governmental agencies. No exemption in the Psychology Licensing Law, however, appears to cover Behavior Analysts recognized by the national Behavior Analyst Certification Board. Consequently the Department's authorization to purchase behavior modification

¹ The record indicates that the use of certified behavioral analysts to design and implement behavioral programs for persons who are developmentally disabled originated in the State of Florida. We note that the certification program in Florida is specifically authorized by statute. In this regard Chapter 393.17 of Title XXIX of the 2000 Florida Statutes provides: "The department shall by rule implement a certification program to ensure that qualified persons oversee the design and implementation of behavioral programs for persons who are developmentally disabled. Certification and recertification minimum standards must comply with departmental rules and must include, for initial certification, examination of competencies in applying behavior analysis with persons who are developmentally disabled within established competency clusters. These competency clusters shall include, but not be limited to, behavioral assessments, observation and recording, behavioral program development and monitoring, and other areas as determined by professional practitioners of behavior analysis. Fees shall be charged for certification not to exceed the cost of development and administration of the examination and periodic renewal of certification. The department shall establish by rule the procedures for certification and certification renewal.

intervention services from an unlicensed behavior analysts certified by the national Behavior Analyst Certification Board conflicts with the prohibition of unlicensed practice of psychology in Business and Professions Code Section 2903. The amendment to regulation section 54342 thus fails to satisfy the Consistency standard of Government Code Section 11349.1(a).

B.

The rulemaking record is incomplete. It does not contain a copy of (1) the petition from the California Association of Behavior Analysis which resulted in this rulemaking action, and (2) the procedures and criteria used by the national Behavior Analyst Certification Board to recognize a Board Certified Behavior Analyst.

(1) Government Code Section 11347.3(b)(1) provides that the rulemaking file shall include:

Copies of any petitions received from interested persons proposing the adoption amendment, or repeal of the regulation, and a copy of any decision provided for by subdivision (d) of Section 11340.7, which grants a petition in whole or in part.

The rulemaking record indicates that this rulemaking action resulted from a petition for rulemaking submitted by the California Association of Behavior Analysts. No petition, however, is included in the rulemaking record. Consequently the requirements of Government Code Section 11347.3(b)(1) have not been satisfied.

(2) Government Code Section 11347.3(b)(7) provides that the rulemaking file shall include:

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,”

The Department’s rationale for authorizing regional centers to purchase behavior modification services from behavior analysts certified by the national Behavior Analyst Certification Board is that those individuals have the education, training, and experience necessary to make them competent to provide those services. This rationale obviously relies on the criteria established by the national Behavior Analyst Certification Board for issuance of its certification. Notwithstanding this fact, the Department has not identified the national Behavior Analyst Certification Board’s criteria for certification as information relied upon (the initial statement of reasons does not identify *any* information relied upon in proposing this amendment), and the Department has not included information about the Board’s criteria in the rulemaking record. Such information is essential to support the proposition that behavior analysts certified by the national Behavior Analyst Certification Board are competent to provide behavior modification services. Because the Department has not included this information in the rulemaking record, the requirements of Government Code Section 11347.3(b)(7) have not been satisfied.

Note: Should the Department add to the rulemaking record any material relied upon which was not identified in the initial statement of reasons as material relied upon, the new material must be made available for public comment as specified in Government Code Section 11347.1.

FOR THESE REASONS OAL disapproved the adoption of subsection (a)(11)(A) of Section 54342 of Title 17 of the California Code of Regulations.

Date: January 16, 2001

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