

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
BOARD OF PHYSICAL THERAPY)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
)	
REGULATORY ACTION:)	Government Code section 11349.3
)	
Title 16, California Code of Regulations)	OAL File No. 01-0910-02 S
)	
Adopt section 1398.26.5)	
)	
Amend section 1398.26)	
_____)	

SUMMARY OF REGULATORY ACTION

Subdivision (a) of Business and Professions Code section 2653 provides that an applicant for a license as a physical therapist who was issued a diploma by a physical therapist education program that is not an approved program and is not located in the United States must meet certain specified requirements. Among those requirements, subdivision (a)(3) mandates the completion of a period of up to nine months of clinical service under the direct and immediate supervision of a physical therapist licensed by the board. The Board is authorized to waive all or part of the required clinical service pursuant to guidelines set forth in its regulations. This regulatory action specifies the minimum number of months (and the number of hours constituting a month) of required clinical service, the application forms for (1) clinical sites that desire approval to provide the required clinical experience and (2) applicants wishing to demonstrate their clinical experience, and provides for waiver of the clinical service requirements. On October 17, 2001, the Office of Administrative Law (OAL) disapproved this regulatory action for failure to comply with the requirements for incorporation by reference, because documents were omitted from the rulemaking record, and for failure to comply with the authority, clarity, consistency, necessity and reference standards of the Administrative Procedure Act.

DISCUSSION

Regulations adopted by the Physical Therapy Board of California (“Board”) concerning clinical service requirements for foreign educated physical therapists must be adopted

pursuant to the Administrative Procedure Act (“APA”). Any regulatory act adopted by a state agency through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless the act is expressly exempted or excluded by statute from APA coverage. (Gov. Code section 11346.) No exemption or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action may become effective, it is subject to a review by the OAL for compliance with procedural requirements of the APA and for compliance with certain substantive standards. (Gov. Code section 11349.1(a).)

1. CLARITY

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

a. Section 2653 of the Business and Professions Code provides that:

“(a) An applicant for a license as a physical therapist who was issued a diploma by a physical therapist education program that is not an approved program and is not located in the United States shall meet all of the following requirements in order to be licensed as a physical therapist:

(1) Furnish documentary evidence satisfactory to the board, that he or she has completed the equivalent professional degree to that issued by a United States accredited physical therapist education program in a physical therapist education program that entitles the applicant to practice as a physical therapist in the country where the diploma was issued. . . .

(2) Pass the written examination required by Section 2636. . . .

(3) **Complete a period of clinical service under the direct and immediate supervision of a physical therapist licensed by the board which does not exceed nine months in a location approved by the board, in a manner satisfactory to the board.** The applicant shall have passed the written examination required in subdivision (b) prior to commencing the period of clinical service. The board shall require the supervising physical therapist to evaluate the applicant and report his or her findings to the board. **The board may in its discretion waive all or part of the required clinical service pursuant to guidelines set forth in its regulations. . . .**” (Emphasis added.)

Subsection (c) of section 1398.26.5 of title 16 as adopted by the Board in this rulemaking provides:

“(c) Except for those applicants who have been licensed in another state the minimum period of clinical service shall be six months. The following shall be considered satisfactory completion of part of the period of clinical service and shall be the basis of waiving all or part of the period of clinical service:

- 1) Licensure in another state. If applicant is practicing in another state, one month of clinical service shall be waived for each month of clinical practice up to the required total of nine months.
- 2) Course in Law and Ethics. **Three months of clinical service shall be waived for satisfactory completion of a course in California Law and Ethics approved by the Board.** Satisfactory completion requires a grade of “C” or better. . . .” (Emphasis added.)

An applicant who has not been licensed in another state would understand from the text of subsection (c) of section 1398.26.5 that he/she need only complete at a minimum 6 months of clinical service, of which 3 months can be waived for satisfactory completion of a course in California law and ethics approved by the Board. However, Board staff confirms that the intent of subsection (c) is that an applicant who has not been licensed in another state must complete at a minimum 9 months of clinical service of which 3 months can be waived for completion of the course. A regulation is presumed not to comply with the “clarity” standard if the language of the regulation conflicts with the agency’s description of the effect of the regulation. (Cal. Code Regs., tit. 1, section 16(a)(2).)

In addition, subsection (c)(2) is silent as to the process involved in getting a course in “California Law and Ethics” approved by the Board. If there are any standards that the Board will apply in determining whether such a course should be approved, these also need to be added to the regulation. An applicant would not understand from subsection (c)(2) how to get a course in California law and ethics approved by the Board, nor what standards such a course must meet. In addition, if the provider of the course must apply to the Board for approval, the requirements of the Permit Reform Act may apply.

Similarly, if there are any standards or requirements the Board will apply in evaluating clinical practice in another state prior to applying the waiver provision in subsection (c)(1), these also must be specified.

Please also note that the first sentence in the introductory paragraph to section 1398.26.5 provides:

“Section 2653 requires satisfactory completion of a period of clinical service not to exceed nine months at a clinical site approved by the Board.”

A person unfamiliar with the statutes regulating physical therapy would not understand from this introduction that the section referred to is contained in the Business and Professions Code and that section 2653 of the Business and Professions Code applies only to applicants who were issued a diploma by a physical therapist education program that is not approved or located in the United States.

b. Subsection (b) of section 1398.26.5 of title 16 as adopted by the Board in this rulemaking provides:

“(b) Clinical sites that desire to be approved by the Board shall submit the American Physical Therapy Association Clinical Site Information Form (CSIF) to the Board. A site shall be considered approved if it demonstrates **adequate** staffing, clinical experiences, and clinical instruction to provide **appropriate** clinical experience for the foreign trained physical therapist license applicant.” (Emphasis added.)

An applicant would not understand from the text of subsection (b) of section 1398.26.5 what amount of staffing, clinical experiences, and clinical instruction is “adequate” to provide “appropriate” clinical experience. In this regard it should be noted that existing section 1398.38 of title 16 of the California Code of Regulations provides some criteria for approval of physical therapy facilities which supervise the clinical service of foreign educated applicants. An applicant would not understand from the text of section 1398.26.5 that the standards in section 1398.38 even exist.

It should also be noted that in order to adequately identify a form it must be identified by both title and revision date. See discussion of this issue under “incorporation by reference.”

In addition, there is no time frame specified in subsection (b) within which the application for approval by a clinical site would be acted on pursuant to the Permit Reform Act. See discussion under “consistency.”

Also, the language “shall be considered approved” seems to create a presumption which applies in lieu of actual approval by the Board. It is unclear how this presumption would arise since it requires an initial demonstration. Board staff has indicated no such presumption was intended.

2. INCORPORATION BY REFERENCE

Subsection (b) of section 1398.26.5 as adopted by the Board in this rulemaking provides in part:

“Clinical sites that desire to be approved by the Board shall submit the American Physical Therapy Association Clinical Site Information Form (CSIF) to the Board. . . .”

OAL has adopted section 20 of Title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (c) of section 20 provides the requirements for a state agency that wishes to incorporate another document as part of a regulation by reference to that document. With respect to the text of the regulation itself, it must refer to the incorporated document by “. . . title and date of publication or issuance.” (Cal. Code Regs., tit. 1, se. 20(c)(4).) This helps insure that significant changes are not made to requirements contained in the form without further compliance with the APA. Subsection (b) of section 1398.26.5 does not specify a revision date as required by subsection (c)(4) of section 20. In addition, material proposed for incorporation by reference must be reviewed by OAL in accordance with procedures and standards for a regulation printed in the California Code of Regulations. (Cal. Code Regs., tit. 1, section 20(b).) The rulemaking file submitted by the Board failed to include copies of the form for review by OAL and filing with the Secretary of State.

It should also be noted that although subsection (d) of section 1398.26.5 incorporates another form by title and revision date (“Board of Clinical Performance Instrument (as adopted by the American Physical Therapy Association, December 1997)”), the rulemaking file is also devoid of copies of this form for review by OAL and filing with the Secretary of State.

3. CONSISTENCY

OAL is also required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “consistency” standard. “‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code sec. 11349(d).)

As previously discussed, subsection (b) of section 1398.26.5 as adopted by the Board in this rulemaking provides:

“Clinical sites that desire to be approved by the Board shall submit the American Physical Therapy Association Clinical Site Information Form (CSIF) to the Board. . . .”

Subsection (b) of section 1398.26.5 does not go on to describe the process of approval.

Subsection (a) of section 15378 of the Government Code defines a “permit” to mean “. . . any license, certificate, registration, permit, **or any other form of authorization required by a state agency to engage in a particular activity or act.**” (Emphasis added.)

The Permit Reform Act provides in section 15376 of the Government Code:

- “All state agencies which issue permits shall adopt regulations regarding their procedures for considering and issuing permits, specifying the following criteria:
- (a) A period dating from the receipt of a permit application within which the agency must either inform the applicant, in writing, that the application is complete and accepted for filing, or that the application is deficient and what specific information is required.
 - (b) A period dating from the filing of a completed application within which the agency must reach a permit decision.
 - (c) The agency’s median, minimum, and maximum time for processing a permit, from the receipt of the initial application to the final permit decision, based on the agency’s actual performance during the two years immediately preceding the proposal of the regulation”

The regulations adopted by the Board in this rulemaking did not provide the time limits required by Government Code section 15376 for the approval of clinical sites by the Board under section 1398.26.5.

4. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . 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.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of Title 1 of the California Code of Regulations (CCR) provides:

“In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

“(1) a statement of the specific purpose of each adoption, amendment, or repeal; and

“(2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, fact, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.”

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed (Gov. Code sec. 11346.2(b)(1)) or, simply restated, “why” a regulation is needed and “how” this proposed regulation fills that need. The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code secs. 11346.2(b) and 11346.5(a)(16) and (b).) It is only in this way that the public can be fully informed about the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code sec. 11347.3(b)(2) and (7).)

The discussion in the initial statement of reasons submitted with this rulemaking failed to provide information explaining why each of the particular provisions in 1398.26.5 were necessary to carry out the propose of the statute: i.e., why the minimum number hours constituting one month was set at 150 hours in subsection (a); the reasons for each of the standards for approval of clinical sites in subsection (b); why the clinical service requirement is waived for licensed out of state practice and why 3 month credit towards clinical service is given for completion of an approved California law and ethics course in subsection (c); and why the supervisor’s evaluation will be considered in subsection (d). “Necessity” must also be provided for any provisions contained in the application forms incorporated by subsections (b) and (d) that are not set forth in the regulation text itself.

5. AUTHORITY AND REFERENCE CITATIONS

Government Code section 11349.1 requires that OAL review all regulations for “authority” and “reference.” “Authority” is defined as “. . . the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. (Gov. Code, sec. 11349(b).) “Reference” is defined as “. . . the statute, court decision, or other provision of law which the agency implements, interprets or makes specific by adopting, amending, or repealing a regulation.” (Gov. Code, sec. 11349(e).)

Section 11346.2 of the Government Code provides in subsection (a)(2) that the regulation text proposed for the notice of proposed action “. . . shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.” Regulation text submitted to OAL for review and filing with the Secretary of State must include the same notation.

“Citations of ‘authority’ and ‘reference’ for each regulatory section which has been adopted or amended and submitted to OAL for filing with the Secretary of State shall appear at the end of each section. Court decisions relied upon by the agency as support for the citations may also be cited at the end of each relevant section.” (Cal. Code Regs., tit. 1, section 14(d).)

The text of section 1398.26.5 as adopted by the Board and submitted to OAL for review and filing with the Secretary of State did not include “authority” or “reference” citations.

Lastly, section 11347.3 of the Government Code in subsection (b)(12) requires that the rulemaking file contain:

“An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, **specifying the date upon which the record was closed** and that the file or the copy, if submitted, is complete.” (Emphasis added.)

The certification of completion and closure contained in this rulemaking file states that the record was closed on July 20, 2001. However, one of the documents contained in the rulemaking record (the STD. 399), bears a date of August 28, 2001 for one of the signatures.

DATE: October 18, 2001

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