

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
AGENCY: SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY BOARD)	DECISION OF PARTIAL DISAPPROVAL OF REGULATORY ACTION
)	
)	(Gov. Code, sec. 11349.3)
)	
REGULATORY ACTION:)	OAL File No. 06-0519-07 S
Title 16)	
California Code of Regulations)	
Amend sections 1399.152 and 1399.156.4)	
)	
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)	

SUMMARY OF REGULATORY ACTION

The Speech-Language Pathology and Audiology Board (“Board”) amended regulations governing the accreditation and approval of institutions and programs attended by prospective licensees and the advertising regulation controlling the licensees in this regulatory action.

On July 3, 2006, the Office of Administrative Law (“OAL”) notified the Board of the approval of the amendment to Title 16 of the California Code of Regulations (“CCR”) section 1399.152 and disapproval of the amendment to Title 16 CCR section 1399.156.4, pertaining to advertising. OAL disapproved section 1399.156.4 for the following reasons: (1) failure to comply with the “Consistency” standard of Government Code section 11349.1, (2) failure to comply with the “Necessity” standard of Government Code section 11349.1, and (3) failure to comply with the “Clarity” standard of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the Speech-Language Pathology and Audiology Board must be adopted pursuant to the California Administrative Procedure Act (“APA”). See Business and Professions Code section 2531.95. Any regulatory act a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless a statute expressly exempts or excludes the act from the requirements of the APA. (Gov. Code section 11346.) No exemption or exclusion applies to the regulatory action under review. Thus, before it may become effective, OAL must review this regulatory action for compliance with both the procedural requirements of the APA and certain substantive standards. (Gov. Code, sec. 11349.1.)

Please note that there were numerous provisions of the proposed regulation that failed to meet the consistency, necessity, and clarity standards. Examples of some of the issues are contained in this disapproval. These examples and all of the problems with the regulation must be resolved before the regulation can be approved by OAL. All of the issues have been discussed with Board staff. OAL reserves the right to conduct a complete APA review when the regulation is resubmitted.

As amended, Title 16 CCR section 1399.156.4 states (new language is underlined):

(a) A licensed speech-language pathologist or audiologist may advertise the provision of any services authorized by the Act so long as such advertising does not promote the excessive or unnecessary use of such services.

(b) A licensed speech-language pathologist or audiologist may advertise any academic degree that has been earned and awarded provided that the advertisement of that degree is not false, deceptive, misleading or in the exercise of reasonable care should be known to be false, deceptive or misleading.

(c) Advertising degrees from any of the following categories of institutions shall be considered by the Board to be false, deceptive or misleading.

(1) An institutions that was not legally authorized or approved to award the degree by the appropriate state regulatory or licensing agency at the time the degree was awarded or at any time during which the licensee was in attendance. For the purpose of this paragraph, the Board reserves the right to disallow the authorization or approval of the institution if it determines that the state agency has not or cannot exercise appropriate regulatory oversight over the institution in question.

(2) An institution whose accreditation or state approval was revoked within (1) year after the degree was awarded.

(3) An institution which has been determined by a judicial or administrative tribunal to have operated illegally in violation of state or federal law at the time the degree was awarded or at any time during which the licensee was in attendance.

(4) Any institution which makes false, deceptive or misleading advertisements or claims with respect to the rigor, integrity or quality of the degrees it awards.

(d) If these degrees are generic, such as Ph.D., Ed.D., M.S., M.A., or M.Ed., the holder may represent them, but shall specify the discipline in which each particular degree was earned.

A. Consistency

OAL must review regulations for compliance with the “Consistency” standard of the APA, in accordance with Government Code section 11349.1. Government Code section 11349, subdivision (d), defines “Consistency” as “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

The amended section 1399.156.4 prohibits the advertising of certain degrees obtained from certain classifications of schools which the Board deems to be inherently false and misleading, for purposes of Business and Professions Code section 17500¹. However, the outright ban on advertising any degree from the various classifications of schools is inconsistent with California Business and Professions Code section 17500.1, which states:

“Notwithstanding any other provision of law, no trade or professional association, or state agency, state board, or state commission within the Department of Consumer Affairs shall enact any rule, regulation, or code of professional ethics which shall restrict or prohibit advertising by any commercial or professional person, firm, partnership or corporation which does not violate the provisions of section 17500 of the Business and Professions Code, or which is not prohibited by other provisions of law.”

Additionally, Business and Professions Code section 651, which generally governs communications containing false, fraudulent, misleading or deceptive statements, specifically

¹ Business and Professions Code section 17500 states:

“It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both that imprisonment and fine.”

allows a licensee of “Healing Arts” agencies to advertise the licensee’s professional achievements:

“(h) Advertising by any person so licensed may include the following:

...

- (7) A statement of names of schools and postgraduate clinical training programs from which the practitioner has graduated, together with the degrees received.”

As drafted, Section 1399.156.4 (c) restricts the advertising of any audiological or speech pathology degree if the degree fails to meet the narrow requirements set forth by the Board by stating:

“(c) Advertising degrees from any of the following categories of institutions shall be considered by the board to be false, deceptive or misleading.

- (1) An institution that was not legally authorized or approved to award the degree by the appropriate state regulatory or licensing agency at the time the degree was awarded or at any time during which the licensee was in attendance. For the purpose of this paragraph, the Board reserves the right to disallow the authorization or approval of the institution if it determines that the state agency has not or cannot exercise appropriate regulatory oversight over the institution in question.”

However, under the Business and Professions Code sections cited above, the licensee is allowed to advertise such degrees. As such, section 1399.156.4 is inconsistent with Business and Professions Code section 17500.1 and section 651 which specifically allow the advertising of such degrees.

B. Necessity.

OAL’s review also requires evaluation of compliance with the Necessity standard stated in Government Code section 11349 (a):

“‘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.”

Title 1, CCR, section 10 (b) provides instruction regarding what must be included in the rulemaking record to meet the Necessity standard:

“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, facts, 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.”

The necessity stated in the file consists of the following passage from the Initial Statement of Reasons:

“Sections 651 and 17500 of the [Business and Professions] Code, set forth that false, deceptive, or misleading advertisements as disseminated by a licensed professional is [*sic*] unlawful and grounds for discipline. However, Section 17500.1 prohibits state agencies from restricting the advertising of any professional person or firm that does not violate other advertising provisions of the Code. The amendments to existing regulations are an effort on the part of the Board to balance these statutory provisions and thereby ensure that licensees are provided with the freedom to advertise their academic achievements in a manner that does not mislead or deceive the public.”

While this statement provides an overview of the applicable law, it does not explain why the Board wants to restrict the advertising of speech pathology or audiology degrees from certain classes of institutions. Upon resubmittal, the Board must explain why each regulatory provision contained in the final text adopted by the Board is required to carry out the purpose of the amendment to section 1399.156.4.

C. Clarity

OAL also reviews regulations for clarity, as defined in Government Code section 11349, subdivision (c):

“‘Clarity’ means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

Title 1, section 16 of the CCR provides further guidance on the meaning of “clarity”, stating:

“(a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or

...

(3) the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute;...”

Section 1399.156.4 deems the advertising of any degree within the categories listed in subdivision (c) (1) – (4) as “false, deceptive or misleading.” In the above example of subdivision (c) (1), a licensee wishing to advertise a degree conferred would be at a loss to determine whether “the appropriate state regulatory or licensing agency” could exercise appropriate regulatory oversight over the degree granting institution.

Additionally, proposed section 1399.156.4 (c) (4) mandates that degrees from the following category of institutions also be classified as “false and misleading”:

“Any institution which makes false, deceptive or misleading advertisements or claims with respect to the rigor, integrity or quality of the degrees it awards.”

It is unclear how a licensee would be able to determine if the institution makes such claims in its advertising. Assuming that a licensee could make such a determination, the licensee may not have seen all of the advertising for the specific degree program. Finally, the licensee is not in a position to judge the rigor, integrity or quality of the degree awarded, nor can the licensee predict how the Board will evaluate the institution’s advertisements.

CONCLUSION

For the reasons described above, the OAL disapproved section 1399.156.4 because it did not comply with the consistency, necessity and clarity standards contained in Government Code section 11349.1.

July 3, 2006

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