

**State of California  
Office of Administrative Law**

In re:

**Bureau of Barbering and  
Cosmetology of the Department of  
Consumer Affairs; and Board of  
Barbering and Cosmetology**

**Regulatory Action: Title 16  
California Code of Regulations**

**Amend section:           950.2**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2008-0912-01 S**

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**DECISION SUMMARY**

On September 12, 2008, the Board submitted to the Office of Administrative Law ("OAL") a proposed amendment to Section 950.2 of Article 7 of Division 9 of Title 16 of the California Code of Regulations ("CCR") regarding cosmetology course curriculum. On October 7, 2008, OAL notified the Board staff that OAL disapproved the proposed amended regulation for failure to comply with specified standards and procedures of the California Administrative Procedures Act ("APA"). The reasons for the disapproval are summarized below:

A. the proposed regulation fails to comply with the consistency standard of Government Code sections 11349.1(a)(4) and 11349(d)<sup>1</sup>;

B. the proposed regulation fails to comply with the clarity standard of sections 11349.1(a)(3) and 11349(c);

C. the proposed regulation fails to comply with the necessity standard of sections 11349.1(a)(1) and 11349(a); and

D. the agency failed to comply with the APA procedures by not responding adequately to certain public comments pursuant to section 11346.9(a)(3).

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<sup>1</sup> Unless stated otherwise, all California Code references are to the Government Code.

This Decision of Disapproval contains examples of some of the identified issues, but is not exhaustive. OAL reserves the right to conduct a further APA review for compliance with the procedural and substantive requirements of Chapter 3.5 (commencing with section 11340, Part 1, Division 3, Title 2, of the Government Code) upon the resubmission of the proposed rulemaking. All APA issues must be resolved prior to OAL approval of any resubmission.

## **PRELIMINARY DISCUSSION REGARDING THE BUREAU AND THE BOARD**

Business and Professions Code section 7303 establishes the Board of Barbering and Cosmetology within the Department of Consumer Affairs and vests administration of the Barbering and Cosmetology Act (hereafter "the Act") with that Board. Section 7303, as it read on June 30, 2008, by its terms became inoperative on July 1, 2008. Business and Professions Code section 101.1(b) generally provides that when a Board within the Department of Consumer Affairs becomes inoperative or is repealed, the Department of Consumer Affairs shall succeed to and is vested with all the duties, powers, purposes, responsibilities and jurisdiction, not otherwise repealed or made inoperative, of that Board and its executive officer. Consequently, effective July 1, 2008, the Bureau of Barbering and Cosmetology within the Department of Consumer Affairs generally assumed responsibility for the duties, powers, purposes, responsibilities and jurisdiction of the Board and will continue to do so until January 1, 2009, at which time administration of the Act is once again vested in the Board. See AB 1545, Chapter 35 of 2008, at Business and Professions Code section 7303.

Most of the activities of this disapproved rulemaking took place during the administration of the Act by the Board, and the statutes within the Act continue to refer to the "Board" rather than to the "Bureau." Therefore, references herein to the responsible agency or its staff will be to the "Board" or "Board staff." This Decision of Disapproval is, however, issued to both the Board of Barbering and Cosmetology and to the Bureau of Barbering and Cosmetology within the Department of Consumer Affairs.

## **BACKGROUND**

In 1990, the Legislature passed and the Governor signed AB 3008, which added section 7362 to the Business and Professions Code and required that: "The board shall determine by regulation the required subjects of instruction to be completed in all approved courses, including the minimum hours of technical instruction and minimum number of practical operations for each subject...." In part under the authority of, and in order to implement, section 7362, the Board promulgated section 950.2 of title 16 of the CCR operative November 17, 1994. Section 950.2 currently provides, among other things, a listing of the subjects to be taught in the required cosmetology curriculum along with the required minimum hours of technical instruction in each subject and the required minimum number of practical operations a student must perform related to each applicable subject. The rulemaking disapproved in this decision removes, among other things, the specific minimum hours of technical instruction and minimum number of practical operations for curriculum subjects.

## 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 APA review. Sections 11340.5 and 11346. OAL reviews regulatory changes for compliance with the standards for administrative regulations in 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 rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

As indicated above, this Decision of Disapproval contains examples of identified issues in the proposed rulemaking submitted by the Board but is not exhaustive. The issues have been identified for and discussed with Board staff. All APA issues must be resolved before the regulation can be approved by OAL. Because the regulations require redrafting and further noticing, OAL reserves the right to conduct a complete review for compliance with both procedural and substantive requirements of the APA.

### A. CONSISTENCY.

OAL must review regulations for compliance with the consistency standard of the APA, in accordance with section 11349.1. Section 11349.1(d) defines "consistency" as meaning "...being in harmony with, and not in conflict with or contrary to, existing statutes, court decisions, or other provisions of law." As currently written, proposed section 950.2 is inconsistent with Business and Professions Code section 7362(b).

Business and Professions Code section 7362(b) states:

The board shall determine by regulation the required subjects of instruction to be completed in all approved courses, including the minimum hours of technical instruction and minimum number of practical operations for each subject, and shall determine how much training is required before a student may begin performing services on paying patrons.

The Board's interpretation of this statute is evident from its Informative Digest. The Board paraphrases Business and Professions Code Section 7362 as authorizing the Board "to determine the required subjects of instruction to be completed by students including the minimum number of hours of practical and technical instruction." The Board interprets practical [operations] and technical instruction as a single thing,

whereas the statute clearly distinguishes the two and requires that the Board determine minimum hours and minimum numbers of each.

The current regulation lists subjects such as, for example, wet hair styling, thermal styling, press and curl, permanent waving, chemical straightening, hair coloring, bleaching, etc., and identifies minimum hours of technical instruction and minimum numbers of practical operations for each.

The proposed regulation groups these "subjects" into a larger subject category of "hair dressing." It repeals the separate minimum hours and minimum number of practical operations for each "subject" and assigns a larger number of required "Hours/Operations" applicable to the enlarged subject category. For example, the phrase: "1100 Hours/Operations in Hair Dressing" does not specify what the minimum number of hours of instruction in hair dressing is, nor does it specify the minimum number of practical hair dressing operations a student must demonstrate.

The term "subject" is not defined in the Title 16 regulations or in statute. Whether a subject is identified as "hair dressing" and consists of many components (such as thermal styling, chemical straightening, hair cutting, hair coloring, etc.), or whether each such component should remain a distinct "subject" for assignment of minimum hours of instruction and a minimum number of practical operations is a decision left to the discretion of the Board. However the Board defines these curriculum subjects, in order to be consistent with Business and Professions Code section 7362(b), it must assign to each subject a minimum number of technical instruction hours and a minimum number of practical operations. This it has not done. The proposed amendments to section 950.2 are, therefore, inconsistent with the governing statute and must be disapproved.

## **B. 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. Section 11340(b). Section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) defines "clarity" to mean "...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them." Title 1 CCR Section 16 states in pertinent part that:

In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the 'clarity' standard if any of the following conditions exist:

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

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; ...

As discussed below, OAL determined that several of the proposed regulatory provisions did not satisfy the "clarity" standard.

1. **Proposed Section 950.2(b).** This subsection defines two terms: technical instruction and practical operation. The next sentence uses a new term: "practical instruction," which is not defined, but states that it: "shall include the following hours and/or operations." The subsection is unclear because no definition of practical instruction is provided. A reader could reasonably conclude the phrase was a reference to technical classroom instruction or to instruction in practical operations. This is particularly true in light of the closing words of the sentence which mix elements of the two defined terms, i.e., hours from technical instruction and operations from practical operations.

2. **Proposed Section 950.2(b)(1)(2)(3)&(4).** These subsections use a number followed by the term "Hours/Operations" in a particular learning domain. The language is unclear because together the phrase could be read to mean that a student could receive 200 hours of technical instruction in, for example, esthetics, with no practical operations, and satisfy the module. Conversely, the subsection could be read to mean that the student could either spend 200 hours demonstrating some number of practical operations or, perhaps, arguably, perform 200 practical operations in esthetics, with no technical instruction, and still satisfy the module. Similarly, the module could be satisfied with a combination of any two undetermined numbers of hours of each (or, perhaps, some number of hours of technical instruction and some number of practical operations) as long as the numbers and hours totaled 200. Given that Business and Professions Code section 7362 requires that the Board determine by regulation the minimum hours of technical instruction and a separate minimum number of practical operations in each subject, these subsections do not clearly determine these minimums.

3. **Proposed Section 950.2(b)(2).** This subsection conflicts with the agency's description of the effect of the regulation in the Initial Statement of Reasons ("ISR"). The ISR states: "Additionally, the Board is proposing to increase the hour requirements for health and safety, listing additional subjects to be taught [emphasis added]." No new subjects are listed under the health and safety domain in proposed subsection (b)(2).

4. **Deletion of current subsection 950.2(d).** Current subsection (d) states: "No credit of any type shall be given for time spent in laundering towels or in washing or scrubbing floors, walls, woodwork, toilets, or windows." It is unclear from this repeal whether these activities will now be eligible for, for example, practical operations credit toward a required number of hours. If time spent performing these tasks is now eligible for satisfaction of part of the 1,600-hour requirement, it is unclear how many such hours will count toward that total. The repeal of this subsection, coupled with the addition of the "consisting of but not limited to" language in subsections (b) (1) through (b)(4) regarding

curriculum topics could be interpreted by the regulated public as authorizing the inclusion of these tasks in, for example, qualifying numbers of practical operations.

### **C. NECESSITY.**

The OAL must review proposed regulatory changes for the necessity of the proposed change. Section 11349.1(a)(1). Necessity means the need for the 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. Section 11349(a). The ISR in a rulemaking file must include a statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment or repeal is necessary to carry out the purpose for which it is proposed. Section 11346.2. Title 1 CCR Section 10(b) requires that the rulemaking record include a statement of the specific purpose of each adoption, amendment, or repeal and information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.

In this rulemaking file, the ISR fails to include a provision-by-provision necessity analysis and explanation for proposed changes. The ISR, for example, does not address each topic, such as chemical hair straightening, and explain why the minimum hours of instruction and minimum number of practical operations are no longer necessary or appropriate or why they must be repealed.

Additionally, several provisions of the current regulation are proposed for repeal without an explanation of the necessity for repeal even where the provision is unrelated to the Board's overall objective of providing individual instructor or cosmetology school curriculum flexibility. For example, repealed subsection (d) provides: "No credit of any type shall be given for time spent in laundering towels or in washing or scrubbing floors, walls, woodwork, toilets, or windows." The rulemaking file contains no statement of necessity or explanation of the reasons for repeal of this provision.

The proposed regulation repeals subjects and operations which relate to consumer safety without an explanation of the necessity for doing so. For example, repealed provisions include:

Theory of Electricity in Cosmetology shall include the nature of electrical current, principles of operating electrical devices, and the various safety precautions used when operating electrical equipment.

The ten required minimum operations shall entail performing all necessary functions for...instruments...as specified in Sections 979 and 980. Disinfection should be emphasized throughout the entire training period and must be performed before use of all instruments and equipment.

Repeal of such provisions without discussion of the rationale is inconsistent with the underlying purpose of the rulemaking as described in the Initial Statement of Reasons,

i.e., “[w]ith new trends surfacing regularly, it is imperative that the Board ensures cosmetology students are being educated to safely and competently operate as licensees.” Such a rationale might include discussion of any current decreased use of electricity or decreased emphasis on disinfection in the cosmetology industry.

#### **D. RESPONSE TO COMMENTS IN THE FINAL STATEMENT OF REASONS.**

Section 11346.9(a)(3) requires that the agency’s Final Statement of Reasons (“FSR”) include an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change.

The Board’s response to opposition comments was essentially the following paragraph:

The Legislature has authorized the Board to establish cosmetology curriculum and its specific requirements. The proposed language provides requirements for the essential components of the cosmetology curriculum. It was strategically drafted so school officials can adjust their curriculum as necessary, allowing students to focus more on the subjects most relevant to today’s industry and less on the others. With the proposed curriculum, school officials also have the ability to teach additional subjects once students have proven competency in those required and have met the minimum hour requirements [emphasis added]. The Board strongly feels that this proposed language is the best option to ensure cosmetology students are prepared to be safe, successful licensees.

One commenter wrote in pertinent part:

What [the Board] are perceiving as necessary change is leaving California with “NO” set standards to hold any Beauty School in California ACCOUNTABLE for their minimum teaching requirements. What [the Board] have perceived as “inflexible” in fact is a form or basis for measuring “minimums and maximums” to hold students as well as School Owners Accountable for their training requirements.

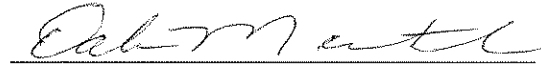
Fourteen form letter commenters stated: “The curriculum changes do not contain any minimum standards or wording that the proposed curriculum is competency based.”

The commenters recognized, as did the Legislature, the need for the Board to determine by regulation the minimum hours of instruction and minimum number of practical operations for each subject. The objection of these commenters is that these minimums are being repealed by the proposed new regulation. The Board’s response to these comments was not responsive to this objection and, in fact, indicates that minimum hour requirements are actually being retained.

## CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6817.

Date: October 24, 2008



Dale Mentink  
Senior Staff Counsel

FOR: SUSAN LAPSLEY  
Director

Original: Kristy Underwood  
Copy: Stacy Meza