

**State of California
Office of Administrative Law**

**In re:
Speech-Language Pathology and
Audiology and Hearing Aid Dispensers
Board**

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

**Adopt sections: 1399.110, 1399.130,
1399.130.1, 1399.156.5**

**Amend sections: 1399.131, 1399.150.3,
1399.151, 1399.155,
1399.156**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2012-0918-04 S

SUMMARY OF REGULATORY ACTION

The Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board) proposed this regulatory action to amend five sections and adopt four sections under title 16 of the California Code of Regulations to enhance the Board's mandate of consumer protection. Among other things, the proposed regulations establish additional grounds for denying an application for licensure or for taking disciplinary action against a licensee.

DECISION

On October 30, 2012, the Office of Administrative Law (OAL) disapproved the proposed regulatory action because the regulations failed to meet the clarity, authority, and reference standards of Government Code section 11349.1.

DISCUSSION

Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the Administrative Procedure Act (APA) unless a statute expressly exempts or excludes the act from compliance with the APA. (Gov. Code, sec. 11346.) Accordingly, regulations adopted by the Board must be adopted pursuant to the APA. No exception or exclusion applies to the regulatory action under review. Thus, before the proposed regulatory action may become effective, it is subject to a review by OAL for compliance with the procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).)

CLARITY

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

The Board proposed adoption of identical regulatory provisions in subdivision (a) of section 1399.130 and subdivision (d) of section 1399.156 to make it a violation or unprofessional conduct, subject to disciplinary action, the “[c]ommission of an act of sexual abuse or misconduct.” The term “sexual abuse” is clear. However, the term “sexual misconduct” is vague. In order for the term to be clear, the Board needs to define the term “sexual misconduct” because different people could interpret it as meaning a varying range of acts. Actions that might be considered sexual misconduct by some people would not be considered sexual misconduct by others. As a result, licensees would not easily understand the meaning of the regulatory provisions.

The initial statement of reasons for this action does not elucidate what is intended by the term “sexual misconduct.” If anything, it underscores the seriousness of such actions and the potential for disciplinary action brought against a licensee for committing any such actions. The initial statement of reasons states on page five:

Because licensees committing acts of sexual abuse or misconduct pose a potential threat to consumers, this proposal would also include as ‘unprofessional conduct’ or establish as a violation, the commission of any act of sexual abuse or misconduct. (Emphasis added)

The two proposed regulatory provisions establishing sexual misconduct as grounds for disciplinary action cite Business and Professions Code section 726 as a reference. The language in Business and Professions Code section 726 is somewhat clearer as far as what constitutes sexual misconduct because it ties any such conduct to acts committed “with a patient, client, or customer.” Otherwise, the statutory language is still vague in describing what constitutes sexual misconduct. Business and Professions Code section 726 provides:

The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3.

This section shall not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.

The Board will need to provide a definition of sexual misconduct in order to make the regulatory provision clear. OAL discussed this issue with the Board’s staff, and the Board may determine to change the two regulatory provisions to refer to another standard. Whatever the Board determines, the regulatory provisions in subdivision (a) of section 1399.130 and subdivision (d) of section 1399.156 will need to be changed to meet the clarity standard. The change to the

regulations is substantial and will require a 15-day notice and public comment period pursuant to Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44.

AUTHORITY AND REFERENCE

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “authority” and “reference” standards. (Gov. Code, sec. 11349.1(a)(2) and (a)(5).) Both standards are discussed here because the Board’s authority and reference citations for most regulations of this action were improperly cited.

“Authority,” as defined by Government Code section 11349(b), means “the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” A reference citation is different from an authority citation. “Reference,” as defined by Government Code section 11349(e), means “the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.”

For most regulations in this action, the Board cited as “authority” Business and Professions Code sections that did not meet the definition of an authority but met the definition of a reference. Additionally, the Board cited as “reference” Business and Professions Code sections or sections from other parts of the California codes that did not meet the definition of a reference. Finally, in some regulations, the Board cited as “reference” Business and Professions Code sections that met the definition of a reference but did not fully support the regulation for which it was being cited, i.e., the regulation implemented, interpreted, or made specific other statutes or provisions of law that were not cited as a reference. As a result, the Board needs to add additional references to these regulations.

OAL discussed this issue with the Board’s staff and determined appropriate revisions to the authority and reference citations for each regulation to this action.

CONCLUSION

For the reasons set forth above, OAL has disapproved the Board’s rulemaking action because it failed to comply with the “clarity,” “authority,” and “reference” standards in Government Code section 11349.1.

Date: November 6, 2012



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