

**State of California
Office of Administrative Law**

In re:
Board of Behavioral Sciences

Regulatory Action:

Title 16, California Code of Regulations

Adopt section: 1805.2

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-1213-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This rulemaking action by the Board of Behavioral Sciences (Board) proposes to add section 1805.2 to title 16 of the California Code of Regulations. This section states the conditions under which the Board may grant additional time to complete examinations to those for whom English is a second language.

DECISION

On December 13, 2016, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On January 27, 2017, OAL notified the Board of the disapproval of this regulatory action. The reasons for the disapproval were failure to comply with the “clarity” and “necessity” standards of Government Code section 11349.1. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), chapter 3.5 of part 1 of division 3 of title 2 of the Government Code (secs. 11340-11361). Pursuant to section 11346 of the Government Code, 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 APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA. No exemption or exclusion applies to the present regulatory action under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

I. CLARITY

OAL must review regulations for compliance with the “clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “clarity” as meaning “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), OAL’s regulation on “clarity,” which provides the following:

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 exists:
 - (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; 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; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
- (b) Persons shall be presumed to be “directly affected” if they:
 - (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

As discussed below, two provisions of proposed section 1805.2 fail to comply with the clarity standard of the APA.

The Board administers a number of examinations, all of which are given in English. Pursuant to section 1805.2, an applicant whose native language is not English may request additional time to complete a Board examination by providing evidence of his or her English as a Second Language (ESL) status. The Board will consider three types of evidence, which are described in section 1805.2, subdivisions (a) through (c).

Subdivisions (b) and (c) of proposed section 1805.2 read:

(b) Documentation, to the satisfaction of the board, from the qualifying master's degree program that the program had granted the applicant additional examination time or other allowance due to speaking English as a second language while he or she was enrolled in the program.

(c) Documentation, to the satisfaction of the board, that the qualifying master's degree was obtained from an educational institution outside the United States, and that coursework was presented primarily in a language other than English. [Emphasis added.]

Issue 1. The phrase “to the satisfaction of the board” in subdivisions (b) and (c) is not clear or easily understood by those affected by the regulation. Section 1805.2 provides no examples, criteria, or other benchmarks to assist an applicant in submitting documentation that will satisfy the Board. This lack of distinct guidance leaves documentation “to the satisfaction of the board” open to more than one reasonable and logical interpretation by each directly affected person, which is a violation of the clarity standard of the APA and section 16, subdivision (a)(1), of title 1 of the CCR.

Issue 2. The word “primarily” in subdivision (c) is vague. Merriam-Webster's Collegiate Dictionary (11th Ed., 2007) defines “primarily” to mean “for the most part.” Stated numerically, “primarily” ranges from slightly more than 50% to slightly less than 100%. At what point in this spectrum will the Board begin approving requests for additional examination time? Based on the regulation text alone, an applicant cannot be certain what percentage of international coursework presented in a language other than English will satisfy the Board. This ambiguity violates the clarity standard of the APA and section 16, subdivision (a)(1), of title 1 of the CCR.

II. NECESSITY

OAL must review regulations for compliance with the “necessity” standard of Government Code section 11349.1. Government Code section 11349, subdivision (a), defines “necessity” as meaning “...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 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, 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.

Issue 1. When requesting additional examination time, proposed section 1805.2 requires each applicant to state “under penalty of perjury that English is his or her second language[.]” The Board’s Initial Statement of Reasons (ISR) simply restates the above provision without offering any evidence to explain why an applicant must certify his or her request under penalty of perjury. Further, though the rulemaking record includes a series of Board meeting minutes and three documents relied upon to supplement the ISR in support of this proposed regulation, these additional materials provide no justification for requiring an applicant to certify his or her request under penalty of perjury. The complete absence of evidentiary support for the adoption of this requirement is a violation of the necessity standard of the APA.

CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption by the Board. Additionally, any supplement to the ISR or other document the Board may create or otherwise propose to add to the record in order to address the necessity issue discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1 prior to adoption by the Board. The Board must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information before resubmitting to OAL.

If you have any questions, please contact me at (916) 322-3761.

Date: February 2, 2017



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