

**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 section: 1399.129

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-1220-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This rulemaking action by the Speech-Language Pathology & Audiology & Hearing Aid Dispensers Board (Board) proposes to add section 1399.129 to title 16 of the California Code of Regulations (CCR). The purpose of this action is to compile all statutory application, license, and other related fees into one section for clarity and ease of access.

DECISION

On December 20, 2016, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On February 3, 2017, OAL notified the Board of the disapproval of this regulatory action. The reasons for the disapproval were failure to comply with the “necessity” standard of Government Code section 11349.1 and failure to follow all required procedures under the California Administrative Procedure Act (APA). 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 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. 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.

In order to provide the public with an opportunity to review and comment upon an agency’s need for a regulation, the APA requires a rulemaking agency to describe the need for the regulation and identify documents relied upon in proposing the regulation in the Initial Statement of Reasons (ISR), pursuant to Government Code section 11346.2, subdivision (b). In the instant case, the Board’s rulemaking record includes an ISR and a series of documents relied upon in support of the proposed regulation text.

As discussed below, the rulemaking record fails to comply with the necessity standard of the APA for a number of proposed regulatory provisions in section 1399.129.

Issue 1. The fees for taking and retaking the written and practical examinations are proposed in section 1399.129, subdivisions (c) and (d), respectively, as follows:

- (c) The fee for taking or retaking the written examination shall be \$225.00.
- (d) The fee for taking or retaking the practical examination shall be \$500.00.

Unlike most of the other fees in proposed section 1399.129, these two fees are not specifically established by statute. Instead, Business and Professions Code section 2538.57, subdivision (b), states:

The fees for taking or retaking the written and practical examinations shall be amounts fixed by the board, which shall be equal to the actual cost of preparing, grading, analyzing, and administering the examinations. [Emphasis added.]

This statute directs the Board to analyze certain costs before calculating the examination fees and, as the Board wisely recognized, adopting the fees as regulations pursuant to the APA. The Board must provide these analyses and calculations in the rulemaking record in order to substantiate the proposed fee amounts being adopted. In this regard, however, the Board's rulemaking record falls short.

To begin with, the ISR in the record is of little value. Statements included under the heading "Factual Basis/Rationale" are confusing and largely irrelevant (e.g., "The Board anticipates requesting the Legislature raise the fee ceiling within the next few years which would necessitate the fees being incorporated into the regulations at that time."). Other statements are simply false as applied to these examination fees (e.g., "The fees listed in the regulatory proposal are set by statute and are not being changed."). No evidence to support the specific examination fee amounts can be found in the ISR.

The Board's documents relied upon are more relevant than the ISR, but their utility is hampered by inconsistencies. For example, Board meeting minutes from January 27, 2011, include a discussion of the need to raise the written and practical examination fees to \$225 and \$500, respectively. The minutes indicate that as of late 2010, the revenue from collected fees was only about 60% of the amount needed to keep the Hearing Aid Dispensers Program solvent. Additional calculations were provided in an attachment to the minutes. However, even assuming that these calculations were still valid and accurate at the time the regulation was proposed in late 2015, the minutes clearly indicate that the Board did not rely upon them to adopt the fees as regulations in title 16 of the CCR. The rulemaking record does not explain how these facts, which were originally presented to the Board many years ago, justify the adoption of the proposed examination fees in section 1399.129 now.

This issue is muddled even further by the presence of separate analyses and calculations in the record that, while much more recent, appear to justify significantly higher fees. In a document referred to simply as "Budget Memo" (dated July 14, 2016), the actual costs of administering the written and practical examinations, averaged over the preceding three years, are \$254 and \$743, respectively. If these figures represent the true costs of administering the examinations, which were calculated by the Board in accordance with the mandate of Business and Professions Code section 2538.57, subdivision (b), then why are the fees proposed in section 1399.129 different? Ultimately, because the totality of the evidence in the rulemaking record is unclear, inconsistent,

and does not support the proposed regulation text, the record does not satisfy the necessity standard of the APA.

OAL notes that the Budget Memo referenced above states: “The Board is authorized by statute to charge a fee for the written and practical examination up to, but not to exceed, the cost of administering each exam.” This statement appears to be a misinterpretation of section 2538.57, subdivision (b), of the Business and Professions Code. As quoted above, the statute requires the Board to set the examination fees in amounts “equal to,” not less than, the actual examination costs. In other words, the statute provides the methodology to determine the fees instead of simply providing the maximum fees. The Board must ensure that the proposed fees are supported by substantial evidence and consistent with existing law prior to resubmission to OAL.

OAL additionally notes that Business and Professions Code section 2538.57 begins: “The amount of fees and penalties prescribed by this article shall be those set forth in this section unless a lower fee is fixed by the board.” If the Board desires to adopt lower fee amounts of \$225 and \$500, respectively, in accordance with the statutory language above, despite the actual written and practical examination costs of \$254 and \$746, respectively, then the Board must explain this intention and provide substantial evidence of the justification for the specific, lower fee amounts in the rulemaking record prior to resubmission to OAL.

Issue 2. Proposed section 1399.129, subdivision (e), states:

(e) The initial license fee and annual renewal fee for a hearing aid dispenser license or dispensing audiology license shall be \$280.00.

The \$280 license renewal fee in section 1399.129, subdivision (e), is not supported by the rulemaking record. Business and Professions Code section 2538.57, subdivision (d), states:

The initial permanent license fee is two hundred eighty dollars (\$280). The fee for renewal of a permanent license is not more than two hundred eighty dollars (\$280) for each renewal. [Emphasis added.]

Thus, the statute establishes a fixed initial fee of \$280, as well as a maximum renewal fee of \$280. The Board has discretion to set the renewal fee – by regulation – at \$280 or less, with the adopted amount necessarily being justified in the rulemaking record. In this case, the Board set the renewal fee at the maximum of \$280 but offered no analyses, calculations, or other information to support the adoption of the specific fee. This lack of evidence violates the necessity standard of the APA.

Issue 3. Proposed section 1399.129, subdivision (k), provides:

(k) The continuing education course approval application fee shall be \$50.00 per course, per calendar year. [Emphasis added.]

While the \$50 fee is expressly prescribed in Business and Professions Code, subdivision (h), the requirement that the fee be paid each calendar year is not. No evidence to support the adoption of this requirement exists in the rulemaking record; thus, the record fails to satisfy the necessity standard of the APA.

OAL notes that existing section 1399.141, subdivision (f), of title 16 of the CCR requires each continuing education provider to “submit to the Board on an annual basis a description or outline of each approved course to be offered the following year and a resume of any new instructor who will be presenting the course.” It appears that this submission is required to accompany each course approval application and \$50 application fee. Yet, whether the phrases “on an annual basis” and “per calendar year” are synonymous is unclear and open to interpretation. The Board must ensure that the text of proposed section 1399.129, subdivision (k), is not only supported by substantial evidence in the record, but also consistent with existing law, before resubmission of this action to OAL.

II. INCORRECT PROCEDURE

Issue 1. Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking record contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6), requires, in part, the estimate of the cost or savings to any state agency. This paragraph further defines “cost or savings” as “additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.” Government Code section 11357 requires that DOF adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, DOF has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement.” (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in STD. 399 require the concurrence of DOF. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION

(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes the DOF to “...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation.”

A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies.

Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- | | |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs | B.1-State Costs |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings | B.4-Other |
| A.6-Other | |

In addition, the DOF's approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399....

In the Fiscal Impact Statement section of the STD. 399 included in the rulemaking record, the Board checked box B.4-Other, and wrote "See attached" in the space provided. The document attached to the STD. 399 is a page from the "Budget Memo" referenced above. Under the heading "FISCAL IMPACT STATEMENT," the memo provides:

This regulation would have no fiscal impact to the Board since the workload already exists. If there were to be an impact to the Board, the Board would assume it would be minimal and absorbable.

Pursuant to SAM section 6615, when a state agency indicates that its proposed regulatory action may result in increased costs, however minimal, then the STD. 399 is required to be submitted to DOF for review and a signature obtained from DOF indicating concurrence by DOF before submitting the STD. 399 as part of the rulemaking record for OAL's review. This did not occur. There was no signature from DOF on the STD. 399 submitted to OAL for review. Thus, the Board failed to follow required APA procedures. A review and signature from DOF must be obtained and indicated on the STD. 399 before resubmitting this action to OAL.

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 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 issues 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.

Date: February 8, 2017



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