

**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:

**Amend sections: 1399.152.2, 1399.153,
1399.170, 1399.170.4,
1399.170.6, 1399.170.10,
1399.170.11,
1399.170.15**

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0104-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On January 4, 2017, the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board) submitted to the Office of Administrative Law (OAL) this proposed regulatory action to amend various sections in Title 16 of the California Code of Regulations (CCR). The amendments incorporate the American Speech-Language-Hearing Association's *Speech-Language Pathology Assistant Scope of Practice* (2013), address the level of experience that supervisors of a licensed speech-language pathologist are required to have, allow supervision to be done on-site or by way of electronic means, and update the form SPA 110 – *Responsibility Statement for Supervisors of a Speech-Language Pathology Assistant* that is incorporated by reference.

DECISION

On February 16, 2017, OAL notified the Board that OAL disapproved the proposed regulations because the regulations failed to comply with the clarity and necessity standards of Government Code section 11349.1 and the Board failed to follow procedural requirements of the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

The adoption, amendment, or repeal of regulations by the Board must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation

adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 coverage. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

It is important to note that material proposed to be incorporated by reference into a regulation shall be reviewed in accordance with the same procedures and standards for a regulation published in the California Code of Regulations. (1 Cal. Code Regs., sec. 20, subd. (b).) Therefore, both the form SPA 110 – *Responsibility Statement for Supervisors of a Speech-Language Pathology Assistant* and the American Speech-Language-Hearing Association's *Speech-Language Pathology Assistant Scope of Practice* (2013), which are incorporated by reference in the regulations, must comply with all APA standards.

Upon resubmission of this regulatory action, OAL reserves the right to review the regulations for all six (6) standards of the APA.

1. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.”

In this regulatory action, the Board failed to comply with the clarity standard of the APA.

1.1. When to submit form SPA 110 to the Board

Section 1399.170.15, subdivision (b) states that “[a]ny person supervising a speech-language pathology assistant registered with the Board ... shall submit, *within thirty (30) days* of the commencement of such supervision, the ‘Responsibility Statement for Supervision of a Speech-Language Pathology Assistant’ [form SPA 110].” (Emphasis added.)

Form SPA 110 [01/16] requires that “[t]his form must be submitted *within 14 business days* from the start date of supervision.” (Emphasis added.) Further in the form, a qualified supervising speech-language pathologist to a registered speech-language pathology assistant must “...provide this Board with this original signed form [SPA 110] *within 14 calendar days* of commencement of any supervision.” (Emphasis added.)

While the regulation text requires the form to be submitted within thirty (30) days, the form requires submission within fourteen (14) business days in one place and fourteen (14) calendar days in another. This internal inconsistency between the regulation text and the form text causes the proposed action to be unclear because it provides two different compliance dates, one is for 30 days and the other is for 14 days. Further, it provides two different types of deadline computation, one for 14 *calendar* days and the other is for 14 *business* days. Those directly affected would not know the exact time frame within which the form is required to be submitted to the Board.

1.2. Who signs form SPA 110 under penalty of perjury

Form SPA 110, titled *Responsibility Statement for Supervisors of a Speech-Language Pathology Assistant*, provides in part, at the top of page 2:

...Section 1399.170.15 requires that any qualified speech-language pathologist *who assumes responsibility for providing supervision* to a registered speech-language pathology assistant *to complete and sign under penalty of perjury, the following statement.*

- 1) I have read and understand the excerpts of the laws and regulations, included with my application, pertaining to the responsibilities of a Speech-Language Pathology Assistant.
- 2) *My supervisor* shall maintain a current license issued by the Board, during the time of my supervision. If my supervisor’s license expires during the course of professional experience, I will immediately notify the board. *A supervisor’s license can be verified at any time at the Board’s website.* [Emphasis bold italics added; plain italics, original.]

First, the form states that section 1399.170.15 requires the above statements to be completed and signed under penalty of perjury; however, this is incorrect because section 1399.170.15 does not include that requirement.

Second, although the form requires the statements be completed and signed under penalty of perjury, the place designated where to sign on the form does not contain an actual declaration under penalty of perjury. Current existing text on the form contains this “under penalty of perjury” declaration; however, the Board now proposes to remove it from the form. The proposed form needs to include the declaration to be attested to, under penalty of perjury, directly on the form.

Third, the form's instructions to a supervisor using this form are to complete and sign the form on page 2. On page 2 of the form is a declaration with the heading "Duties and Responsibilities of Speech-Language Pathology Assistant," to be signed by "Applicant." Under the heading, however, the statement begins as if it will be a statement signed by a supervisor, i.e., any qualified speech-language pathologist *who assumes responsibility for providing supervision* "shall complete and sign under penalty of perjury, the following statement." The form is unclear because the "following statement" appears to be a declaration to be made by a speech-language pathology assistant, not a supervisor. In particular, the wording used in paragraph #2 of the declaration begins with the wording: "My supervisor shall...." Thus, the form is unclear because it is not easily understood who is required to sign the form on page 2.

We note that on page 3 of the form there is a signature line for "Signature of Supervisor." It is not clear if a speech-language pathology assistant would easily understand there is a requirement to sign form SPA 110, especially given that the title of the form is directed to supervisors: *Responsibility Statement for Supervisors of a Speech-Language Pathology Assistant*. (Emphasis added.) Also, the same issue discussed above regarding the statement to be signed under penalty of perjury would also apply to the place for a supervisor to sign under penalty of perjury.

For the reasons discussed above, the text of the form fails to comply with the clarity standard of the APA. The Board must make all substantial modifications available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the California Code of Regulations before adopting the regulations and resubmitting this regulatory action to OAL for review. Additionally, any comments made in relation to the proposed modifications must be summarized and responded to in the final statement of reasons, pursuant to Government Code section 11347.1, subdivision (d).

2. NECESSITY STANDARD

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines "necessity" to mean:

(a) ...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, Title 1 of the California Code of Regulations, section 10, subdivision (b) provides:

(b) 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 regulations 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. [Emphasis added.]

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISOR). (Gov. Code, sec. 11346.2, subd. (b).) The ISOR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2, subd. (b)(1).) The ISOR must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, sec. 11346.2, subd. (b) and sec. 11346.5, subds. (a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The proposed regulations amend one document incorporated by reference: SPA 110 – *Responsibility Statement for Supervisors of a Speech-Language Pathology Assistant* and adopt another document that is incorporated by reference: the American Speech-Language-Hearing Association’s *Speech-Language Pathology Assistant Scope of Practice* (2013). However, the ISOR does not provide any necessity for the amendments to, or contents of, either document.

The APA requires the ISOR to include an explanation of the need and the rationale for each proposed new regulatory provision or change to existing regulatory language, including language found in documents incorporated by reference, and such explanation must be made available to the public. Any supplement to the initial statement of reasons that provides the missing necessity must be made available to the public for comment for at least 15 days prior to adoption of the regulations by the Board pursuant to Government Code section 11347.1.

3. FAILURE TO FOLLOW REQUIRED APA PROCEDURES

The APA requires agencies to follow specific procedures. In this rulemaking action, the Board failed to comply with the following required procedures.

3.1. Failure to Obtain Department of Finance Signature on Form STD 399

Government Code section 11347.3, subdivision (b)(5) requires a rulemaking file to include 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 subdivision 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 Finance 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, Finance has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement.” (SAM Chapter 6600, commencing with section 6601.) Specifically, at SAM section 6615, Finance has established when financial estimates contained in an STD. 399 require the concurrence of the Finance. Section 6615 states:

A state agency is not required in all instances to obtain the concurrence of [Finance] 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 the rulemaking record, the Fiscal Impact Statement part of the STD. 399 depicts “other” in sections A.6 and B.4. Thus, the STD. 399 requires a Finance signature (i.e., concurrence). The rulemaking file does not include an STD. 399 that has a Finance signature, and therefore, the Board failed to follow required APA procedures. A review and signature from Finance must be obtained and indicated on the STD. 399 before this rulemaking action can be approved by OAL.

3.2. Failure to Summarize and Respond to Public Comments

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a final statement of reasons. One of the requirements of the Final Statement of Reasons (FSR) is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the FSR include:

- (a)(3) A summary of *each* objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate *each* objection or recommendation, or the reasons for making no change.

This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.... [Emphasis added.]

During the 15-day comment period, a commenter pointed out to the Board that “[a]lthough the notice indicates that there is no fiscal impact... unfortunately there is a significant fiscal impact that will result due to the requirement for immediate supervision during the first 90 days.” In the FSR, the Board's response states that it accepted the comment and added that it “did not contemplate the additional cost that supervision would require and will consider the cost in the Final Statement of Reasons.” However, the FSR does not include any further discussion about those costs.

Thus, this comment was not summarized or responded to in the FSR as the Board indicated it would. The Board is required to summarize and respond to all comments received, pursuant to Government Code section 11346.9, subdivision (a)(3), before resubmitting the rulemaking action to OAL for review.

3.3. Improper Illustration of Text

When noticing any modified text to the public for comments, the Board must ensure that the changes to the underlying text of the regulations and forms incorporated by reference are accurately illustrated. (Gov. Code, sec. 11346.2, subd. (a)(3); 1 Cal. Code Regs., secs. 8, 44, and 46.) The proposed regulations and forms incorporated by reference were noticed to the public; however, the text was not accurately illustrated so that the public would know what the exact changes were in order to comment on those changes.

For example, the phrase “of the Act or out of state” is stricken out in the final regulation text of proposed section 1399.153, subdivision (d); however, it was not stricken out in either the 45-day or the 15-day text that was made available to the public for comments. Also, the Board proposed modifications to the form SPA 110; however, none of the documents in the rulemaking file show that these proposed changes were properly illustrated during the public comment periods.

The Board must accurately illustrate text when it issues modified text with a 15-day notice and makes it available to the public for comment. The Board must make all changes available to the public for a minimum 15-day comment period, with changes accurately illustrated, prior to resubmitting the rulemaking to OAL for review.

3.4. Failure to Identify Document or Form Incorporated by Reference

In this regulatory action, the proposed regulation text included two documents incorporated by reference: the *Responsibility Statement for Supervisors of a Speech-Language Pathology Assistant* (SPA 110 Rev 01/16) and the *Speech-Language Pathology Assistant Scope of Practice* (2013). However, these documents were not properly incorporated by reference, pursuant to title 1, section 20 of the CCR.

Title 1, section 20, subdivision (c)(3), of the CCR states that an agency may incorporate a document or a form by reference only if, among other requirements, “[t]he informative digest in

the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.”

In the file, the Notice of Proposed Action did not identify any documents incorporated by reference. The file does include a notice titled “Availability of Documents Added to the Rulemaking File” that identifies both of the above documents as “documents added to the rulemaking record” rather than as documents incorporated by reference into the regulation text. This notice appears to be a notice of availability for a 15-day comment period; however, prior to resubmitting this regulatory action to OAL, the Board must properly notice the documents as incorporated by reference in compliance with title 1, section 20, of the CCR, and title 1, section 44, of the CCR.

3.5. Failure to Attach the Documents Incorporated by Reference to the Form 400

All regulatory actions submitted to OAL for transmittal to the Secretary of State and for publication in the CCR must include seven copies of the regulations, including the documents incorporated by reference (Gov. Code, sec. 11343, subd. (a); 1 Cal. Code Regs., secs. 6 and 20). A completed Form 400 must be attached to each of the seven copies of the regulations/documents incorporated by reference submitted to OAL.

The Board did not attach either of the two documents incorporated by reference to the Form 400. Upon resubmittal, the Board must attach to the Form 400, along with the proposed regulation text, both the *Responsibility Statement for Supervision of a Speech-Language Pathology Assistant (SPA 110 Rev 01/16)* and the *Speech-Language Pathology Assistant Scope of Practice (2013)*.

3.6. Inadequate Section 44 Confirming Statement

The Board completed a 15-day public comment period and included in the file a confirming statement that states that the Board complied with Government Code section 11346.4(a)(1) through (a)(4). However, title 1, CCR, section 44, subdivision (b), states that “[t]he rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.”

Thus, upon resubmittal, the rulemaking file’s confirming statement for the 15-day public comment period must state that the Board complied with title 1, section 44 of the CCR, rather than section 11346.4(a)(1) through (4) of the Government Code.

3.7. Failure to Include all Required Documents in the Rulemaking File

According to the 45-day regulation text, it appears that the Board modified the form SPA 110 by changing the revision date of the form from “12/99” to “07/15.” However, an incomplete form is included in the file; that is, only two out of three pages of the form are included in the record.

Government Code section 11347.3, subdivision (b)(10), requires the rulemaking record to include “the text of regulations as originally proposed and the modified text of regulations ... that were made available to the public prior to adoption.”

Pursuant to Government Code section 11347.3, upon resubmittal, the rulemaking file must include complete documents that were made available to the public prior to adoption.

4. MISCELLANEOUS

The following issues must be addressed by the Board prior to resubmitting its rulemaking action to OAL:

- 4.1. In Section B.4. of the Form 400, the Board included the period of “October 2, 2015 – November 23, 2015.” It appears that these are the dates of the 45-day comment period. However, section B.4. of the Form 400 should only include “all beginning and ending dates of availability of modified regulations and/or material added to the rulemaking file (Cal. Code Regs., title 1, sec. 44 and Gov. Code sec. 11347.1).” Upon resubmittal, the dates of the 45-day comment period should not appear in this section of the Form 400.
- 4.2. The information in the FSR incorrectly references the *Application for Speech-Language Pathology Assistance* (form SPA 100) as a document incorporated by reference. However, this form SPA 100 is not affected by this proposed action. This must be clarified upon resubmittal of this regulatory action.
- 4.3. The proposed modifications in the regulatory text caused various subdivisions to be renumbered; however, the affected subdivisions were not properly renumbered. The subdivisions in the regulation text must be properly renumbered upon resubmittal.
- 4.4. The affidavit located in the Table of Contents which declares under penalty of perjury that the file is closed and complete states that the file was closed on November 23, 2015, reopened on June 13, 2016, and closed again on June 28, 2018. Upon resubmittal, the affidavit must correctly state the date that the file is closed and complete.

CONCLUSION

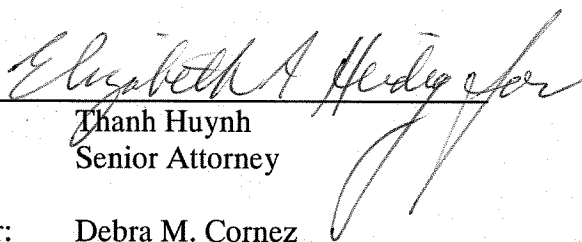
For these reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Board may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval.

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. Additionally, any document relied upon and 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. The Board must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this Decision of Disapproval, before resubmitting to OAL.

If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: February 22, 2017



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