

**State of California
Office of Administrative Law**

**In re:
Board of Chiropractic Examiners**

Regulatory Action:

Title 16, California Code of Regulations

Amend sections: 321, 364

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0310-03

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This rulemaking action by the Board of Chiropractic Examiners (Board) proposes to amend its existing "Application for License to Practice Chiropractic" (Form 09A-1, rev. 05/16), incorporated by reference in section 321 of title 16 of the California Code of Regulations (CCR), to include various new requirements. In addition, the Board proposes to incorporate two new forms in section 321: "Verification of Prechiropractic Hours" (Form 09B-3, new 07/14) and "Chiropractic College Certificate" (Form 09B-2, new 07/14). This action also includes amendments to title 16 of the CCR designed to incentivize participation in examination development and assist past and present members of the United States Armed Forces with obtaining and maintaining Board licensure.

DECISION

On March 10, 2017, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On April 24, 2017, OAL notified the Board of the disapproval of this regulatory action. The reasons for the disapproval were failure to comply with the "necessity" and "clarity" 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 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. 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.

Additionally, subdivision (b) of section 20 of title 1 of the CCR requires that all material proposed to be incorporated by reference shall be reviewed in accordance with procedures and standards for a regulation.

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, if any, in the Initial Statement of Reasons (ISR), pursuant to Government Code section 11346.2, subdivision (b). As discussed below, the rulemaking record fails to comply with the necessity standard of the APA for a number of proposed regulatory provisions in Forms 09A-1, 09B-2, and 09B-3, incorporated by reference in section 321.

Issue 1. Form 09A-1 includes a cover sheet that contains instructions and information intended to help the applicant properly complete the application form. The Board refers to this cover sheet as a “check sheet.” Under the heading, “CONVICTIONS,” the check sheet mandates the following:

For reportable citations/arrests on your record including those set aside, dismissed or expunged, you are required to submit the following documentation for each incident:

- A signed detailed explanation. Specify what occurred on the date(s) in question, which resulted in the citation. If the explanation is not detailed or signed, you will be asked to resubmit.
- A copy of the police/incident report. *If the report no longer exists or is not available, you must obtain a letter from the reporting agency, on their letterhead, specifying that fact.*
- CERTIFIED court documents. Copies will not be accepted. *If the report no longer exists or is not available, you must obtain a letter from the court, on their letterhead, specifying that fact.* [Italics added for emphasis.]

The ISR provides no specific evidence of the need to adopt the italicized text above. This lack of evidence in the record constitutes a violation of the necessity standard of the APA.

Issue 2. Under the “Personal Information” section of Form 09A-1 is the following instruction:

If you answer yes to either question A¹ or B² below, please provide official documentation. Documentation includes: military orders showing duty station; discharge papers or copies of current Leave and Earnings statements. For Question B, documentation also includes: copy of marriage certificate or certified declaration/registration of domestic partnership filed with the Secretary of State. For other forms of “legal union” not recognized by California, you may submit other documentary evidence of legal union issued by the State that recognizes your legal union for consideration.

The ISR describes how Business and Professions Code sections 114.3, 114.5, 115.4 and 115.5 collectively mandate the inclusion of questions A and B on Form 09A-1. However, these statutes do not expressly define “official documentation,” or provide any guidance regarding the types of documentation that might be useful to verify an applicant’s military history or legal relationship status. The statutes leave the Board with discretion to choose how to implement the requirements.

¹ “Have you ever served in the United States military?”

² “Are you a spouse, domestic partner or in a legal union with an active duty member of the U.S. Armed Forces stationed in California?”

For example, Section 115.4 of the Business and Professions Code provides:

(a) Notwithstanding any other law, on and after July 1, 2016, a board within the department shall expedite, and may assist, the initial licensure process for an applicant who supplies *satisfactory evidence* to the board that the applicant has served as an active duty member of the Armed Forces of the United States and was honorably discharged.

(b) *A board may adopt regulations necessary to administer this section.* [Emphasis added.]

The problem is that while the Board identified the specific documentation that would furnish satisfactory evidence of military service and legal relationship status, it did not provide any evidence in the rulemaking record to explain the reasons for proposing that documentation. Thus, the Board's rulemaking record violates the necessity standard of the APA.

Issue 3. Forms 09A-1, 09B-2, and 09B-3 each require the signatory to certify, under penalty of perjury, that the information provided on the form is true and accurate.

Regarding Form 09A-1, the declaration on the last page of the form reads:

I hereby certify under penalty of perjury under the laws of the State of California to the truth and accuracy of the foregoing information contained on this application, including any attachments. I also certify that I personally read and completed this application and have read the instructions.

The affidavit on Form 09B-2 states:

I hereby certify under penalty of perjury that the information reported on this College Certificate is true and correct.

Finally, the statement on Form 09B-3 says:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true, correct, and complete to the best of my knowledge.

Form 09A-1 must be signed by the applicant. The ISR explains that the declaration "was added to provide the Board with a legal basis for denial of the application or administrative action of a license for failure to complete the application truthfully." The Board is suggesting in the ISR that without the signed certification under penalty of perjury, there would be no legal justification to deny an application for licensure. Yet, the declaration serves more than one purpose. In addition to risking denial of licensure, an applicant who knowingly provides false information to the Board and signs the declaration subjects himself or herself to prosecution for perjury. The ISR provides no evidence of the reason for such a requirement, which may lead to a significant penalty.

This lack of evidence is more acute in the case of the other two forms, which are used to verify that an applicant has satisfactorily completed all of the Board's prechiropractic and chiropractic education requirements. These two forms are required to be completed and certified under penalty of perjury not by the applicant, but a representative from the chiropractic school attended by the applicant. Why must the Board subject non-applicants to this substantial condition and its potentially severe consequences? This question cannot be answered because the ISR is devoid of any evidence to support this requirement.

Ultimately, in order to meet the necessity standard of the APA, the rulemaking record must include substantial evidence demonstrating why the Board needed to adopt the forms in the ways described above and the evidence then needs to be made available to the public pursuant to Government Code section 11347.1.

II. 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 CCR, 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.

The clarity issues discussed below must be resolved before the Department resubmits this action to OAL.

Issue 1. Section 364 of title 16 of the CCR, “Exemptions and Reduction of Requirement,” provides that under certain circumstances, a licensee may be fully or partially exempt from the Board’s continuing education (CE) requirements. The Board proposed the following new exemption as subdivision (g) of section 364:

(g) A licensee who participates in *the entire two-day workshop* as a Subject Matter Expert for the purpose of exam development of the California Law and Professional Practice Examination shall receive *a maximum of sixteen (16) hours* of continuing education credit which includes eight (8) hours in the Ethics and Law and eight (8) hours in the Principles of Practice subject areas as defined in sections 361(g)(11) and 361(g)(16)(A) respectively. [Emphasis added.]

It is not clear how the Board will determine the number of CE hours a participating licensee will be credited. Logically, if a licensee participates in the entire two-day workshop, then he or she will receive full CE credit. But to a directly affected person reading subdivision (g), it appears that even if he or she participates in the entire two-day workshop, the Board may still decide to credit fewer than sixteen hours.

The ISR describes how most licensed chiropractors are sole proprietors, who would face significant financial hardship if they closed their businesses for two days. The ISR explains that the purpose of adopting subdivision (g) of section 364 is to offer a worthwhile incentive to these licensees. It is reasonable to infer from the ISR that the Board intends to grant full CE credit to those licensees who fully participate in the workshop; however, this further amplifies the ambiguity present in the proposed text.

The Board must refine the text – for example, by stating simply that participating licensees will receive one hour of CE credit for each hour volunteered, up to a maximum of sixteen hours – and ensure that the text is consistent with the rulemaking record in order to resolve the issue and satisfy the clarity standard of the APA in Government Code section 11349.1 and section 16, subdivisions (a)(1) and (a)(2), of title 1 of the CCR.

Issue 2. As previously discussed, the check sheet included with Form 09A-1 requires the applicant to provide documentation of certain reportable incidents to the Board. The requirements are excerpted below for reference.

- A signed detailed explanation
- A copy of the police/incident report
- CERTIFIED court documents. Copies will not be accepted.

On page 3 of Form 09A-1 itself, under the heading, “DISCIPLINARY HISTORY,” the applicant is again instructed to submit this documentation. For each reportable incident, the form requires the applicant to:

[A]ttach a written DETAILED explanation, obtain a *certified copy of the arrest report* and include CERTIFIED copies of all court documents for each conviction. *Include proof of completion of any terms of parole, probation, restitution or any other sanctions imposed against you.* [Italics added for emphasis.]

Discrepancies between these two sets of instructions give rise to a series of clarity problems. First, it is unclear whether “arrest report,” “incident report,” and “police report” are synonymous. Further, Form 09A-1 requires the applicant to submit certified copies of these reports, but the check sheet does not expressly require certified copies. Similarly, it is unclear the Board is requiring certified court documents or certified copies of court documents. Finally, it is unclear what the Board will accept as “proof” of completion of parole, probation, etc., and the check sheet does not include this requirement to provide proof of completion to the Board. These ambiguities and inconsistencies in the requirements will create confusion among directly affected applicants and may result in the unwarranted rejection of applications by the Board. These violations of Government Code section 11349.1 and section 16(a)(1) of title 1 of the CCR must be addressed by the Board prior to resubmitting this action to OAL for review.

Issue 3. Under the heading, “PRACTICE IMPAIRMENT OR LIMITATIONS,” question #12 on Form 09A-1 asks: “Do you have a current physical or mental impairment related to drugs or alcohol?” This vague question can be reasonably and logically interpreted to have more than one meaning. How would an applicant know which specific physical and mental impairments are required to be reported? At what point in time is a past impairment too old to be considered current? The Board must clearly define the scope and meaning of the proposed text in order to narrow this question down to a single, reasonable interpretation that will satisfy the requirements of Government Code section 11349.1 and section 16(a)(1) of title 1 of the CCR.

Issue 4. As previously discussed, Forms 09B-2 and 09B-3 are required to be signed by a representative from the school attended by the applicant. Form 09B-3 expressly states that “[o]nly the President, Dean or Registrar of the college may sign this form.” Form 09B-2

includes no such requirement, and appears to permit any school employee to sign the form. However, the ISR provides:

As part of the satisfactory proof of education required by the Act, the Board requires completion of a verification of prechiropractic [Form 09B-3] and chiropractic [Form 09B-2] education by the chiropractic school's President, Dean or Registrar.

This creates an inconsistency between Form 09B-2 and the Board's description of the form in the rulemaking record, which is a violation of section 16, subdivision (a)(2), of title 1 of the CCR. The Board must reconcile the text and record in order to resolve the clarity issue before resubmitting this action to OAL for review.


CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this disapproval decision will be e-mailed to the Board contact person on the date this decision is signed below.

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. Additionally, 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. The Board must document in the rulemaking record 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) 323-6225.

Date: May 1, 2017


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