

BOARD OF PSYCHOLOGY
FINAL STATEMENT OF REASONS

Hearing Date: August 22, 2014

Subject Matter of Proposed Regulations: Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees

Sections Affected: Title 16, California Code of Regulations Section 1397.12 renumbered as Section 1395.2 within Article 7, Standards Related to Denial, Discipline, and Reinstatement of Licenses or Registrations

Updated Information

The Initial Statement of Reasons is included in the file. The information contained therein is updated as follows:

The 45-day public comment period began on July 3, 2014, and ended on August 18, 2014. The Board of Psychology (Board) held a regulatory hearing on August 22, 2014, in San Francisco, California. No written public comments in response to the proposed regulation were received by the Board during the 45-day comment period, and no public comments were made at the hearing. Board staff recommended non-substantive modifications to make grammatical and clarity corrections. The Department of Consumer Affairs (DCA) requested a minor consequence be added to the consequences for a minor violation under the 'Major and Minor Violations' heading. This change was incorporated in the Board's modified language.

Modified text was noticed on the Board's web site and mailed on October 17, 2014. The 15-day public comment period began on October 17, 2014, and ended on November 1, 2014. The Board received no public comments in response to the proposed modifications.

DCA recommended additional amendments as follows:

- Language relating to suspending licenses was deleted where the Board only has the authority to order a respondent to cease practice.
- Under the Major and Minor Violations, a sixth consequence for minor violations (required re-evaluation and/or testing) was added.
- Several grammatical and consistency issues were corrected.

The second modified text to include the above amendments was noticed on the Board's web site and mailed on April 28, 2015. The 15-day public comment period began on April 28, 2015, and ended on May 12, 2015. The Board received no public comments in response to the proposed modifications.

On September 25, 2015, the Board submitted the proposed Order of Adoption to the Office of Administrative Law (OAL). On November 6, 2015, OAL issued a Notice of Disapproval of the proposed adoption, and on November 10, 2015, a Decision of Disapproval of Regulatory Action, summarized as follows:

Clarity:

The regulatory language stated the Board was to consider and apply the “Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees (4/15)” which was incorporated by reference, as well as the DCA Substance Abuse Coordination Committee’s (SACC) Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011), also incorporated by reference. As the Board’s incorporated document also included uniform standards and differed in some elements from the SACC’s document, OAL determined that a person directly affected would not easily understand which uniform standard is to be applied where the two varied.

The regulatory language stated the Disciplinary Guidelines apply to all disciplinary matters; the Uniform Standards describe the mandatory conditions that apply to a substance-abusing licensee, except that the Board may impose more restrictive conditions if necessary to protect the public. OAL determined that a person directly affected would not easily understand if the “Uniform Standards” referred to are the standards adopted by the Board or the SACC. Additionally, a person would not easily understand if the regulation was intended to give the Board the ability to impose more restrictive conditions than the uniform standards adopted by the Committee, or if the provision is intended to give the Board the ability to impose even more restrictive standards without going through the rulemaking process.

Language in the Disciplinary Guidelines under “Drug Testing Standards” included an incomplete sentence. OAL determined that since the rest of the sentence was omitted, a person directly affected by the regulation would not easily understand the consequences of the referenced violation.

Language in the Disciplinary Guidelines under “Penalty Guidelines for Disciplinary Actions” and “Drug Testing Standards” contained multiple inaccurate cross-references.

Consistency:

OAL determined that the Board’s uniform standards as amended did not include the SACC’s uniform standard providing for five exceptions to the testing frequency schedule when a licensee tests positive for a banned substance. Additionally, OAL determined that a directive to boards in determining whether a positive test is evidence of prohibited use should be included in the Uniform

Standards Related to Substance Abusing Licensees.

Improper Public Notice:

OAL determined that specific wording in the first 15-day notice of modified text was not present in the initial text made available to the public for 45 days.

Missing and/or Defective Documents:

OAL determined that there were minor discrepancies in the language of the Disciplinary Guidelines, the Updated Informative Digest was missing clear and concise summary of the immediately preceding laws and regulations relating directly to the amended regulation, and two documents incorporated by reference were not included with the rest of the regulation text attached to the seven copies of the STD Form 400.

The third modified text to address the reasons for OAL's disapproval (see fourth modified text discussion below) was noticed on the Board's web site and mailed on February 12, 2016. The 15-day public comment period began on February 12, 2016, and ended on February 27, 2016. The Board received one public comment which the Board determined was non-germane to the proposed modifications.

Subsequent to that, Board staff recommended substantive and non-substantive modifications to make grammatical and clarity corrections, as well as add a legal opinion to the file.

The fourth modified text was noticed on the Board's web site and mailed on May 2, 2016. The 15-day public comment period began on May 2, 2016, and ended on May 17, 2016. The Board received no public comments in response to the proposed modifications.

With the third and fourth modified texts, the Board amended the proposed language of the regulation and the incorporated "Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees (4/15)" to:

- Best reflect the applicable elements from DCA's SACC's "Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011)," differentiating the uniform standards applicable to a substance abusing licensee by adding or amending the "Notes" included after specific terms or conditions.
- Reflect that the DCA SACC's "Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011)" is no longer incorporated by reference by deleting that in the new 1392.5, and now identifying as "material relied upon" by adding them to the file.
- Make clear the Board did not intend to impose more restrictive standards than those permissible under existing laws and regulations, by deleting any language that would suggest such.

- Correct an incomplete sentence clarifying the consequences of a violation.
- Correct cross-references to terms and conditions under “Penalty Guidelines for Disciplinary Actions” and optional terms under “Drug Testing Standards.”
- Incorporate the SACC’s five exceptions to testing frequency.
- Properly notice specific wording that was omitted in the original notice of modified text.
- Correct various minor non-substantive discrepancies and grammatical errors.

DCA’s Legal Affairs Division’s Deputy Director provided the healing arts boards with an advice memorandum providing the following guidance regarding implementation of the Uniform Standards for Substance Abusing Healing Arts Licensees:

- While the Attorney General concluded that healing arts boards may, but are not required to, adopt regulations incorporating the Uniform Standards, it is recommended that each healing arts board formally implement the Standards through regulations and incorporate them into the board’s Disciplinary Guidelines.
- Develop a regulation defining what constitutes a “substance abusing licensee.”
- Identify which of the Uniform Standards are mandatory, discretionary, and administrative.

This memorandum was added to the rulemaking record and made available to the public at the time the fourth Modified Text was noticed.

Local Mandate

A mandate is not imposed on local agencies or school districts.

Small Business Impact

This action will not have a significant adverse economic impact on small businesses.

The anticipated benefit of this regulatory proposal is a uniform and consistent disciplinary process and to ensure uniformity among the standards established by the SACC for the healing arts licensing boards under the DCA that further protects consumers of psychological services.

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulation or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Objections or Recommendations/Responses

45-Day Comment Period: The Board did not receive any comments regarding the proposed regulatory action during the 45-day notice period.

15-Day Notice of Modified Text: The Board did not receive any comments regarding the proposed regulatory action during the first 15-Day Notice of Modified Text.

Second 15-Day Notice of Modified Text: The Board did not receive any comments regarding the proposed regulatory action during the second 15-Day Notice of Modified Text.

Third 15-Day Notice of Modified Text: The Board did receive one comment during the third 15-Day Notice of Modified Text, which the Board determined was not related to the proposed regulatory action.

Fourth 15-Day Notice of Modified Text: The Board did not receive any comments regarding the proposed regulatory action during the fourth 15-Day Notice of Modified Text.