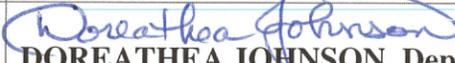




MEMORANDUM

DATE	February 11, 2016
TO	HEALING ARTS BOARDS Executive Officers, Assistant Executive Officers Board Presidents and Vice Presidents
FROM	 DOREATHEA JOHNSON, Deputy Director Legal Affairs Division
SUBJECT	Advice Memorandum – Re: SB 1441 Uniform Standards Regarding Substance Abusing Licensees

This memorandum provides additional guidance regarding implementation of the Uniform Standards for Substance Abusing Healing Arts Licensees (Uniform Standards or Standards), promulgated pursuant to Senate Bill No. 1441 (2007-2008 Sess.).

BACKGROUND

In 2008, the Legislature enacted Senate Bill 1441 to address what the Legislature found to be “an increasing problem in the health care professions.” (SB 1441, § 1(a).) Finding that “various health care licensing boards have inconsistent or nonexistent standards that guide the way they deal with substance-abusing licensees” (*id.*, § 1(g)), the Legislature directed the newly-created Substance Abuse Coordination Committee to “formulate uniform and specific standards in [sixteen] areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program.” (Bus. & Prof. Code, § 315(c).)

After SB 1441’s enactment, the Board of Pharmacy requested a formal opinion from the Attorney General regarding the lawfulness of the bill and the scope of Business and Professions (B&P) Code section 315.¹ That opinion addressed four questions raised by the Board of Pharmacy:

1. Is the law that prescribes the development and issuance of uniform standards for healing arts boards to use in dealing with their “substance-abusing licensees” invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the committee charged with formulating the standards?

¹ A copy of the Attorney General’s opinion (AG Opinion) is attached.

2. To be effective, must the uniform standards be adopted as regulations under the Administrative Procedure Act, and, if so, by what entities?
3. May individual healing arts boards adopt regulations defining the term “substance-abusing licensees” for purposes of determining which of their licensees are subject to the uniform standards?
4. Must individual healing arts boards use the uniform standards as written in all cases in which they are found to apply, and, if so, do the boards nonetheless retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases?

The Attorney General summarized her responses to those questions as follows:

1. The law that prescribes the development and issuance of uniform standards for healing arts boards to use in dealing with their “substance-abusing licensees” is not invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the committee charged with formulating the standards.
2. The uniform standards need not be adopted as regulations under the Administrative Procedure Act in order to be effective. Individual healing arts boards may, but are not required to, adopt regulations incorporating the uniform standards for the purpose of administering their own programs.
3. Individual healing arts boards may adopt regulations defining the term “substance-abusing licensees” for purposes of determining which of their licensees are subject to the uniform standards, so long as such regulations are consistent with the legislation directing the formulation and issuance of the uniform standards and reasonably necessary to effectuate the purposes of that legislation.
4. To the extent practicable, individual healing arts boards must use the uniform standards as written in all cases in which they are found to apply, but the boards retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases.

ANALYSIS

This office has thoroughly reviewed the AG Opinion and offers the following guidance to the healing arts boards to implement the Uniform Standards in a manner consistent with B&P Code section 315 and the AG Opinion.

Question No. 1: Question one addresses the legal issue of whether B&P Code section 315 was invalid because it was “void for vagueness” or improperly delegated legislative authority to the Substance Abuse Coordination Committee (Committee). Based on well-established principles, the Attorney General concluded that section 315 is valid (Opn. pp. 6-9), and we do not believe any additional guidance is needed on this question.

Question No. 2: The Attorney General concluded that boards “may, but are not required to, adopt regulations incorporating” the Uniform Standards. (Opn. at pp. 11, 12.) In her view, if a “board wishes to enact regulations governing its own programs—including drug diversion programs—it is up to that board to do so.” (Opn. at p. 12.) This office recommends that each healing arts board, if it hasn’t already done so, formally implement the Standards through regulations adopted pursuant to the Administrative Procedure Act (APA), and incorporate them into the board’s Disciplinary Guidelines. This will ensure that a practitioner is aware of the Uniform Standards, and can access all of the standards relevant to him or her in each board’s regulations.

Question No 3: In response to the question of whether a board may define the term “substance-abusing licensee,” the Attorney General concluded that, yes, a board may. To do so, the board would be required to comply with the APA and “must ensure” the definition is both “consistent with section 315 and reasonably necessary to effectuate” its purposes. (Opn. at p. 12.)

Many of the healing arts boards have already adopted regulations defining the term “substance-abusing licensee” for their specific universe of licensees, or the process for making that determination. Others are in the process of defining the term. If your board has not yet done so, we suggest you work with your assigned legal counsel to develop a regulation defining what constitutes a “substance abusing licensee.”

Question No 4: In the final question, the Attorney General addressed whether the boards must use the standards as written in all cases in which they are found to apply, and whether the boards retain discretion to apply the Uniform Standards in individual cases. The Attorney General opined that the “Boards are not to ignore, discard, or disregard them; they are to ‘use’ them.” (Opn. at p. 13.) Thus, the Attorney General advised that *individual healing arts boards must use the uniform standards as written in all cases in which they are found to apply, to the extent practicable.* (Opn. at p. 14 [emphasis added].) The Attorney General further concluded that because individual boards have independent authority over their licensees, they retain *reasonable* discretion over how to apply the uniform standards to individual cases, [but] boards “should not depart from [the Uniform Standards] without some *substantial* reason for doing so.” (Opn. at p. 13 [emphasis added].)

We understand there may be some confusion regarding whether the AG Opinion means the boards have unlimited discretion to reject or modify a Standard that would otherwise be applicable because, for example, the board dislikes or disagrees with the Standard. We read the AG Opinion and B&P Code section 315 as providing some discretion in several situations in which independent judgment is necessarily required, such as: determining whether or not a licensee is a substance-abusing licensee; deciding whether a discretionary Standard should be applied to a particular licensee; deciding—where a Standard provides a range of options—the

extent to which that Standard will apply to a particular licensee;² and to determine whether some Standards should be applied in a case that involves substance *use*, but does not involve a substance *abusing* licensee. But we do not read the AG Opinion and Business and Professions Code section 315 as authorizing a board to “ignore, discard or disregard” a mandatory Standard. (Bus. & Prof. Code, § 315, subd. (c) [“each healing arts board shall use [the Uniform Standards] in dealing with substance-abusing licensees”]; Opn. at p. 13.)

Initially a board exercises its discretion by deciding whether or not the licensee is a “substance-abusing licensee,” as the term is defined by the board. If a licensee is determined to be a substance-abusing licensee, the next question is whether one or more of the Uniform Standards must be applied in a particular case.

Business and Professions Code section 315 requires the healing arts boards to “use” the Committee’s uniform standards, but the law does not control a board’s discretion to determine whether all of the standards must be used in every case involving a substance abusing licensee. The opinion’s use of “*to the extent practicable*” must be read in the context of the language of the Standards themselves, and based upon the facts of a particular case. For example, some Standards use the phrase “*if ordered (or determined)*,” which reflects that the boards have discretion to choose whether or not to include a term incorporating that Standard in a decision and probationary order. If, on the other hand, the Standard is written in mandatory terms, it must be used. As discussed below, however, once a Uniform Standard is applied, it must be applied as written, without modification—there is no discretion to “ignore, discard or disregard” a Standard. (Opn. at p. 13.)

The following chart outlines which Standards this office considers to be mandatory (must be used in a disciplinary order against a substance-abusing licensee), discretionary (ordered if the board exercises its discretion to impose it), or administrative (not applicable to be included as terms and conditions of probation):

STANDARD	MANDATORY, DISCRETIONARY, or ADMINISTRATIVE
Standard #1 – clinical diagnostic evaluation	Discretionary. IF ordered, however, a cease practice order is mandatory (Standard # 2), as well as a diagnostic report
Standard # 2 – practice restrictions	Mandatory IF a clinical diagnostic evaluation (Standard #1) is ordered
Standard # 3 – names and addresses and	Mandatory

² Standard Nos. 4 and 5, for example, provide a range of drug/alcohol tests and group meeting attendance to be imposed, and under Standard 10 a board can decide to impose additional consequences for a “major violation.”

consent to communicate with employer	
Standard # 4 – drug and alcohol testing	Mandatory
Standard # 5 – group support meetings	Discretionary
Standard # 6 – inpatient or outpatient treatment	Discretionary
Standard # 7 – worksite monitors	Discretionary
Standard # 8 – cease practice order for positive test	Mandatory
Standard # 9 – consequences for major violation for positive test	Mandatory – use of a controlled substance is deemed a major violation that is subject to the consequences specified in Standard #10

Standard # 10 – definitions of and consequences for major and minor violations	Discretionary/Administrative. Although may be reflected in disciplinary guidelines in conjunction with #9 as to what actions the board may take, the standard is not included in a disciplinary order
Standard # 11 – criteria for petitioning for modification	Administrative/Mandatory
Standard # 12 – criteria for petitioning for reinstatement	Administrative/Mandatory
Standard # 13 – criteria for specimen collection and other providers; vendor requirement	Administrative/Discretionary
Standard # 14 – board disclosure of information to the public	Administrative/Discretionary
Standard # 15 – criteria for audits of vendors	Administrative/Discretionary
Standard # 16 – criteria for board reports to the Department and Legislature	Administrative/Mandatory

A board's discretion may be exercised where the language of the Standard itself authorizes the board to determine *whether* it should apply. In our view, it is only those Standards which, by their terms, are discretionary where the boards may decide whether or not a Standard should be applied in cases involving a substance-abusing licensee. But once a Standard is ordered in a particular case, it must be adhered to, without modification, unless the board has good cause to depart from its terms.

For example, if a board decides a substance-abusing licensee's probationary terms require a worksite monitor (Standard No. 7—a discretionary standard that a board may decide whether or not to include in a disciplinary order), then the Standard's criteria must be adhered to. In other words, once the board decides to include the worksite monitor standard as a term and condition of the licensee's probation, it cannot modify the standard to allow any part to be less stringent, such as allowing a family member to act as the monitor (which the Standard prohibits).

Lastly, where a licensee's conduct and resulting discipline are rooted in substance use or abuse but he or she is not found to be a "substance-abusing licensee," (e.g., the licensee has either submitted sufficient evidence to overcome that finding or a clinical diagnostic evaluator's report does not conclude that the licensee has a substance abuse problem) while not mandated, many of the terms and conditions in the Uniform Standards *may still* be imposed if they are relevant to the facts of that case. Under these circumstances, the Standards may be modified so that a licensee's probationary terms and conditions can be shaped for that individual case. For example, a board may decide that a certain licensee had previously been a substance abuser but is not currently a substance-abusing licensee within the meaning of the board's regulation. In such a case, using the Standards is not mandated, and the board retains the discretion to order those terms and conditions that best honor its consumer protection mission. For example, it may order drug and alcohol testing, but tailor the frequency required by Standard No. 4 to individual circumstances.

CONCLUSION

We hope this information is helpful in guiding your board's implementation of the Uniform Standards. Please work with your assigned counsel if you have any questions and in developing the definition of "substance abusing licensee" and any other necessary regulations.

cc: Awet Kidane, Director
Tracy Rhine, Chief Deputy Director
Legal Affairs Division Attorneys