

BOARD OF PSYCHOLOGY
FINAL STATEMENT OF REASONS

Hearing Date: April 8, 2020

Subject Matter of Proposed Regulations: AB 2138 – Substantial Relationship Criteria, Rehabilitation Criteria

Section(s) Affected:

Amend 16 CCR, § 1394
Amend 16 CCR, § 1395
Amend 16 CCR, § 1395.1

Updated Information

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

This package was in the notice register on February 14, 2020. The 45-day comment period began on February 14, 2020, and was scheduled to end on March 30, 2020. As not all parties were properly noticed, the Board of Psychology (Board) re-noticed the package on February 21, 2020, and extended the comment period through April 7, 2020.

The Board issued a 15-day notice of modified text on March 24, 2020. The comment period ended concurrently with the 45-day extended comment period on April 7, 2020.

During the 45-day extended comment period, the Board received comments on February 21, 2020, February 26, 2020, April 3, 2020, and April 7, 2020. Because two of the comments were received after the issuance of the 15-day notice of modified text, and because it was not clear to what language the comments were addressed, the two commenters were given copies of the modified text on April 8, 2020, and given until April 23, 2020, to provide comment on the modified text. No additional comments were received.

The regulatory hearing was held on April 8, 2020. No comments were received at the hearing.

The Board considered the four sets of comments at its meeting on April 17, 2020, and voted to adopt the regulation as noticed in the 15-day notice of modified text.

Amend 16 CCR § 1394

Existing regulation 16 CCR §1394 specifies for the purposes of denial, suspension, or revocation of a license or registration the criteria for determining whether a crime, professional misconduct, or an act is substantially related to the practice of psychology.

The following updates to the initial statement of reasons are made:

Subdivision (a) was amended to include references to sections 2960 and 2960.6 of the Business and Professions Code. Section 2960 allows the Board to deny an application, place a license/registration on probation, or suspend or revoke a license/registration if the licensee/registrant is guilty of unprofessional conduct as defined by 2960(a)-(r). Section 2960.6 allows the Board to deny a license/registration or suspend/revoke a license/registration for an administrative action taken against a psychologist or healing arts license in another state.

Adding these sections clarifies that all bases for denial or revocation/suspension listed in 1394(a) will be evaluated in the same way as to whether it is substantially related to the practice of psychology.

Subdivision (b)(3) was amended to clarify that the Board will consider the nature and duties of the profession for which the individual is seeking licensure/registration or is licensed/registered, rather than the nature and duties of the individual licensee/registrant.

Lastly, the references were amended to include the additional sections referenced above.

Amend 16 CCR § 1395

Existing regulation 16 CCR § 1395 specifies rehabilitation criteria for denials and reinstatements.

The following updates to the initial statement of reasons are made:

The introductory sentence was amended to add references to sections 141, 2960 and 2960.6 of the Business and Professions Code. Section 141 allows the Board to discipline a licensee/registrant if the licensee/registrant was disciplined by another state, the federal government, or another country for any act that is substantially related to the practice of psychology. Section 2960 allows the Board to deny an application, place a license/registration on probation, or suspend or revoke a license/registration if the licensee/registrant is guilty of unprofessional conduct as defined by 2960(a)-(r). Section 2960.6 allows the Board to deny, suspend, or revoke a license based upon a disciplinary action taken by another state or country.

In addition, the word “was” was replaced with “has been” for ease of reading in subdivision (a). In (a)(1), “gravity” replaced “severity” as a better reflection of the

criterion to indicate that the seriousness of the crime is considered, as opposed to the nature of the harm caused, which is what “severity” implies.

Subdivision (b) was amended for clarity to add professional misconduct or unprofessional conduct under 2960 or 2960.6 as the bases for denials or the revocation or surrender prior to a reinstatement, rather than just refer to a denial/surrender /revocation that was **not** based upon a conviction.

Subdivision (b)(1) was amended for consistency with (b) to include references to sections 141, 2960, and 2960.6 of the Business and Professions Code.

These sections were added to § 1395 to clarify that the criterion will be an evaluation of subsequent actions that could also be bases for denial or revocation/suspension as described above.

Lastly, the reference section was amended to include the additional sections referenced above.

Amend 16 CCR § 1395.1

Existing regulation 16 CCR § 1395.1 specifies the rehabilitation criteria when considering a suspension or revocation of a license.

The following updates to the initial statement of reasons are made:

In subdivision (a), the word “severity” was replaced with “gravity” as a better reflection of that criterion to indicate that the seriousness of the crime is considered, as opposed to the nature of the harm caused, which is what “severity” implies.

Subdivision (b) was amended to include references to professional misconduct and unprofessional conduct under sections 2960 and 2960.6 of the Business and Professions Code.

These sections were added for clarity to refer to the bases of the Board’s action, rather than just refer to a suspension or revocation that was not based on a conviction.

Subdivision (b)(1) was amended to specifically indicate that the “total criminal record” that the Board will take into consideration includes the nature and gravity of the acts that underlie the discipline or enforcement action.

Local Mandate

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

Small Business Impact

The Board has determined that the proposed regulations may affect small businesses. It may increase the ability of some individuals with past convictions or disciplinary action to obtain a Board license where they previously could not. Having more licensees increases the pool of hireable candidates for small businesses looking to hire licensed mental health professionals. In addition, the proposed regulations may affect small businesses, who wish to hire or contract with registrants of the Board who need to obtain Supervised Professional Experience for licensure. The effect would be a potentially greater pool of licensees and registrants from which to hire.

Economic Impact

To the extent license applicants and licensees were convicted of a crime or were previously disciplined, the proposed regulations could impact individual licensees by authorizing individuals with criminal convictions to obtain licensure by the Board, if they have met the rehabilitative criteria, and the criminal convictions are substantially related, as established in this regulatory proposal.

However, because the Board historically denies a minimal number (zero to four) initial license applications per year, as specified, the Board does not anticipate an increase in the number of new initial licensees resulting from the proposed regulations.

Fiscal Impact

The Board anticipates increased costs to the state as a result of adopting and amending the sections identified in this regulatory proposal. By further defining the substantial relationship and rehabilitation criteria for criminal convictions, Board staff may see increased workload to research convictions and to substantiate rehabilitation has been achieved. Any workload and costs are anticipated to be minor and absorbable within existing resources.

Because the Board historically denies a minimal number (zero to four) of initial license applications per year, no increase in the number of initial applications approved per year is anticipated. As a result, the proposed regulations are not anticipated to increase licensing and/or enforcement costs related to any expansion of the licensee population.

Consideration of Alternatives

Any alternatives raised in the comments were rejected for the reasons described in the responses below. No alternatives identified and rejected below would have been more effective in carrying out the purpose.

Objections or Recommendations/Responses to Comments

During the 45-day public comment period from February 14, 2020, to March 30, 2020, which was then extended to April 7, 2020, the board received several comments. All comments were provided in the meeting materials for the April 17, 2020, Board meeting, and were reviewed and considered by the Board. After consideration of the comments, the Board adopted the text as noticed in the 15-day Notice of Modified Text.

Commenter	Comment	Board Determination	Rationale
Richard Tingey	<p>Commenter agrees with the changes, except for the phrase “conviction or act.” He agrees with taking action based on a conviction, but the term “act” in several places lacks any reference to substantiated fact. He suggests something like “substantiated, proven, verified, confirmed... act;” and that it is included somewhere in the regulation, if not already present, what criteria is used to confirm that the alleged act was substantiated, proven, etc.</p>	Reject	<p>The Board can only take action to discipline a license on any grounds that may be a basis for discipline if the licensee is guilty of unprofessional conduct (B&P Code section 2960). The board carries the burden of establishing the violations by clear and convincing evidence (<i>Ettinger v. Board of Medical Quality Assurance</i> (1982) 135 Cal.App.3d 853, 856). Because the law already requires that violations be proven at hearing or admitted (usually in a stipulated settlement), the suggested amendments are not necessary.</p>
Amy Wytiaz	<p>The proposed changes aren’t very clear in terms of whether the BOP intends to make it easier for people with histories of these to get/remain licensed or if BOP is becoming more rigid to exclude these people.</p>	Reject	<p>The Board’s intent is to implement the provisions of AB 2138. The intent of the changes is articulated in the legislative history and is outside the control of the Board.</p>
	<p>Considering the field of psychology is based upon the assumption people can be “rehabilitated,” commenter would be concerned if the BOP decided to make it harder for such people to be</p>	Reject	<p>With respect to the substantial relationship criteria, the Board seeks clarity by including those acts that, if proven, that Board has determined would impact a licensee’s</p>

	<p>“rehabilitated” to practice. Commenter personally had encounters with substance abuse as a teen, which led to grossly-inflated criminal charges. Commenter is concerned about people charged with drug-related felonies/offenses being rejected because the BOP might be forced to reject a specific category.</p>		<p>or applicant’s ability to practice safely with the public. There is always the opportunity to establish rehabilitation. This implements the legislative intent to balance the opportunity for successful rehabilitation against the safety of clients.</p>
	<p>Commenter states that the psychology field prospers from diversity. Psychologists who have “lived experiences” of addiction, the legal system and related behavior/issues can become powerful providers due to such experiences. The field & patients lose out if the BOP decides to eliminate these people from licensure.</p>	Reject	<p>Board’s intent is to implement AB 2138, which requires the Board to consider as part of its rehabilitation criteria whether a person who has been convicted of a crime has completed their criminal sentence without a violation of parole or probation.</p>
	<p>Commenter is not sure about the “7-year rule.” Who’s to say some psychologists might not be able to perform ethically 1-2-3 years after a DUI or something similar? Does the BOP have the manpower and wisdom to decide?</p>	Reject	<p>With respect to the substantial relationship criteria, the Board seeks clarity by including those acts that, if proven, the Board has determined would impact a licensee’s or applicant’s ability to practice safely with the public. There is always the opportunity to establish rehabilitation. The Board is implementing the provisions of AB 2138. The statute generally permits the Board to consider denying a license based upon convictions that occurred within the last 7 years, and where the Board considers whether the facts make denial of a license</p>

			appropriate. This is not mandating a denial.
	<p>Commenter supports the BOP putting measures in place to ensure the safety of the public. Rather than rigid or categorical disqualifying rules, she would like the BOP to consider using its vast field of SUD (substance use disorder), forensic & general psychologists to review such cases.</p>	Reject	<p>To the extent that the comment suggests that there should not be any substantially related conduct spelled out, the Board believes that including some acts that it considers substantially related to the practice of psychology adds clarity.</p> <p>To the extent that the comment suggests using SUD (substance use disorder), forensic & general psychologists to review such cases, the Board determines how to review each file that may indicate a basis for denial on a case by case basis, depending on the information gathered in connection with the application, and would not be appropriate to include in a regulation.</p>
<p>Vinuta Naik, Community Legal Services in East Palo Alto (CLSEPA);</p> <p>Faride Perez-Aucar, Root & Rebound and other organizations</p>	<p>Section 1394(c) lists certain convictions and defines them as substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of AB 2138 Business and Professions Code section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis. Moreover, section 1394(c) fails to note that criminal history that resulted in the applicant obtaining a Certificate of Rehabilitation, pardon,</p>	Reject	<p>Section 1394 does not need to include the time periods already set out in statute, as well as whether or not the conviction has been dismissed, pardoned, etc., as this would be duplicative of the statute.</p>

	dismissal per Penal Code section 1203.4 et seq., or an arrest that resulted in a disposition other than a conviction shall not be denied a license.		
	The proposed regulations should include the 7-year washout period for consideration of convictions or discipline which are not statutorily considered serious felonies under Penal Code. 1192.7.	Reject	The 7-year washout period does not need to be included as it will be duplicative of the statute.
	The proposed regulations should provide that a person with a criminal history shall not be denied a license if the applicant has obtained a Certificate of Rehabilitation, dismissal per Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, or an arrest which led to an infraction/citation or a disposition other than a conviction, or juvenile adjudication.	Reject	This language does not need to be included as it will be duplicative of the statute.
	The proposed regulations fail to include that the board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history.	Reject	This language does not need to be included as it will be duplicative of the statute.
	The proposed regulations fail to include that the board shall	Reject	The process is already set forth in BPC 485, also

	<p>notify the applicant in writing if the applicant is denied or disqualified from licensure. The Board must provide procedures describing the process for the applicant to challenge the decision or to request re-consideration, that the applicant has a right to appeal the board's decision, and the process of requesting a complete conviction history.</p>		<p>480(f)(3). This language does not need to be included as it would duplicate those statutes.</p>
	<p>The intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. Merely looking to law enforcement will not adequately show how an applicant would do on the job. Rather, rehabilitation can and does take many forms that extend beyond mere law enforcement supervision. To better define rehabilitation, commenter recommends that the Board provide examples of evidence of mitigating circumstances and rehabilitation efforts to assist both the Board and licensing applicants.</p>	<p>Reject</p>	<p>The Board considers all documentation that the applicant or licensee chooses to provide to demonstrate rehabilitation. The Board does not want to limit what it will accept regarding rehabilitation, as it is dependent on how the applicant or licensee chooses to rehabilitate themselves. In addition, it is misleading to say any listed criteria in and of itself demonstrates rehabilitation as it must be evaluated in the context of all the evidence.</p>
	<p>The proposed regulations fail to include any mention of requirements to obtain statistical information on the number of applicants with a criminal record who apply and receive notice of denial/disqualification of licensure, provided evidence of mitigation or rehabilitation, the final disposition of the application, and demographic information.</p>	<p>Reject</p>	<p>The reporting requirements already appear in statute and therefore do not need to be repeated in these regulations.</p>

Nonduplication Statement - 1 CCR § 12

The proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as “authority” and “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).

Request for Early Effective Date

As the provisions of AB 2138 go into effect July 1, 2020, the Bureau requests an effective date of July 1, 2020 to coincide with statute or as soon thereafter as approved.