

**BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing Date: Wednesday, April 1, 2020

Subject Matter of Proposed Regulations: Substantial Relationship Criteria; Rehabilitation Criteria for Denials or Reinstatements; Rehabilitation Criteria for Suspension or Revocation.

Section(s) Affected: Title 16, California Code of Regulations (CCR) amend Sections 1394, 1395, and 1395.1.

Introduction

The California Board of Psychology (Board) protects consumers of psychological services by licensing psychologists, regulating the practice of psychology, and supporting the evolution of the profession. To accomplish this, the Board regulates licensed psychologists, psychological assistants, and registered psychologists.

The Board is seeking to make conforming changes as required by the passage of AB 2138 (Chiu, Chapter 995, Statutes of 2018), hereafter referenced as AB 2138. AB 2138 requires the Board to amend its existing regulations governing substantially-related crimes or acts as well as rehabilitation criteria by July 1, 2020.

At the Board's February 7-8, 2019, meeting, this regulatory proposal was presented to the Board for its review and approval (See Underlying Data, February 2019 Board Meeting Materials: Agenda Item 26 Review and Consider Draft Language to Initiate the Rulemaking Process to Implement AB 2138 Regarding Licensing Boards: Denial of Application: Revocation or Suspension of Licensure: Criminal Conviction). The Board approved the proposed language and delegated authority to its Executive Officer to make any technical, non-substantive changes, if necessary.

As required under AB 2138, the Board proposes to amend California Code of Regulations, title 16, sections 1394, 1395, and 1395.1 to adhere to these mandates and revise its substantial relationship criteria and rehabilitation criteria for denials and reinstatements, and suspension and revocations.

Specific Purpose of each Adoption, Amendment or Repeal:

Problem: The sections of the regulations affected are not in compliance with the required changes in AB 2138, which become operative July 1, 2020. AB 2138 replaces Business and Professions Code (BPC) Sections 481, which requires the Board to amend its criteria when considering the denial, suspension, or revocation of a license to

determine whether a crime is substantially related to the qualifications, functions, or duties of the practice of psychology.¹ Further, BPC Section 493 requires the Board to determine whether a crime is substantially related to the qualifications, functions, or duties of the profession it regulates by using criteria including the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of the profession. The substantial relationship requirement stems from the due process principle that a statute, constitutionally, can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice (*Arneson v. Fox* (1980) 28 Cal.3d 440, 448; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135).

In addition, BPC Section 482 requires the Board to amend its criteria for evaluating the rehabilitation of a person when considering the denial, suspension, or revocation of a license. In the context of professional licensing decisions, the courts have said that, “[r]ehabilitation . . . is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058, internal punctuation omitted.) Lastly, the Legislature’s clear intent in enacting AB 2138 was “to reduce licensing and employment barriers for people who are rehabilitated.” (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

Anticipated Benefits: The changes to the sections affected bring the Board into compliance with the upcoming changes to the law and, to the extent possible, maintains adequate consumer protections by ensuring Board licensees are fit to practice independently with potentially vulnerable consumer populations.

Amend Section 1394 – Substantial Relationship Criteria

Factual Basis/Rationale: Beginning July 1, 2020, the Board will be authorized to deny a license when an applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of the practice of psychology and the conviction was within the past seven (7) years, or the applicant had been incarcerated within the preceding seven years. The Board may not deny a license to an applicant based upon a conviction, or due to the acts underlying the conviction, if the applicant has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged.

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¹ Although AB 2138 applies to all the licenses regulated by the Business & Professions Code, this package will only refer to the practice of psychology, which is the profession regulated by the Board.

1394(a):

Purpose: Subdivision (a) is amended to broaden the application of the substantial relationship criteria to when a license is denied or disciplined, under section 141 of the California Business and Professions Code (BPC), or due to professional misconduct in addition to the bases already included. It also amends the language to be more gender neutral.

Factual Basis/Rationale: BPC section 141 authorizes the Board to discipline a license on the basis of substantially related discipline by another jurisdiction. As added by AB 2138, BPC section 480 also authorizes the Board to deny an application for licensure on the basis of substantially related formal discipline based on professional misconduct by a licensing Board in or outside of California. Therefore, this amendment adds those provisions to the Board's substantial relationship criteria regulation. These additions will provide the notice to applicants and licensees that discipline in an out-of-state jurisdiction and professional misconduct are grounds for license denial, suspension, or revocation, and how the substantial relationship criteria will be applied in those cases. The amendment also consolidates, into one regulation, the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

1394(b):

Purpose: Subdivision (b) specifies three criteria that the Board must consider when evaluating the denial or discipline of a license, under subdivision (a), whether a crime is substantially related to the practice of psychology: (1) The nature and gravity of the offense; (2) The number of years elapsed since the date of the offense; and, (3) The nature and duties of the licensee or registrant.

Factual Basis/Rationale: As added by AB 2138, BPC section 481 mandates that the board develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the practice of psychology. BPC 481(b), as added by AB 2138, mandates that that criteria include the nature and gravity of the offense; the number of years elapsed since the date of the offense; and, the nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed. Additionally, BPC section 2960(a) authorizes the Board to discipline a license on the basis of the conviction of a crime substantially related to the qualifications, functions or duties of a psychologist or psychological assistant. Therefore, subdivision (b) is added to include these criteria so that all the considerations regarding substantial relationship are in one place. This adds to the transparency of the process and helps with consistency of the application of all the criteria that the Board must consider, since there is one regulation

for review and consideration by those involved in the licensing and disciplinary processes, including the Board staff, the respondent, the Deputy Attorney General, and the Administrative Law Judge.

1394(c):

Purpose: As added by AB 2138, BPC section 481 mandates that the board develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the practice of psychology. This section is amended to add specific crimes, professional misconduct, or acts to those already named, as those that are defined as substantially related for purposes of denial, suspension or revocation of a license or registration. Specifically, the Board has determined that the conduct of or convictions for child abuse ((c)(3)), lewd conduct or sexual impropriety ((c)(5)), assault, battery, or other violence ((c)(6)), use of drugs or alcohol to an extent or in a manner dangerous to the individual or the public ((c)(7)), harassment, trespass, or stalking ((c)(8)) of this section are substantially related to the nature and duties of the practice of psychology, and demonstrate a present or potential lack of fitness to ethically and safely practice psychology with clients.

Factual Basis/Rationale: As added by AB 2138, BPC section 481 mandates that the board develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the practice of psychology. BPC section 141 authorizes the Board to discipline a license on the basis of substantially related discipline by another jurisdiction. As added by AB 2138, BPC section 480 also authorizes the Board to deny an application for licensure on the basis of substantially related formal discipline based on professional misconduct by a licensing Board in or outside of California. By adding specific conduct to the list of what is already defined as substantially related, the Board does not have to prove, in every licensing or disciplinary case, whether that conduct is substantially related.

All the conduct specified -- child abuse; lewd conduct or sexual impropriety; assault, battery, or other violence; use of drugs or alcohol to an extent or in a manner dangerous to the individual or the public; harassment, trespass, or stalking – is substantially related to the practice of psychology and demonstrates an actual or potential lack of fitness to practicing safely with the public. Pursuant to BPC Section 2936, the Board establishes the “Ethical Principles of Psychologists and Code of Conduct” (Ethics Code), published by the American Psychological Association (APA), as its standards of ethical conduct relating to the practice of psychology for both licensing and enforcement purposes. This Ethics Code includes a Preamble, five General Principles (A-E) and specific Ethical Standards. Any of this conduct clearly violates the following General Principle:

Principle A: Beneficence and Nonmaleficence

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work.

All the conduct added demonstrates either a capacity for violence (child abuse, assault, battery, or other violence), a disrespect of personal boundaries in a very inappropriate or dangerous way (child abuse, lewd conduct or sexual impropriety, harassment, trespass or stalking), or comporting oneself in a way as to be unable to practice safely with the public (dangerous use of drugs or alcohol). The consumers of psychological services are often very vulnerable populations who are seeking those services, in part, because of their vulnerabilities. They may share intimate details of their lives, increasing their vulnerability. All of this conduct is inimical to the principles guiding the profession and how a licensee is expected to treat those consumers. All of this conduct is of the type that would very likely impact how a licensee treats consumers of psychological services, and be particularly harmful to vulnerable consumers, making the conduct substantially related to the practice of psychology and appropriate for inclusion.

While the General Principles are aspirational goals to guide psychologists toward the highest ideals of psychology, the Preamble and General Principles are not themselves enforceable rules. The Ethical Standards set forth enforceable rules for conduct as psychologists. Additionally, conviction of the above crimes may violate one or more of the following Ethical Standards:

- 2.06 Personal Problems and Conflicts;
- 3.02 Sexual Harassment;
- 3.03 Other Harassment;
- 3.04 Avoiding Harm;
- 3.08 Exploitative Relationships;
- 7.07 Sexual Relationships with Students and Supervisees;
- 10.05 Sexual Intimacies with Current Therapy Clients/Patients;
- 10.06 Sexual Intimacies with Relatives or Significant Others of Current Therapy Clients/Patients;

- 10.07 Therapy with Former Sexual Partners; and
- 10.08 Sexual Intimacies with Former Therapy Clients/Patients.

Lastly, subdivision (c)(4) is added because BPC Section 2964.3 makes persons convicted of a crime requiring registration as a sex offender pursuant to Penal Code Section 290 ineligible for licensure as a psychologist. Accordingly, and for all the same reasons cited above, it is substantially related to the practice of psychology.

Amend Section 1395 – Rehabilitation Criteria for Denials or Reinstatements

Factual Basis/Rationale: Existing law requires the Board to develop criteria to evaluate the rehabilitation of an applicant or petitioner when considering denying or disciplining a license (BPC § 482(a)), and to consider evidence of rehabilitation that is provided by the applicant or licensee (BPC § 482(b)).

As added by AB 2138, BPC Section 480 will authorize the Board to deny a license based on the conviction of a crime only where the conviction was within the last 7 years, is substantially related to the practice of psychology, and the applicant failed to make a showing of rehabilitation pursuant to BPC Section 482. (BPC § 480(b).) As added by AB 2138, BPC section 493 prohibits the Board from categorically barring an applicant based solely upon the type of conviction without considering evidence of rehabilitation. Also as added by AB 2138, BPC section 482 requires the Board to develop criteria that will be used to determine whether an applicant made a showing of rehabilitation. In addition, that Board shall consider whether an applicant or licensee has made a showing of rehabilitation if either they have completed any criminal sentence at issue without a violation of parole or probation, or the board finds rehabilitation after applying its criteria.

Section 1395:

Purpose: The introductory paragraph was amended to delete a reference to section 11522 of the Government Code and include instead section 2962 of the BPC when referring to the section under which a petitioner would be applying for reinstatement or modification of penalty. “Modification of penalty” was also added as a type of petition to which the rehabilitation criteria would be applied, along with a petition for reinstatement. Along with other grammatical changes, the language was amended to refer to present fitness for licensure, rather than eligibility.

Factual Basis/Rationale: BPC section 2962 is within the Board’s practice act and is specific to the terms required to be met in order to petition this Board to reinstate a license or modify a penalty imposed on a license. Therefore, it is the more appropriate reference than to the general provisions of the Administrative Procedure Act within the Government Code. It was necessary to add “modification of penalty” because

rehabilitation criteria are relevant to this kind of petition filed before the Board, as well as for petitions for reinstatement (and denials). The term “present fitness for a license” is more appropriate than “present eligibility for a license,” since eligibility is more commonly used to describe whether a person has met the minimum qualification for licensure. Fitness is the much better term to describe what the Board is evaluating – i.e., whether a person who meets the minimum qualifications for licensure is fit to practice.

Section 1395(a):

Purpose: Subdivision (a) was added to specify when the basis for the denial, or the surrender or revocation was due in part to a conviction, the applicant or petitioner must have completed the applicable criminal sentence without a violation of parole or probation in order for the Board to consider that the person has made a showing of rehabilitation. Further, that determination requires the Board to consider the criteria in (a)(1) – (a)(5), where available, to find a showing of rehabilitation, specifically: the nature and severity of the crime(s); the reason for granting and the length(s) of the applicable parole or probation period(s); the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; the terms or conditions of parole or probation and the extent to which they bear on the applicant’s or petitioner’s rehabilitation; and the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

Factual Basis/Rationale: The language that the Board shall consider whether the applicant or petitioner made a showing of rehabilitation if the person completed the criminal sentence without a violation of parole or probation has been added in order to reflect the requirement added by AB 2138. Only if the person completed the criminal sentence without a violation of parole or probation will the Board consider whether the person is rehabilitated under this subdivision. In addition, as part of that consideration, the Board has added the additional criteria. The necessity for the specified criteria in subdivision (a) is because the Board cannot reliably determine whether someone has been rehabilitated based upon the bare fact of completion of parole or probation without violation. Historically, courts have rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Additionally, there are many factors that can impact someone’s sentence and terms of probation or parole. Some of

these include variations in county to county sentencing guidelines, county to county differences in the terms and conditions of probation and parole (including whether the terms included meaningful rehabilitation, such as mandatory attendance at Alcoholics Anonymous meetings for the underlying issues that caused the behavior), and length of parole or probation may have been modified due to external pressures and factors.

The additional criteria in (a) allow the Board to make a more accurate determination as to whether the applicant or petitioner has demonstrated rehabilitation and is fit and safe to practice independently when considering the completion of parole or probation, even without violation. Specifically: (1) the nature and severity of the crime(s); (2) The reason for granting and the length(s) of the applicable parole or probation period(s); (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's or petitioner's rehabilitation; and (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. Each of these criteria is narrow in scope and would provide to the Board information specific and relevant to the applicant's criminal sentence and terms or conditions of parole or probation.

Sub (a)(1): The Board will consider the nature and gravity of the crime because this is the offense against which the applicant's rehabilitative efforts will be evaluated. The removal of the reference to "acts" was necessary as the acts underlying the conviction can no longer be the basis of a denial. "[U]nder consideration as grounds for denial" was deleted to make more sense since the rehabilitation criteria are only considered after there has been a basis for denial, or the license was previously revoked.

Sub (a)(2): The Board will consider the reason for granting and the length of the applicable parole or probation period because the basis for probation or parole (e.g., good behavior vs. prison overcrowding) and the length of time that the applicant served probation or parole, without a violation, is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period that he is once again fit to practice"].)

Sub (a)(3): The Board will consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the applicant or petitioner is sufficiently rehabilitated.

Sub (a)(4): The Board will consider the terms or conditions of parole or probation and the extent to which they bear on the applicant's or petitioner's rehabilitation because the

actual parole or probation terms can inform the Board on whether the applicant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous".])

Sub (a)(5): Lastly, the Board will consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification as relevant to the Board's determination. For instance, if correctional authorities removed terms of parole or probation due to the applicant's or petitioner's good behavior, this would bear on the Board's evaluation of the applicant's rehabilitation and willingness to conform to the rules of licensure.

Section 1395(b):

Purpose: Subdivision (b) was added to specify the criteria for evaluating the rehabilitation of the applicant or petitioner when the basis for denial, or the surrender or revocation was not due to a conviction, or when the applicant or petitioner did not establish evidence of rehabilitation under subdivision (a) when the denial, or the surrender or revocation was due, in part, to a conviction. Specifically, these criteria include:

- Evidence of any act(s) committed subsequent to the act(s) or crime(s) that are grounds for denial, or that were grounds for surrender or revocation, which also could be considered as grounds for denial under section 480 of the Code, and the time that has elapsed between them. Most of this is existing language, just adding "grounds for surrender or revocation" to address the fact that these criteria apply to a petitioner for reinstatement or modification of penalty, not just applicants for licensure, and makes other grammatical changes. The language "the time that has elapsed between them," is existing language in subdivision (3).
- The extent to which the applicant or petitioner has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant or petitioner. This is mostly existing language, except for adding "petitioner" to address the fact that these criteria apply to a petitioner for reinstatement or modification of penalty, not just applicants for licensure.
- The criteria in subdivision (a)(1)-(5), as applicable. This is to address that while the applicant or petitioner may not have made a showing of rehabilitation according to subdivision (a), those criteria are still relevant in the overall consideration of rehabilitation.

- Evidence, if any, of rehabilitation submitted by the applicant or petitioner demonstrating that he or she has a mature, measured appreciation of the gravity of the misconduct and remorse for the harm caused, and showing a course of conduct that convinces and assures the Board that the public will be safe if the person is permitted to be licensed or registered to practice psychology. This last criterion, that is now subdivision (b)(4), expands the description of the rehabilitation evidence that may be submitted to clarify and better explain that the Board is looking for both an internal measure of rehabilitation, as well as an external manifestation of it.

Factual Basis/Rationale: The necessity for the changes specified in subdivision (b) is to ensure that all applicants and petitioners before the Board know what the Board finds relevant for them to make a showing of rehabilitation. These criteria apply to, and can be used by, applicants or petitioners who do not fit the narrow criteria in subdivision (a) when: (1) the applicant or petitioner has not completed the criminal sentence at issue without a violation of parole or probation; (2) even if there has no violation of parole or probation, the Board does not find that the applicant or petitioner made a sufficient showing of rehabilitation based on the criteria in subdivision (a); or, (3) the denial or revocation is based on conduct other than a conviction, such as discipline due to professional misconduct in another jurisdiction or under another licensing board's jurisdiction.

Sub (b)(1): The Board will consider any acts committed subsequent to the acts that are grounds for denial, or a previous surrender or revocation, which are also grounds for denial under 480 BPC, and the time between these occurrences. This is necessary because subsequent criminal convictions or acts of professional misconduct provide evidence of a lack of rehabilitation on the part of the applicant or petitioner if they continue to violate the law or ethical and professional standards for psychologists.

Sub (b)(2): The Board already considers the extent to which the applicant or petitioner complied with terms of parole or probation. This addition of "petitioner" adds clarity, as the Board applies this factor to a petitioner for reinstatement as well as an applicant.

Sub (b)(3): The Board will consider the criteria in subdivisions (a)(1) through (a)(5) as relevant in demonstrating rehabilitation, even if they did not independently demonstrate it. Because the criteria are still relevant to the evaluation, it is necessary to be included in (b).

Sub (b)(4): The Board has always considered evidence of rehabilitation submitted by an applicant or petitioner. The added language informs applicants and petitioners how the Board evaluates all the evidence that it has in order to determine whether there has been a sufficient showing of rehabilitation. It also assists the Board in formulating a

decision that contains a defensible assessment of the applicant's or petitioner's ability to practice safely with the public.

Amend Section 1395.1 – Rehabilitation Criteria for Suspensions or Revocations

Factual Basis/Rationale: Existing law requires the Board to develop criteria to evaluate the rehabilitation of a licensee when considering suspending or revoking a license (BPC § 482(a)), and to consider evidence of rehabilitation that is provided by the applicant or licensee (BPC § 482(b)). The Board may consider the circumstances surrounding the commission of a crime to determine whether the crime is substantially related to the practice of psychology, and to determine the appropriate discipline. (BPC § 493(a)).

As added by AB 2138, BPC Section 482 requires the Board to develop criteria to evaluate rehabilitation and to consider whether a licensee has made a showing of rehabilitation if they have either completed any criminal sentence at issue without a violation of parole or probation, or the board finds rehabilitation after applying its criteria.

Section 1395.1:

Purpose: The introductory paragraph was amended to delete the reference to considering rehabilitation if the licensee has been convicted of a crime. Along with other grammatical changes, the language was amended to refer to showing of being “presently fit for a license”, rather than showing eligibility.

Factual Basis/Rationale: Deleting the reference to conviction of a crime clarifies that the criteria apply to any basis for the discipline, as the subdivisions now separate out those criteria. The term “presently fit for a license” is more appropriate than “showing eligibility,” since eligibility is more commonly used to describe whether a person has met the minimum qualification for licensure. Fitness is the much better term to describe what the Board is evaluating – i.e., whether a person who meets the minimum qualifications for licensure is fit to practice.

Section 1395.1(a):

Purpose: Subdivision (a) was added to specify when the basis for the discipline was due to a conviction, the licensee must have completed the applicable criminal sentence without a violation of parole or probation in order for the Board to consider that the person has made a showing of rehabilitation. Further, that determination requires the Board to consider the criteria in (a)(1) – (a)(5), where available, to find a showing of rehabilitation, specifically: the nature and severity of the crime(s); the reason for granting and the length(s) of the applicable parole or probation period(s); the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; the terms or conditions of parole or probation and

the extent to which they bear on the applicant's or petitioner's rehabilitation; and the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

Factual Basis/Rationale: The language that the Board shall consider whether the licensee made a showing of rehabilitation if the licensee completed the criminal sentence without a violation of parole or probation has been added to reflect the requirement added by AB 2138. Only if the licensee completed the criminal sentence without a violation of parole or probation will the Board consider whether the person is rehabilitated under this subdivision. In addition, as part of that consideration, the Board has added the additional criteria. The necessity for the specified criteria in subdivision (a) is because the Board cannot reliably determine whether someone has been rehabilitated based upon the bare fact of completion of parole or probation without violation.

Historically, courts have rejected the view that compliant applicants and licensees are, per se, rehabilitated: "The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense." (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole".]) Additionally, there are many factors which can impact someone's sentence and terms of probation or parole. Some of these include variations in county to county sentencing guidelines, county to county differences in the terms and conditions of probation and parole (including whether the terms included meaningful rehabilitation, such as mandatory attendance at Alcoholics Anonymous meetings for the underlying issues that caused the behavior), and length of parole or probation may have been modified due to external pressures and factors.

The additional criteria in (a) allow the Board to make a more accurate determination as to whether the licensee has demonstrated rehabilitation and is fit and safe to practice independently when considering the completion of parole or probation, even without violation. Specifically: (1) the nature and severity of the crime(s); (2) The reason for granting and the length(s) of the applicable parole or probation period(s); (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) The terms or conditions of parole or probation and the extent to which they bear on the licensees rehabilitation; and (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. Each of these criteria is narrow in scope and would provide to the

Board information specific and relevant to the licensee's criminal sentence and terms or conditions of parole or probation.

Sub (a)(1): The Board will consider the nature and severity of the crime because this is the offense against which the licensee's rehabilitative efforts will be evaluated. The removal of the reference to "acts" was necessary as the acts underlying the conviction can no longer be the basis for discipline.

Sub (a)(2): The Board will consider the reason for granting and the length of the applicable parole or probation period because the basis for probation or parole (e.g., good behavior vs. prison overcrowding) and the length of time that the licensee served probation or parole without a violation is relevant to whether the licensee is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period that he is once again fit to practice"].)

Sub (a)(3): The Board will consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the licensee is sufficiently rehabilitated.

Sub (a)(4): The Board will consider the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation because the actual parole or probation terms can inform the Board on whether the licensee is rehabilitated. For instance, in cases where a licensee was convicted of a crime involving alcohol, probation terms requiring the licensee to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the licensee's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)

Sub (a)(5): Lastly, the Board will consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification as relevant to the Board's determination. For instance, if correctional authorities removed terms of parole or probation due to the licensee's good behavior, this would bear on the Board's evaluation of the licensee's rehabilitation and willingness to conform to the rules of licensure.

Section 1395.1(b):

Purpose: Subdivision (b) was added to specify the criteria for evaluating the rehabilitation of the licensee when the basis for discipline was not due to a conviction, or when the licensee did not establish evidence of rehabilitation under subdivision (a) when the discipline was due, in part, to a conviction. Specifically, these criteria include:

- Total criminal record and/or record of discipline or other enforcement action. This just adds language regarding the record of discipline or other enforcement action to the already existing criterion of total criminal record.
- The time that has elapsed since commission of the act(s) or crime(s). This just amends the existing language to refer to “crimes” instead of “offenses.”
- Whether the licensee or registrant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person. This amends the existing term of “registration holder” to “registrant.”
- If applicable, evidence of dismissal proceedings pursuant to section 1203.4 of the Penal Code. This amends the existing term of “expungement” to “dismissal,” which is a more technically accurate term.
- The criteria in subdivision (a)(1)-(5), as applicable.
- Evidence, if any, of rehabilitation submitted by the licensee or registrant demonstrating that the licensee or registrant has a mature, measured appreciation of the gravity of the misconduct and remorse for the harm caused, and showing a demonstrated course of conduct by the licensee or registrant that convinces and assures the Board that the public will be safe if the person is permitted to be licensed or registered to practice psychology. This last criterion, that is now subdivision (b)(6), expands the description to clarify and better explain what the Board is looking for, as described above.

Factual Basis/Rationale: The necessity for the changes specified in subdivision (b), is to ensure that all licensees brought before the Board know what the Board finds relevant for them to make a showing of rehabilitation. These criteria apply to, and can be used by, licensees who do not fit the narrow criteria in subdivision (a) when: (1) the licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) even if there has been no violation of parole or probation, the Board does not find that the licensee made a sufficient showing of rehabilitation based on the criteria in subdivision (a); or, (3) the denial or revocation is based on conduct other than a conviction, such as discipline due to professional misconduct in another jurisdiction or under another licensing board’s jurisdiction.

Sub (b)(1): The Board will consider, in addition to the licensee’s total criminal record, the record of discipline or other enforcement action. This is relevant to show the licensee’s

overall course of conduct, a pattern and practice of behavior, evidencing whether the licensee is safe to practice with the public.

Sub (b)(2): The amendment to the criterion of the time that has elapsed since the act(s) or crime(s) simply substitutes the term “crime(s)” for “offense(s)” to be more specific, since the Board would be taking action based upon convictions.

Sub (b)(3): The Board will consider the extent to which the licensee or registrant complied to the terms of parole, probation, restitution, or other sanction imposed. The only amendment in this subdivision is to use the term “registrant” rather than “registration holder,” to more accurately reflect the term used for this category.

Sub (b)(4): Penal Code section 1203.4 uses the term “dismissal,” and not “expungement.” Accordingly, this amendment simply reflects to accurate language of the statute that is referenced.

Sub (b)(5): The Board will consider the criteria in subdivisions (a)(1) through (a)(5) as relevant in demonstrating rehabilitation even if they did not independently demonstrate it. The criteria are still relevant to the evaluation for the same reasons described above.

Sub (b)(6): The Board has always considered evidence of rehabilitation submitted by a licensee. The added language informs licensees how the Board evaluates all the evidence that it has in order to determine whether there has been a sufficient showing of rehabilitation. It also assists the Board in formulating a decision that contains a defensible assessment of the licensee’s ability to practice safely with the public.

Underlying Data

- Staff memo to the Board dated February 5, 2019, regarding agenda item number 26, discussed at the February 7-8, 2019, Board meeting.
- Board meeting minutes February 2019
- “Ethical Principles of Psychologists and Code of Conduct” effective January 1, 2017, published by the American Psychological Association

Business Impact This regulation will not have a significant adverse economic impact on businesses. This initial determination is because this regulation does not change the business process for an applicant, petitioner, or licensee affected by these regulations. It is also based on the lack of testimony, at the Board’s meeting, that the regulation would impact businesses. The Board anticipates that the proposed regulations will impact businesses to the extent that individual applicants or licensees are able to be licensed or retain licensure under the proposal. The Board does not know how many applicants will gain or retain licensure, but does not anticipate the number to significantly impact businesses.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It may create and will not eliminate jobs within the State of California because the proposed regulation reduces barriers to licensure for applicants with criminal or disciplinary history. The proposed regulation increases the ability for some individuals to become licensed, which could lead to increased job opportunities for some individuals.
- It will not eliminate existing businesses within the State of California because the proposed regulation does not directly affect those hiring the Board's licensees. However, it may create some new businesses if a person who was previously unable to obtain licensure, due to past convictions or discipline, is now able to become licensed and decides to go into business for themselves.
- It may affect the expansion of businesses currently doing business within the State of California because the proposed regulatory action seeks to broaden the ability of those with a past criminal or disciplinary history to obtain licensure. If more individuals are able to be licensed, businesses will be able to hire more licensees if they desire.
- This regulatory proposal benefits the health and welfare of California residents, because it may increase the ability of some individuals to obtain a Board license where they previously could not, thereby increasing the supply of, and access to, licensed mental health professionals.
- This regulatory proposal does not affect worker safety because it seeks to increase the ability of some individuals to obtain a Board license with past convictions or discipline if they meet certain criteria and show evidence of rehabilitation. It does not require boards to issue a license to those with recent substantially related convictions (as defined by the proposed regulations) or serious felony convictions (as defined by Penal Code section 1192.7).
- This regulatory proposal does not benefit the State's environment because the proposed regulatory action does not involve any topic that induces harm or benefit to the environment in the State.
- This regulatory proposal does not benefit the State's housing crisis because the proposed regulatory action does not involve any topic that induces harm or benefit to the housing crisis in the State.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. The Board of Psychology considered an additional option for section 1394 - Substantial Relationship Criteria. This additional option involved reviewing the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of a licensee or registrant.

While this option meets the letter of the law, the Board felt it does not adequately meet the intent of AB 2138, and the Board preferred to identify specific acts related to the practice of psychology to better inform the public and applicants of the Board's review criteria. Additionally, by specifying certain crimes and acts as substantially related, the Board does not repeatedly waste resources and incur additional costs related to a Deputy Attorney General having to establish on a case by case basis the substantial relationship for each crime or act during each administrative hearing.

2. The Board of Psychology considered an additional option for section 1395(a) - Rehabilitation Criteria for Denials and Reinstatements (due to the conviction of a crime). This additional option involved relying on the completion of parole or probation, without a violation, as the determinant of rehabilitation.

The Board felt this alternative rehabilitation criteria did not ensure the Board that all applicants, licensees, and petitioners were being held to the same rehabilitative criteria due to the external factors that impact sentencing and probation/parole terms in this State.

3. Not adopt the regulation. The Board opted not to pursue this option because pursuant to AB 2138, the Board is mandated to adopt proposed regulations by July 1, 2020.