

**BOARD OF PSYCHOLOGY  
DEPARTMENT OF CONSUMER AFFAIRS**

**INITIAL STATEMENT OF REASONS**

**HEARING DATE:** Wednesday, September 30, 2020

**Subject Matter of Proposed Regulations:**

Standards of Practice for Telehealth

**Section Added:**

Title 16, California Code of Regulations (CCR) Section 1396.8

**Problem Being Addressed:**

The Board of Psychology (Board) regulates licensed psychologists, registered psychological assistants, and registered psychologists, all of whom are entitled to provide psychological services in California. California Business and Professions Code (Code) section 2920.1 states that protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. Sections 2290.5 and 2904.5 of the Code allow licensees of the Board to provide psychological health care services via telehealth. Section 2930 of the Code authorizes the Board to adopt regulations as may be necessary to enable the Board to effectuate the Psychology Licensing Law. Specifically, the Board is proposing to add section 1396.8 to Title 16 of the California Code of Regulations to establish standards of practice for providing services via telehealth by licensed California psychologists and psychology trainees.

In 2011, as part of the Board's Sunset Review, the Legislature asked the Board if legislative or regulatory changes need to be made to address telehealth or online practice. In its report back to the Legislature, the Board stated it was researching and analyzing the use of telehealth as a mode for the practice of psychology and what impact this newer mode of psychotherapy delivery will have on the consumer of psychological services. In 2016, as part of its next Sunset Review, the Board committed to developing telepsychology regulations that would instruct licensees how to provide telehealth to Californians, and give additional opportunities to provide care to underserved populations. In its efforts to meet its commitment, the Board established the ad hoc Telepsychology Committee (Committee). The Committee considered the American Psychological Association Guidelines (APA Guidelines) for the Practice of Telepsychology and the Association of State and Provincial Psychology Board (ASPPB)

Telepsychology Task Force Principles and Standards when developing draft regulatory language.

The provision of psychological services, maybe more than almost any healing art, lends itself to being delivered via telehealth. Licensed psychologists have probably been delivering services through various technologies for years. The advent of new and changing technologies have left psychologists in need of guidance about the parameters of providing telehealth services. Although sections 2290.5 and 2904.5 authorize licensees of the Board to provide psychological health care services via telehealth, they do not provide any specific guidelines for the provision of services in this manner. Additionally, although the APA Guidelines provide some guidance regarding the provision of services via telehealth, they do not codify for California licensees accepted standards of practice for providing services via telehealth. Now the standard of practice is clear, which will make it easier for the Board to establish any violation if it receives a complaint related to the provision of services via telehealth.

**Specific Purpose of Each Adoption, Amendment, or Repeal, Factual Basis/Rationale, and Anticipated Benefits:**

Specifically, the Board is proposing the following changes:

Add Section 1396.8, subd. (a) to Title 16 of the California Code of Regulations:

This proposed subdivision clarifies when a licensee is permitted to provide psychological health care services via telehealth and defines the terms “resident” and “domicile.”

*Factual Basis/Rationale and Anticipated Benefits:*

This proposal clarifies how a licensee can provide psychological health care services via telehealth to an originating site in this State, as well as to a client who is a resident of California who is temporarily located outside of this State, subject to the laws and regulations of the state where the client or licensee is located. The regulation governs four types of telehealth transactions:

1. A California licensee providing telehealth services to clients located in California;
2. A California licensee providing telehealth services to clients that are California residents, but who are temporarily located out-of-state, subject to the laws of the other state;
3. A California licensee located out-of-state providing services to the clients that are located in California, subject to the laws of the other state; and,

4. A California licensee located out-of-state providing services to clients that are California residents, but who are temporarily located out of state, subject to the laws of the other state.

The definition of resident includes one who is domiciled in the state to cover services that are provided to consumers whose permanent home is in California, as well as consumers who reside in California, but whose permanent home is in another state. It is necessary to establish a residency requirement because California law governs the provision of services by California licensees to Californians. Business and Professions Code section 2290.5 could conceivably cover the provision of telehealth services to nonresidents, but the Board believes that the proper scope and focus of services should be California residents. The definitions of residence and domicile are found in well-established state law. (See 27B Cal.Jur.3d Domicile § 2)

Telehealth is not a type of service provided by licensees, rather it is a mode of delivery of psychological services. This proposal would improve access to psychological care to individuals who live in remote areas who, due to illness or mobility issues, cannot leave their homes, or who require additional support between regularly scheduled office visits. Additionally, licensees and clients benefit by addressing the issue of providing services via telehealth across state lines, which has been a source of confusion. Questions have arisen regarding clients who are domiciled in California, but are outside the state for reasons such as school, vacation, or business travel, or who possibly reside in another state for some portion of the year. There have also been questions, however, regarding people residing in California, but who are domiciled in another state. For example, a student lives in California during the academic school year, but may return to his or her home state during breaks; or a person may split his or her time between California and another state that is the permanent domicile, for example, a person who spends winters in a warmer climate. Consumer protection and continuity of care dictate that such residents who may receive services in California initially, should be allowed to receive services via telehealth after returning to the state where they are domiciled. Accordingly, the language clarifies that licensees may provide services via telehealth to their clients while the clients are temporarily located outside of this State. The proposed language clarifies that the provision of these service interstate are subject to the laws and regulations of the other state because the Board cannot dictate that it is allowable for either the licensee or client to deliver and receive services in that other state, even though such services would not violate California's laws and regulations, provided all other conditions are met. It would also afford additional opportunities to provide psychological care to underserved populations by providing access to those who may have transportation issues, or who live in areas with few licensees.

Add Section 1396.8, subd. (b) to Title 16 of the California Code of Regulations:

This regulatory proposal establishes the conditions under which the provision of psychological health care services via telehealth must be provided.

This proposal requires that licensees hold a valid and current license issued by the Board in order to provide psychological health care services via telehealth. It also requires that licensees obtain informed consent from the client specific to the considerations unique to the receipt of such services via telehealth. Additionally, it requires that licensees are competent to deliver such services, determine that the delivery of services via telehealth is appropriate for each client, take reasonable steps to ensure that electronic data is transmitted securely, and comply with all other provisions of the Psychology Licensing Law and its attendant regulations.

*Factual Basis/Rationale and Anticipated Benefits:*

This proposal helps ensure consumer protection by requiring that licensees meet specific criteria and are competent to provide psychological health care services via telehealth prior to the provision of such services.

(b)(1) First, to provide services to a consumer in California, either because the psychologist or the client is present in California, the psychologist must be licensed by the Board (Business and Professions Code section 2903.), which is necessary to ensure the services are lawful.

(b)(2) Next, Business and Professions Code section 2290.5 requires a licensee to obtain a patient's informed consent to use telehealth, including the risks to confidentiality and data security, potential for connection disruption, insurance issues, and other ways in which telehealth differs from in-person health care services. This is necessary to advance consumer protection because the informed consent must address the uniqueness of receiving telehealth services, making for a more educated consumer who is more able to determine whether receipt of services in this manner is right for him or her.

(b)(3) Additionally, the licensee is likewise required to evaluate whether services can be appropriately provided to a client, taking into account the client's needs, preferences, risks/benefits, and physical location and circumstances. This is necessary to advance consumer protection because the licensee must consider whether or not the individual client's needs and safety will be met by telehealth.

(b)(4) The regulation further requires that the provision of telehealth be within the licensee's (or trainee's) own competence including the information technology chosen for the delivery of telehealth, before engaging in telehealth services. Consumer

protection requires that the licensee be competent to provide services through telehealth because of the different nature of this modality, which also requires familiarity with the available platforms and their appropriate use. (b)(5) It would further require that licensees take reasonable steps under the circumstances to ensure that the data is securely transmitted, and that clients are informed of data breaches. This is necessary because confidentiality of data, HIPAA compliance, and client privacy are bedrock ethical and legal concerns of the practice of psychology.

(b)(6) Lastly, it would require the licensee to comply with all provisions of the Psychology Licensing Law and attendant regulations, as well as any laws or standards of care in California and any other jurisdiction state, if any, where either the licensee or the client is located. This is necessary to inform licensees that providing services via telehealth does not release them from their other legal and ethical responsibilities in their practice of psychology. Telepsychology is not a type of psychological service but a mode of delivery for the services provided, and subject to all the standards otherwise applicable to the services being rendered.

Add Section 1396.8(c) to Title 16 of the California Code of Regulations:

This regulatory proposal establishes that a failure to comply with the standards of practice for telehealth or with the laws and regulations relating to telehealth of a jurisdiction outside of this State constitutes unprofessional conduct.

The language clarifies that the license

*Factual Basis/Rationale and Anticipated Benefits:*

Clarifying that a failure to comply with the applicable telehealth standards is unprofessional conduct gives licensees notice regarding the possible consequences.

The APA Guidelines provide some guidance regarding the provision of services via telehealth. They do not grant authority to the Board, however, to take action against licensees who fail to follow the guidelines. This proposal is necessary because it clarifies that failure to comply with the regulations is unprofessional conduct, allowing the Board to take enforcement action against non-compliant licensees. In addition, it clarifies that licensees are required to be in compliance with the laws and regulations of another state, if either they or their client are located in that other state as states may have laws that apply to psychological services being provided or received within their jurisdiction. This enhances fairness by giving licensees notice of the expectations and consequences, and consumer protection by having enforcement mechanisms of the

standards set. It is also merely a restatement of Business and Professions Code section 2996, which provides that it is unprofessional conduct to violate Board regulations.

### **Underlying Data**

- American Psychological Association Guidelines for the Practice of Telepsychology (<http://www.apapracticecentral.org/ce/guidelines/telepsychology-guidelines.pdf>)
- ASPPB Telepsychology Task Force Principles and Standards ([https://c.ymcdn.com/sites/asppb.site-ym.com/resource/resmgr/PSYPACT\\_Docs/ASPPB\\_TELEPSYCH\\_PRINCIPLES.pdf](https://c.ymcdn.com/sites/asppb.site-ym.com/resource/resmgr/PSYPACT_Docs/ASPPB_TELEPSYCH_PRINCIPLES.pdf))
- 2016 Sunset Review Report
- Board Meeting Minutes
  - August 18-19, 2016
  - November 17-18, 2016
  - February 9-10, 2017

### **Business Impact**

This regulation will not have a significant adverse economic impact on businesses. This initial determination is based upon the fact that this proposal establishes guidelines for licensed California psychologists and psychology trainees for providing psychological services via telehealth in California, including to residents who are temporarily located outside of California. Telehealth services have long been provided at the discretion of the licensee, and requires no new fees or business investment. In addition, it will not reduce, and may actually increase, a licensee's ability to provide services.

### **Economic Impact Assessment**

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the proposed regulatory action establishes standards for the practice of psychology via telehealth by currently licensed psychologists and psychology trainees.
- It will not create new businesses or eliminate existing businesses within the State of California because the proposed regulatory action establishes standards for the practice of psychology via telehealth by psychologists currently licensed by the Board and psychology trainees.
- It will not affect the expansion of businesses currently doing business within the State of California because the proposed regulatory action establishes standards for the practice of psychology via telehealth by psychologists currently licensed by the Board and psychology trainees.
- This regulatory proposal benefits the health and welfare of California residents, because it provides guidance to and establishes standards for licensed California

psychologists and psychology trainees who provide psychological services via telehealth and affords additional opportunities for the provision of psychological care to underserved populations.

- This regulatory proposal does not affect worker safety because the proposed regulations are not relative to workers' safety.
- This regulatory proposal may benefit the State's environment because the proposed regulations may reduce transportation related emissions, which is a benefit to the State's environment.

The Board indicates because the proposed regulations do not require licensees to provide telehealth services, they do not result in additional costs. However, to the extent a licensee without a current information technology (IT) system capable of providing telemedicine services opts to begin providing these services, start-up IT costs are estimated to be \$200 per facility and less than \$1,000 per year ongoing thereafter.

### **Specific Technologies or Equipment**

This regulation does not mandate the use of specific technologies or equipment. Technologies used to provide services via telehealth, however, must be in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to protect the confidentiality of the services being provided.

### **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 regulations in a manner that ensures full compliance with the law being implemented or made specific.

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

- Not adopt the amendments. This alternative was rejected because this regulatory proposal establishes standards and provides guidance for licensed California psychologists and psychology trainees who provide psychological health care services to clients via telehealth, an issue about which the Board has received many questions.
- Joining the Association of State and Provincial Psychology Board's (ASPPB) Telepsychology Compact (Compact). The Board formed a Telepsychology Task Force (Task Force) at its November 21, 2014, meeting to discuss and analyze the Compact. The Task Force's first meeting took place on December 16, 2014. The Task Force agreed with ASPPB that it is important to increase license

portability and consumer access to psychological services. However, the Task Force's initial review raised a number of fundamental concerns:

- Article IX addresses the creation of the "Interjurisdictional Telepsychology Compact Commission" (Commission). The Compact States would pay for the operations of the Commission via (as yet unspecified) fees through a currently unspecified formula. There will be costs associated with reporting to a database and additional administrative costs to the Board while all fees paid by licensees and state contributions to the administration of the Commission, under the proposed scheme, will go to ASPPB and the Commission.
- The Commission would also have the ability to promulgate regulations which would have the force of law in Compact States.
- Article X of the Compact grants the Commission authority to make "emergency rules." The definition and implementation of the clause is vague and the Compact grants unnecessary regulatory authority to the Commission.
- Article XIII of the Compact addresses the "Coordinated Licensure Information Exchange." States would be forced to rely on a complex national database for licensing, complaint, and discipline information exchange. The system, which is not yet developed, would be owned and operated by a nongovernmental agency. It is also unclear at this time who will be the "administrator" of the database.
- The current Compact language does not require any Continuing Education (CE) of Home State licensees. Licensees from jurisdictions that do not require CE (e.g., New York) would be able to practice on California consumers with only three hours of CE per year in the area of technology and psychological practice.
- The Compact would also place responsibilities on the Board to report information regarding California licensees and possibly even complainants, which would typically be considered confidential under California law.

This alternative was rejected based on the foregoing concerns.

### **Fiscal Impact Assessment**

The Board receives approximately five to ten complaints related to telehealth services per year. The Board does not anticipate an increase in complaints following adoption of this regulation. Because the Board currently receives so few complaints related to telehealth per year, any increase in the number of complaints received annually will likely be minimal. The Board therefore anticipates no fiscal impact.