

# **SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY AND HEARING AID DISPENSERS BOARD**

## **INITIAL STATEMENT OF REASONS**

Hearing Date: No hearing has been scheduled for the proposed action

Subject Matter of Proposed Regulations: Enforcement Program Enhancements

Sections Affected:

Division 13.3 Hearing Aid Dispensers: Adopts Sections 1399.110, 1399.130, and 1399.130.1 and Amends Section 1399.131

Division 13.4 Speech-Language Pathology and Audiology: Amends Sections 1399.150.3, 1399.151, 1399.155, and 1399.156 and Adopts Section 1399.156.5

### **Introduction**

During July 2009, a series of articles appeared in the Los Angeles Times newspaper pointing out consumer protection issues and findings of egregious licensee misconduct at a specific healing arts licensing board within the Department of Consumer Affairs (Department). The articles addressed systemic problems with how the board handled complaints, investigations, disciplinary actions, and probation monitoring.

Based on these findings, the Department held a series of meetings to address these findings. The Department also reviewed existing enforcement processes of other Department healing arts boards. The review discovered systematic problems, due to legal, procedural, and inadequate resources that limit a board's ability to investigate and act on cases in a timely manner.

The Department worked with the healing arts boards to identify areas that could be improved administratively to better coordinate the Department's enforcement objectives, improve services provided to the boards, and establish streamlined processes and procedures. The Department recognized the need for all healing arts boards to review their processes and realign consumer protection laws and regulations to ensure that consumer protection is paramount.

In response to this review, the Department launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement processes used by healing arts boards within the Department.

This regulatory proposal is in response to the Department's request to implement regulations to enhance the Board's mandate of consumer protection.

Business and Professions Code Section 2531.02 mandates that protection of the public shall be the highest priority of the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board) in exercising its licensing, regulatory, and

disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

This proposal would make specific regulatory changes to enhance the Board's mandate of consumer protection.

This proposal would delegate authority to the Executive Officer the ability to accept default decisions, to approve settlement agreements for revocation, surrender or interim suspension of a license.

This proposal would authorize the Board to order an applicant for licensure to submit to a physical or mental examination if it appears that the applicant may be unable to perform safely the duties and functions of a licensee due to physical or mental illness affecting competency. Additionally, if after receiving the evaluation report the Board determines that the applicant is unable to practice safely, the Board may deny the application.

This proposal would also require that in specific cases of a licensee having sexual contact with a patient or any finding that a licensee has committed a sex offense, or been convicted of a sex offense, a proposed decision would contain an order revoking the license. The proposed order could not contain an order staying the revocation of the license.

Additionally, this proposal would define required disciplinary action to be taken by the Board against registered sex offenders who are applicants or licensees. The proposal would, in addition to conduct described in Business and Professions Code Sections 2533 and 3401, establish as unprofessional conduct or a violation of law, the prohibition of including provisions in civil dispute settlement agreements that prohibit a person from contacting, cooperating with, filing, or withdrawing a complaint with the Board.

The definition of "Unprofessional Conduct" and expansion of violations would also include failure of the licensee to provide lawfully requested documents; the commission of any act of sexual abuse or misconduct; failure to cooperate with an investigation pending against the licensee; failure to report an indictment, charging a felony, arrest, conviction of the licensee; failure to report any disciplinary action taken by another licensing entity or authority; or failure to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board.

Specific Purpose of each adoption, amendment, or repeal:

1. Amends Section 1399.150.3. Delegation of Functions:

Existing law requires that the Board, itself, vote to adopt all stipulated settlement agreements proposed to be entered into by the Board's Executive Officer.

After an Accusation is filed against a licensee, the respondent has fourteen days to file a Notice of Defense. If the respondent does not file a Notice of Defense, then a Default Decision is granted. If the respondent files a Notice of Defense, the matter then moves

to the Office of Administrative Hearings, which schedules a pre-hearing conference and a formal hearing. A Proposed Stipulated Decision may be developed either at the pre-hearing conference or at the formal hearing. Additionally, the respondent may also elect to voluntarily surrender the license via a Stipulated Settlement.

Under existing law, the Executive Officer has the obligation to pursue administrative action against licensee who has violated the law. Ultimately, it is the Board that votes on all proposed decisions including stipulated settlements and default decisions. This proposal would delegate to the Board's Executive Officer the authority to accept default decisions, adopt settlement agreements (stipulated decisions) for revocation, surrender, default decisions, or interim suspension of a license.

#### Factual Basis/Rationale

Because the respondent has failed to respond to the Accusation, agreed to a Stipulated Settlement, or agreed to surrender the license, there is little or no discretion for the Board to exercise in those situations.

Authorizing the Board's Executive Officer to accept Default Decisions and approve Stipulated Settlements resulting in revocation, surrender of a license, or interim suspension will allow the Board to focus on more pressing disciplinary matters and will shorten the timeline for Default Decisions or Stipulated Surrender cases to take effect, thus adding to consumer protection by allowing the orders to become effective in a more timely manner.

2. Adopts Sections 1399.110. Applications; Amends Section 1399.151. Applications for License:

This proposal would authorize the Board to compel an applicant for licensure that has physical or mental health issues to submit to physical or mental examinations to assist the Board in determining an applicant's fitness for licensure. The proposal would also permit the Board to deny the application if the applicant is unable to safely practice, based on the review of the evaluation report.

#### Factual Basis/Rationale

Although the Board can compel a licensee to submit to a physical or mental examination when the licensee's fitness to practice is compromised based on suspected physical or mental illness, this authority does not apply to applicants for licensure. The authority to compel a physical or mental examination for an applicant for licensure would provide an additional enforcement tool and would enhance the Board's mandate to protect the public given the potential harm to the public presented by applicants who may have physical or mental illness that would impact their ability to practice safely.

3. Amends Section 1399.131 and 1399.155. Disciplinary Guidelines:

Existing regulations allow that when reaching a decision on a disciplinary action under the Administrative Procedures Act, the Board shall consider the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board's Disciplinary Guidelines.

Deviation from the guidelines and orders, including standard terms of probation, is appropriate where the Board in its sole discretion determines that the facts of a particular case warrant such deviation.

This proposal would require that proposed decisions in any disciplinary matter where there is a finding that the licensee engaged in sexual misconduct with a patient, a finding that the licensee committed a sex offense against any person regardless of whether the licensee was convicted for the same, or was convicted of a sex offense automatically order the penalty of revocation. The Board will still have the power to non-adopt proposed decisions.

#### Factual Basis/Rationale

Because of the seriousness of sex offense, and the potential threat to consumers that sex offenders pose, this proposal would establish proposed decisions that have an automatic penalty of revocation in any licensee engaged in sexual misconduct.

4. Adopts Sections 1399.130.1 and 1399.156.5. Required Actions Against Registered Sex Offenders.

This proposal would require the Board to deny applications, revoke licenses, or deny any petition to reinstate or reissue licenses to individuals who must register as a sex offender.

This section provides some exceptions to this penalty, such as for those individuals who are relieved of their duty to register as a sex offender under Penal Code Section 290.5, those individuals who are required to register as sex offenders solely because of a misdemeanor conviction under Penal Code section 314, or those individuals whose administrative proceedings are fully adjudicated before the effective date of the regulation.

#### Factual Basis/Rationale

The Board recognizes that registered sex offenders represent a potential threat to consumers and therefore should not be granted a speech-language pathology, audiology, or hearing aid dispensers' license. Additionally, licensees who are required to register as sex offenders should not be permitted to practice as speech-language pathologists, audiologists, or hearing aid dispensers.

5. Adopts Section 1399.130. Violations and Amends Section 1399.156. Unprofessional conduct.

In addition to the conduct described in Business and Professions Code Sections 2533 and 3401, this proposal would define, as unprofessional conduct, or establish as a violation, including or permitting to be included in an agreement to settle a civil dispute arising from the licensee's practice to which the licensee is or expects to be named as a party, whether the agreement is made before or after the filing of the action; provisions that would prohibit another party to the dispute from contacting, cooperating with, filing a complaint with the Board; or requiring the other party to the dispute to attempt to

withdraw a complaint the party has filed with the Board.

### Factual Basis/Rationale

The increasing use of agreements to provisions in civil dispute settlements prohibiting the other party from contacting, cooperating with, or filing complaints, hereafter, an “agreement not to pursue,” denies consumers the right to file complaints and prevents the Board from investigating and disciplining licensees who present a danger to consumers. These licensees may continue to practice and harm the public because the Board is not aware of civil dispute settlements. This proposal would prevent licensees who have violated the law from avoiding disciplinary action against their licenses.

“Agreements not to pursue” can delay and thwart the Board’s effort to investigate possible cases of misconduct, thereby preventing the Board from protecting the public. These clauses delay action by the Board and tarnish the reputation of competent and reputable licensed health care professionals. By allowing repeat offenders who injure patients to hide their legal acts from the Board further prevents the Board from protecting consumers.

It has been argued that a licensee should not be subject to review by the Board after a civil settlement has been reached. Protection from license disciplinary action does not attach to civil proceedings or subsequent administering proceedings. Criminal, civil, and administrative proceedings each serve entirely different legal functions. No ordinary citizen can claim immunity from one proceeding because he or she already underwent the other. It necessarily follows that Board licensees should not enjoy any exception to the rule of legal process.

This proposal would also define as “unprofessional conduct” or establish as a violation, failure to provide the Board with lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever occurs later.

Patient medical records can only be obtained under two circumstances: 1) the patient has given written authorization for release of the records to the Board; and 2) the Board or the Attorney General has sought a court order and the court has issued a subpoena mandating the release of the records. Under both circumstances, penalties would apply if the records are not supplied by those who have both possession and control over the records.

Failure of a licensee to provide lawfully requested documents also would delay the Board’s investigation of consumer complaints. The obtaining and inspection of documents is crucial in investigating consumer complaints and taking appropriate action against a licensee who may cause patient harm.

Because licensees committing acts of sexual abuse or misconduct pose a potential threat to consumers, this proposal would also include as “unprofessional conduct” or establish as a violation, the commission of any act of sexual abuse or misconduct.

Also defined as “unprofessional conduct” or a violation, is the failure to cooperate and

participate in any Board investigation pending against the licensee. Again, failure of the licensee to cooperate with the Board in an investigation further erodes the Board's mandate of consumer protection. This proposal would not, however, deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution or other constitutional or statutory privileges. Additionally, this proposal would not require the licensee to cooperate with a request that would require them to waive any constitutional or statutory privilege.

This proposal would further define as "unprofessional conduct" or establish as a violation, the failure of a licensee to report to the Board within 30 days the bringing of an indictment or information charging a felony, an arrest, conviction of a crime; any disciplinary action taken against another licensing entity; or failure or refusal to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board.

As part of the licensing process, all applicants for licensure are fingerprinted for purposes of conducting criminal history background checks through the California Department of Justice (DOJ) and Federal Bureau of Investigation (FBI). In most cases, the Board receives subsequent arrest notifications for licensees convicted of crimes. The Board, however, may not always be made aware of convictions or other actions. Additionally, other agencies may not be required to report actions or not be aware that the individual is licensed in California.

By requiring licensees to report this information, the Board gains an additional enforcement tool so that a determination may be made to pursue disciplinary action against the licensee, as appropriate.

#### Underlying Data

Technical, theoretical or empirical studies or reports relied upon (if any): None.

#### Business Impact

This regulation will not have a significant adverse economic impact on businesses because it only impacts those licensed by the Board.

The Board does not license businesses or small businesses; rather, it licenses individuals to practice as licensed speech-language pathologists, audiologists and hearing aid dispensers. Licensees may work for businesses and, thus, businesses may be indirectly impacted if an individual licensee is affected by the proposed regulation by, for example, having his or her license revoked or otherwise disciplined pursuant to the proposed regulations. The Board has approximately 17,000 licensees.

#### Specific Technologies or Equipment

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

#### Consideration of Alternatives

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

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

1. Not adopt the regulations. This alternative was rejected because the Board has identified areas of concern regarding enhanced protection of consumers
2. Adopt regulations. The Board determined that this alternative is the most feasible because it will assist the Board in its mandate of consumer protection.