

BOARD OF BEHAVIORAL SCIENCES INITIAL STATEMENT OF REASONS

Hearing Date: Upon Request

Subject Matter of Proposed Regulations: Revision of Disciplinary Guidelines.

Section(s) Affected: Amend Section 1888 in Division 18 of Title 16 of the California Code of Regulations.

Specific Purpose of each adoption, amendment, or repeal:

Business and Professions Code (BPC) Sections 4982, 4989.54, and 4992.3 specify the grounds for which the Board may discipline a Marriage and Family Therapist, Licensed Clinical Social Worker, Licensed Educational Psychologist, Registered Marriage and Family Therapist Intern, and Associate Clinical Social Worker.

Section 1888 in Division 18 of Title 16 of the California Code of Regulations (CCR) requires that the Board to consider the disciplinary guidelines entitled "Board of Behavioral Sciences Disciplinary Guidelines" (Guidelines) in reaching a decision on a disciplinary action under the Administrative Procedure Act.

The purpose of these regulations is to protect the consumer of services of Board licensees by ensuring all Marriage and Family Therapist, Licensed Clinical Social Workers and Licensed Educational Psychologists remain competent in their respective practices and abide by the standards of professional conduct. This regulatory proposal would revise Guidelines in order to do the following: delete outdated code section references; conform the regulation to current law; create greater clarity and consistency within the guidelines; and, allow board discretion and flexibility to better ensure that a respondent has the opportunity to meet the requirements set forth in a disciplinary order related to supervision, psychotherapy and a probationer's access to a qualified mental health professionals.

Specifically, the regulation would incorporate amendments to the Guidelines, as revised November 2008, which are as follows:

Penalty Guidelines

- Replace errant references to BPC sections 4986.10, 4986.20, 4986.50, 4986.70, 4986.71 and 4986.75. SB 1475, Chapter 659, Statutes of 2006 repealed and recast law relating to the regulation of Licensed Educational Psychologists and moved the content in the above code sections to BPC Sections 4989.14, 4989.20, 4989.26, 4989.54, 4989.56, and 4989.58. The purpose of this proposed change is to make the Guidelines, which are incorporated at 16 CCR Section 1888, consistent with these current statutes.

- Add a reference to BPC section 4992.3(r) in addition to 4989.54(f) to include the violation of unprofessional conduct statutes by a registrant related to the acquisition of experience hours. The purpose of the proposed change is to make the Guidelines consistent with the newly re-numbered Licensed Educational Psychologist and current Licensed Clinical Social Worker unprofessional conduct statutes.
- Delete references to subsections (a)-(e), (g)-(k) and (n) of Section 1858 of Title 16, CCR. An approved regulatory change operative December 30, 2007, repealed these subsections in accordance with changes implemented by SB 1475, Chapter 659, Statutes of 2006. The purpose of this proposed change is to delete these obsolete references and update the Guidelines.
- Add reference to 16 CCR section 1845((b) related to unprofessional conduct. This reference was inadvertently omitted in the current version of the Guidelines. The purpose of this change is to add clarity and consistency by referencing all relevant code sections related to the violation.
- Add reference to BPC sections 4982(aa)(1), 4992.3(x)(1) and 4989.54(y)(1) that were created by SB 797, Chapter 33, Statutes of 2008. The purpose of this change is to make Section 1888 consistent with current statute. These code sections now specify that it is unprofessional conduct for a licensee or registrant to do any of the following:
 - engaging in an act with a minor punishable as a sexually related crime regardless of whether the act occurred prior to or after registration or licensure; and,
 - engaging in an act described in section 261, 286, 288a, or 289 of the Penal code with a minor or an act described in sections 288 or 288.5 of the Penal Code regardless of whether the act occurred prior to or after the time registration or license was issued by the board.
- Add references to BPC sections 4982(y), 4992.3(v) and 4989.54(x). SB 1048, Chapter 588, Statutes of 2007 added willful violation of Chapter 1 of part 1 of division 106 of the Health and Safety Code to the unprofessional conduct statutes of Board licensing law. The purpose of this change is to make the Guidelines consistent with current statute.
- Add reference to BPC sections 4982(z) and 4992.3(w). SB 1048, Chapter 588, Statutes of 2007 added failure to comply with telemedicine law (BPC section 2290.5) to the unprofessional conduct statutes for board licensees. The purpose of this change is to make the Guidelines consistent with current statute.
- Makes a conforming change to provide consistency for penalties within the same violation category on page 9 of the guidelines related to fiscal and property crimes.
- Make several non-substantive changes to provide clarity and order to page five of the Guidelines.

Optional Terms and Conditions of Probation

- *(Psychotherapy Terms)* Allow a respondent, with the permission of the Board, to secure mandated personal psychotherapy services via videoconferencing. Currently this section is silent on the method by which services may be received. For the purpose of addressing areas of the state in which access to qualified mental health providers may be difficult, this regulatory change will allow compliance with a personal psychotherapy order in those rural areas where the respondent may be the only licensed mental health professional.
- *(Psychotherapy Terms)* Allow a respondent, with permission of the Board, to receive mandated supervised practice via videoconferencing or with a supervisor not in the respondent's field of practice. Currently a supervisor providing services pursuant to this section of the Guidelines must be licensed in the same field of practice as the respondent. This section does not currently allow supervision via video conferencing. For the purpose of addressing areas of the state in which access to qualified mental health providers may be difficult or impossible, this regulatory change will allow a respondent alternatives to meeting the conditions of the order, if approved by the board. This change is necessary to increase compliance in areas where a qualified mental health professional may not be available.
- *(Psychotherapy Terms)* Clarify that supervision obtained from a probation supervisor may not be used as experience gained toward licensure. The purpose of this change is to clarify that supervision gained as a condition of probation may only count towards one supervision requirement, meeting the conditions of the disciplinary order, and may not be counted towards the licensure requirements.
- *(Law and Ethics/Education Terms)* Allow a respondent to take mandated educational courses from an approved educational institution, in addition to accredited institutions or through a course approved by the Board. This is consistent with required coursework for licensure eligibility which allows that education to be gained at a Bureau for Private and Postsecondary Vocational *Education* approved institution that offer qualifying degrees for Board licensees (BPC 4980.40(a)).
- *(Law and Ethics/Education Terms)* Delete the prohibition against attending workshops to meet educational requirements and allow a respondent to receive mandated educational courses through a workshop. The purpose of this change is to allow greater flexibility for respondents that may have difficulty finding access to these types of courses.
- *(Law and Ethics/Education Terms)* Require that mandated coursework must be completed one year from the effective date of the decision. Currently the guidelines allow a date to be determined by the entity making the order. The purpose of this change is to establish a standard timeframe that will enable the Board to more easily enforce the order and thereby ensure better compliance from respondents.
- *(Reimbursement of Probation Program Terms)* Clarify the reimbursement costs to be paid by respondents by adding a reference line to allow the amount to be paid per month to be entered in the order. The purpose of this change is to add clarity for the

respondent about the timeframes for compliance with the order and determination by the Board of the reimbursement costs due.

Standard Terms and Conditions of Probation

- Delete obsolete references to BPC 4986.10 and 4986.70 and replace with correct references to 4989.14, 4989.54(h) and 4989.54(i). SB 1475, Chapter 659, Statutes of 2006 repealed and recast the law relating to the regulation of Licensed Educational Psychologists and moved the content in the above code sections. The purpose of this change is to make this section of the Guidelines consistent with those current statutes.
- (*Cost Recovery Terms*) Specify that a respondent must complete cost recovery payments six month prior to the termination of probation. The purpose of the change is to increase enforceability of cost recovery. Currently the respondent could be released from probation before the Board becomes aware that the financial requirements of the disciplinary order have not been met. This proposed change is necessary to allow the Board to enforce this provision of a disciplinary order and grant flexibility when necessary to enable the respondent to meet the mandated requirements.

Board Policies and Guidelines

- (*Language for License Surrenders*) The addition of this proposed language would permit the Board to directly discuss a pending stipulation with the staff or advisors to the Board to determine whether to adopt a stipulation proffered by the respondent and the Board's Executive Officer. This language is necessary for the Board to effectively consider a proposed settlement, to permit communications between Board staff and the Board regarding the pending stipulation, and to comply with the requirements of the Administrative Procedure Act governing settlements and permissible communications with the Board (Government Code sections 11415.60 and 11430.30(b)).
- Allow a respondent to reapply to the Board for licensure three years from the date of surrender. Currently the disciplinary guidelines do not specify a waiting period for reapplication, allowing a respondent to reapply immediately. However, current law (BPC 4990.30) specifies that a petition for reinstatement of a license or registration that has been revoked for unprofessional conduct may be filed only after three years. Both revocation and license surrender occur as a result of unprofessional conduct and therefore should have consistent timeframes for subsequent licensure. The purpose of this change is to create a standardized timeframe for reapplication of a surrendered license consistent with reinstatement of a revoked license.
- Add recommended language for registration applicants and registrants that describes the conditions of revocation of registration and subsequent registrations with the Board. This language is necessary to standardize the orders for registrants as no language currently exists in the disciplinary guidelines, without this standardized language, the Board will continue to observe inconsistencies in the form of the orders given to registrants related to revocation and probation.

Factual Basis/Necessity

BPC 4982, 4989.54, and 4992.3 specify the grounds for which the Board may discipline a

Marriage and Family Therapist, Licensed Clinical Social Worker, Licensed Educational Psychologist, Registered Marriage and Family Therapist Intern, and Associate Clinical Social Worker.

Section 1888 in Division 18 of Title 16 CCR requires that the Board must consider the disciplinary guidelines entitled "Board of Behavioral Sciences Disciplinary Guidelines" in reaching a decision on a disciplinary action under the Administrative Procedure Act.

The Board's Disciplinary Guidelines are utilized by Board staff, Deputy Attorneys General, Administrative Law Judges and attorneys to assist in determining the penalties in the disciplinary process against Marriage and Family Therapists, Licensed Clinical Social Workers, Licensed Educational Psychologists, Registered Marriage and Family Therapist Interns, and Associate Clinical Social Workers. The Disciplinary Guidelines indicate the minimum and maximum discipline that may be imposed for each violation of the Board's laws and regulations. The Disciplinary Guidelines also contain standard and optional terms and conditions that may be imposed if the respondent is placed on probation. "Standard" terms and conditions of probation are applied in all settlements where a period of probation is granted. The "optional" terms and conditions of probation are incorporated in the settlement based on the circumstances specific to the case.

Legislation passed since the last revision date of the disciplinary guidelines (May 2004) has amended the underlying code section on which the disciplinary guidelines are based. SB 1475, Chapter 659, Statutes of 2006 repealed and recast law relating to the regulation of Licensed Educational Psychologists and moved the content in those code sections, including provisions outlining unprofessional conduct. Current code references to these obsolete code sections in the disciplinary guidelines make the guidelines inconsistent with current law.

In 2007, SB 1048 (Chapter 588) made a number of technical changes to board licensing law, including recasting and adding two new violations to the Board's unprofessional conduct statutes.

An urgency measure, SB 797, Chapter 33, Statutes of 2008, specified that unprofessional conduct includes engaging in specified acts with a minor regardless of whether the act occurred prior to or after the time the registration or license was issued by the board, and would apply this provision to acts that occurred prior to the effective date of the bill. SB 797 also specified that, if after the limitations periods have expired, the board discovers a specified alleged act with a minor, and there is independent evidence corroborating the allegation, an accusation shall be filed within 3 years from the date the board discovers that alleged act. Before the passage of this bill the board may have filed a specified accusation against these licensees or registrants within certain limitations periods for, among other things, an alleged act or omission involving a minor that is the basis for disciplinary action. The disciplinary guidelines, as revised May 2004, are inconsistent with current law and therefore the regulatory proposed changes herein are necessary to rectify that inconsistency.

California has a shortage of mental health providers, most acutely in rural counties. This shortage of qualified mental health providers may create access issues for not only consumers but also licensees ordered to receive supervised practice or personal psychotherapy as imposed by a disciplinary action against that licensee. In order to better facilitate the completion

of terms of disciplinary orders, and therefore, rehabilitate the licensee and ensure the protection of the public, this proposed rulemaking allows the Board discretion to permit a respondent to receive supervised practice or personal psychotherapy via videoconferencing and/or with a qualified mental health professional not licensed in the same field as the respondent.

This proposed rulemaking is necessary to delete obsolete references to statute and regulations made necessary by legislative and regulatory changes enacted after the last revision date of the Guidelines. Additionally, the proposed rulemaking will create more clarity and consistency within penalty guidelines by standardizing penalties within the same violation category. Finally, the proposed changes allow flexibility for the respondent in meeting supervised practice and personal psychotherapy requirements, thereby allowing respondents in rural areas to meet the requirements of a disciplinary order. By giving respondents more opportunity to meet the conditions of a disciplinary order, the Board is better able to ensure the practitioners are remediating violations of unprofessional conduct statutes. This provides greater consumer protection by allowing only competent and rehabilitated practitioners to provide services to the public.

Underlying Data

None

Business Impact

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts or evidence/documents/testimony:

The proposed action does not increase or decrease the penalties that may be imposed in an administrative disciplinary action. Any "adverse economic impact" would only occur as the result of a disciplinary order following a formal administrative proceeding and a finding of fact affirming a violation of the board's laws or regulations and would only affect individuals who are disciplined by the board. Any potential "adverse economic impact" may be avoided simply by complying with the law.

Specific Technologies or Equipment

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

This regulation mandates the use of specific technologies or equipment. Such mandates or prescriptive standards are required for the following reasons:

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board 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.