

## FINAL STATEMENT OF REASONS

**Hearing Date: July 8, 2014**

**Subject Matter of Proposed Regulations: Uniform Standards Related to Substance Abuse and Disciplinary Guidelines**

**Section(s) Affected:** Amend Sections 1888 of Division 18 of Title 16 of the California Code of Regulations, and the Board of Behavioral Sciences Disciplinary guidelines, Revised December 2012, which are incorporated by reference.

**Updated Information**

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

- Page 2, “Amendments to CCR Section 1888”, 6<sup>th</sup> bullet point: per DCA, deviation from the Uniform Standards is not permitted unless the licensee or registrant rebuts that the violation is a substance abuse violation. Therefore, language allowing deviation if there are certain mitigating or aggravating factors has been removed.
- Page 4, under “Clinical Diagnostic Evaluation Report.” The third bullet states that “This report must be provided to the Board in a report within 30 calendar days.” The statement of 30 calendar days is an error. The sentence should read “This report must be provided to the Board no later than 10 days from the date the evaluator was assigned, unless the evaluator requests additional information to complete the evaluation, not to exceed 30 calendar days.”
- Page 11, Item g “Amendments to Section III: Model Disciplinary Orders: Standard Terms and Conditions of Probation.” The second sentence of this paragraph should read as follows: “Amendments are needed to ~~these~~ of these conditions to ensure that they are consistent with the new Uniform Standards for substance abusing licensees.”

The following corrections have been made to the Notice of Proposed Changes in the Regulations (Notice):

- On page 2 of the Notice, the heading that states “Proposed Amendments to BPC Section 1888 and Disciplinary Guidelines” is instead changed to “Proposed Amendments to BPC California Code of Regulations (CCR) Section 1888 and Disciplinary Guidelines.” The 8<sup>th</sup> paragraph, directly under this heading, should also be changed as follows: “The purpose of this proposal is to amend BPC CCR Section 1888 and the “Board of Behavioral Sciences Disciplinary Guidelines” (Rev. December 2012).”
- On page 7 of the Notice, under “Impact on Jobs/Businesses,” the second sentence of the second paragraph is changed as follows: “A small business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation.”

The following changes were made to the proposed regulation text after the 45 day public comment period. The Board approved these changes at a meeting on August 28, 2014, and a subsequent 15-day public comment period was then held:

1. **Amendment to Section 1888.** Subsection (b) of 16 CCR Section 1888 outlines the circumstances in which the Uniform Standards related to substance abuse would apply. The language had stated that in the case of a substance abuse violation, the Uniform Standards must apply without deviation if the licensee or registrant does not rebut the violation. The language also allowed deviation from the Uniform Standards if the licensee, registrant, or the Board established that appropriate public protection could be provided with modification or omission of a specific standard.

DCA states that if a licensee or registrant has a substance abuse violation, and he or she does not rebut that the violation is a substance abuse violation, then the law allows no deviation from the Uniform Standards. Therefore, language stating that the licensee, registrant or Board has discretion to modify or omit a specific uniform standard is prohibited.

Due to this change, the Board has also rearranged some language in Section 1888, because while deviation from the Disciplinary Guidelines is permitted, it is not permitted for the Uniform Standards.

2. **Amendment to “Uniform Standards Related to Substance Abuse and Disciplinary Guidelines”, page 4, 1<sup>st</sup> paragraph.** Like 16 CCR Section 1888, this section also outlines the cases in which the Uniform Standards related to substance abuse would apply. It contained similar language, allowing deviation from the Uniform Standards if the licensee, registrant, or the Board establishes that appropriate public protection can be provided with modification or omission of a specific uniform standard.

Due to DCA's determination that such deviation is not allowed, this discretion has been removed. However, language used in Section 1888, allowing a licensee or registrant to rebut the violation is a substance abuse violation has been added, as DCA is permitting that language.

#### **Objections or Recommendations/Responses to Comments:**

The Board received an email during the 45-day public comment period from L. Aaron Smith, MSW, from Youth Uprising. Mr. Smith's email contained several comments/recommendations:

#### **CONCERN #1**

**COMMENT NO. 1: Considerations or accommodations for those with ethnic backgrounds that are disproportionately involved in the legal system:** Mr. Smith recommended consideration or accommodation for people from different ethnic backgrounds that are disproportionately involved in the criminal justice system. He cites

a January 2005 report from The Sentencing Project, which is an advocacy program which identifies racial disparities in the criminal justice system.

Mr. Smith is concerned that applying across-the-board disciplinary procedures, and increasing the penalties for having a criminal history, the Board will discriminate by impacting the diversity of licensed individuals. He suggests that the Board take steps to ensure parity in the licensing process, and points out that a large number of mental health service consumers are from minority or underserved populations.

RESPONSE: This recommendation was rejected. Board licensing law (BPC §4990.16) mandates the following:

*“Protection of the public shall be the highest priority for the 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.”*

These proposed regulations establish uniform standards and best practices across DCA's healing arts boards, for disciplining substance abusing licensees. They do not seek to discriminate against any ethnic or underrepresented group. The goal is to ensure that licensees are safe to practice and will not cause harm to the consumer. For this board, the consumer is seeking mental health services, and therefore may be particularly vulnerable. Ensuring practitioners are safe to practice is equally as important for the minority and underserved populations as it is for other populations.

In addition, these regulations carry out a mandate required in SB 1441 (Chapter 548, Statutes of 2008) that the committee created by the bill must formulate uniform and specific standards “that each healing arts board shall use in dealing with substance abusing licensees...” (BPC §315(c))

Finally, these regulations do contain a clause that allow the licensee to rebut the presumption that the violation is a substance abuse violation to the Board. Therefore, if a licensee believed his or her substance abuse conviction was due to discrimination, he or she would have the opportunity to provide evidence to rebut the substance abuse presumption to the Board. (16 CCR §1888)

## **CONCERN #2**

**COMMENT NO. 2: Addressing Different Levels of Criminal Convictions:** Mr. Smith would like to know the Board's position on addressing different levels of criminal convictions within the same disciplinary guidelines.

He states that this seems to be an uneven application of justice, and that it makes the Board appear unwilling to address offenses on a case-by-case basis to determine the appropriate disciplinary plan for that particular person.

RESPONSE: This comment was rejected. The Uniform Standards Related to Substance Abuse and Disciplinary Guidelines (Uniform Standards) do require all licensees placed on probation due to a substance abuse violation to undergo a clinical diagnostic evaluation.

However, the Board is required to use the clinical diagnostic evaluation report to determine whether or not the licensee is safe to return to practice, or what restrictions or recommendations should be imposed to ensure safe practice. The Board must consider the following (page 5, Uniform Standards):

- Documented length of sobriety;
- Treatment history;
- Nature, duration, and severity of the substance abuse problem.

Therefore, although the Board is required to take certain disciplinary actions for substance abusing licensees, the Uniform Standards also allow the Board some discretion to tailor the discipline to the circumstances of a particular licensee, based on whether he or she meets certain criteria. For example, consideration of a person's treatment history would take into consideration that person's specific efforts and success towards rehabilitation.

**COMMENT NO. 3: Definition of “Substance Abuse”:** Mr. Smith requests that the term “substance abuse” needs a clearly stated definition, because he believes the Board has the power to make a distinct determination of a person based solely on criminal convictions. He cites cases where officers have planted evidence on people, stating that convictions do not always convey the truth about a person’s status.

RESPONSE: This comment was rejected. The Board would find out if a licensee had a substance abuse violation either through a conviction disclosure on his or her renewal application, or from the Department of Justice via its subsequent arrest notification service.

From there, the licensee would undergo a clinical diagnostic evaluation. As discussed in the response to Comment No. 2 above, the Board would use the results of the clinical diagnostic evaluation and prescribed criteria to determine the degree of the substance abuse problem and need for disciplinary action in order to protect the public. This is where the different levels of criminal convictions would be considered. (For example, is it one conviction for drug use? Numerous convictions for drug use? Or is it a conviction for both drug use and dealing or trafficking?)

Because this discretion is allowed, the Board does not believe a one-size-fits-all definition of substance abuse is appropriate. Finally, the definition of substance abuse violation as it appears in section 1888 is sufficiently clear for purposes of these regulations.

### **CONCERN #3**

**COMMENT NO. 4: Frequency of Drug Testing:** Mr. Smith comments that he would like clarification regarding an item in Attachment A of the Std. 399 (Fiscal Impact). Footnote [3] of the chart on Attachment A states that required frequency of drug testing is 52-104 times per year in year 1, 36-104 times in year 2-5, and if no positive tests, once per month after year 5. He wants to know if, after 5 years of drug testing, will a licensee/registrant be required to test once per month unending?

RESPONSE: This comment is rejected. Based on the Uniform Standards established by DCA, after year 5 a licensee would be required to continue to test once per month. This is established on page 10 of the Uniform Standards.

Page 12 of the Uniform Standards provides specific criteria that a licensee must demonstrate in order to petition the Board for a return to a full and unrestricted license or registration. Therefore, if the criteria are met, the Board may lift the requirement.

### **CONCERN #4**

**COMMENT NO. 5: Criteria for Requiring Discipline:** Mr. Smith requests clarity about the criteria the Board will use to determine the need for an intervention such as inpatient treatment. Would they be blindly applied no matter the circumstances?

RESPONSE: This comment is rejected. The clinical diagnostic evaluation will provide recommendations for substance abuse treatment, practice, restrictions, or other recommendations related to the licensee's rehabilitation or safe practice. (Uniform Standards, page 4).

The Board will then review the clinical diagnostic evaluation, including its recommendations, and determine what restrictions or recommendations to impose based on specified criteria and circumstances. (Uniform Standards, page 5) According to the Uniform Standards, the need for inpatient treatment would be evaluated by the Board based on the clinical diagnostic evaluation, and other factors, including length of sobriety, scope and pattern of substance use, and the duration and severity of the substance abuse. It is not a one-size-fits-all determination and would not blindly apply to all cases.

**COMMENT NO. 6: Cost of Discipline:** Mr. Smith cites concerns about the cost of discipline and requests clarification. He cites data that a social worker's average salary in California is \$55,000. He notes that someone required to do drug testing, a psychological evaluation, and supervised practice or mandatory therapy would incur around \$7,000 in costs in the first year. He would like to know the Board's position about impacting a person's ability to support their family financially.

RESPONSE: This comment is rejected.

Board licensing law (BPC §4990.16) mandates the following:

*"Protection of the public shall be the highest priority for the 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."*

A licensee who is in compliance with the law will not incur any fiscal impact due to these regulations.

For a licensee with a substance abuse violation, the cost of the discipline will depend on the results of the clinical diagnostic evaluation and the Board's consideration of the evaluation to determine the severity of the substance abuse problem and the risk to consumers.

**Comments Received During the 15-Day Period the Modified Text was Available to the Public**

The Board held one 15-day public comment period. No comments were received.

**Small Business Impact:**

The Board has determined that the proposed regulations may affect small businesses.

A license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the small business where the licensee works depending on the nature and severity of the violation. A small business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a small business; therefore, the number or percentage of small businesses that may be affected cannot be predicted. The Board only has the authority to take administrative action against a licensee and not a small business. Therefore, the costs incurred by a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Small businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

### **Consideration of Alternatives**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the BBS 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 adopted regulation or would be more cost effective to the affected private persons and equally effective in implementing the statutory policy or other provision of law. Set forth below are the alternatives which were considered.

1. Not adopt the regulations. This alternative was rejected because this regulatory proposal will provide the Board with additional tools to discipline and monitor substance abusing licensees, and contains measures to ensure that such discipline and monitoring is done in a consistent manner across healing arts boards under DCA. This will ensure more consistent public protection.
2. Adopt the regulations. The Board has determined that this alternative is the most feasible because it will assist the Board in its mandate of consumer protection.

### **Finding of Necessity**

The Board of Behavioral Sciences hereby finds that it is necessary for the public health, safety, and welfare of the people of California that this regulation apply to business.

### **Documents Incorporated by Reference**

The document entitled “Uniform Standards Related to Substance Abuse and Disciplinary Guidelines” [Rev. OAL to insert effective date] have been incorporated by reference. This is because the BBS has determined that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations, due to the fact that the document is 39 pages. Prior versions of this document have also been incorporated by reference into the regulations.

### **Local Mandate**

The proposed regulation does not impose any mandate on local agencies or school districts.