

TITLE 16. CALIFORNIA BOARD OF BEHAVIORAL SCIENCES

INITIAL STATEMENT OF REASONS

Hearing Date: The Board of Behavioral Sciences (Board) has not scheduled a hearing on the proposed changes. However, a hearing will be scheduled upon request by any interested party if the request is received no later than 15 days prior to the close of the written comment period.

Subject Matter of Proposed Regulations: Telehealth

Sections Affected: Section 1815.5 of Division 18 of Title 16 of the California Code of Regulations (CCR)¹.

Introduction and Problem Statement

The Board of Behavioral Sciences (Board) licenses and regulates Licensed Marriage and Family Therapists (LMFTs) (Bus. & Prof. Code (BPC), §§ 4980 et seq.), Licensed Educational Psychologists (LEPs) (BPC §§ 4989.10 et seq.), Licensed Clinical Social Workers (LCSWs) (BPC §§ 4991 et seq.), and Licensed Professional Clinical Counselors (LPCCs) (BPC §§ 4999.10 et seq.).

The Board also registers and regulates individuals gaining supervised experience toward meeting the requirements for licensure. This includes registered Associate Marriage and Family Therapists (AMFTs), Associate Professional Clinical Counselors (APCCs) and Associate Clinical Social Workers (ASWs), and applicants pending registration. While the Board does not register, nor does it directly regulate individuals enrolled in a degree program designed to lead an individual to licensure, the Board's law for two of its professions does set forth certain provisions applicable to these students, and designates these individuals as "trainees" (Marriage and Family Therapist (MFT) Trainees and Professional Clinical Counselor Trainees).

The Board's highest priority is public protection when exercising its licensing, regulatory, and disciplinary functions (BPC § 4990.16). The Board is authorized to adopt rules and regulations as necessary to administer and enforce the provisions of law that it administers and enforces (BPC § 4990.20).

The Board's current telehealth regulations were adopted in 2016. The practice of psychotherapy via telehealth continues to evolve, and the Board has received feedback from stakeholders that some provisions of the telehealth regulations need to be updated or clarified. This proposal would address these concerns by amending existing regulations as follows.

¹ All CCR references are to Title 16 unless otherwise noted.

The proposal would be revised to more accurately reflect the status that an individual needs to hold in order to provide telehealth (either as a trainee in accordance with BPC section 2290.5 or a licensee with a current and active license). In addition, existing regulation at subsection (d)(3) simply states that each time a licensee or registrant provides services via telehealth they shall utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium, without further specification. This proposal would address such ambiguity by removing references to “industry best practices” and instead specifically list those laws and regulations that a licensee or registrant would need to comply to ensure that the technology, method and equipment used to provide services via telehealth comply with all applicable federal and state privacy, confidentiality, and security laws and regulations. These would include:

1. The Confidentiality of Medical Information Act (Part 2.6 (commencing with section 56) of Division 1 of the Civil Code).
2. The Health Insurance Portability and Accountability Act of 1996 (“HIPAA” -- (42 U.S.C. §§ 1320d - 1320d-8)) as amended by subsequent legislation.
3. The regulations promulgated under HIPAA by the United States Department of Health and Human Services, including 45 Code of Federal Regulations parts 160 and 164, as are currently in effect or as later amended.

The proposal would also make non-substantive changes that strike language in existing subsection (f) that is unnecessary and duplicative of statute and add gender neutral pronouns and make other non-substantive changes for consistency of use of those terms throughout the Board’s regulations. The specific proposed changes to the Board’s telehealth regulations and the reasons for those changes are provided in detail below.

Anticipated Benefits from this Regulatory Action:

The objectives of the amendments and anticipated benefits in this regulatory proposal include the following:

- Increase clarity and conciseness in regulation by removing unnecessary language that duplicates statute; by clarifying the license status necessary to provide telehealth services; and resolve ambiguity in regulation regarding the meaning of industry best practices.
- Increase awareness of and compliance with telehealth-related confidentiality, privacy and security laws among Board licensees, which strengthens confidentiality and privacy for consumers of mental health services.

Specific Changes: Purpose and Rationale for Each Adoption, Amendment, or Repeal:

The Board proposes the following changes:

A. Amend Section 1815.5. Telehealth.

Proposed Changes

Subsection (a)

Purpose: Section 1815.5(a) specifies that in order to practice via telehealth with a client located in California, a “valid and current” California license or registration is required. This proposal would do the following:

- Repeal reference to the word “valid” and add the word “active” so that this subsection would instead require the license or registration to be “current and active”; and,
- Add language to specify that an exception exists for trainees in BPC section 2290.5.

Rationale: It is unclear exactly what a “valid” license or registration means, as it is not a status used by the Board. Requiring the license or registration to be “current and active” aligns the language with the license or registration status that the Board requires to practice with all clients, including those seen via telehealth.

Two of the Board’s regulated professions define “Trainee” as an unlicensed person currently enrolled in a degree program designed to qualify the person for licensure, and who has completed 12 semester units or 18 quarter units of study (MFT Trainee - BPC section 4980.03(c); Professional Clinical Counselor Trainee – BPC section 4999.12(g)). These individuals are not licensed or registered by the Board as they are under the purview of their school. Trainees are permitted to provide telehealth services under BPC section 2290.5(a)(3)(B) and (E) if they are functioning pursuant to BPC section 4980.43.3 (MFT Trainee) or BPC section 4999.46.3 (Professional Clinical Counselor Trainee). Including the exception for trainees in the proposal is necessary to provide accurate notice of the authority of all persons practicing telehealth legally in California and to avoid a conflict between the Board’s laws and regulations. Without this revision, subsection (a) could otherwise be interpreted as requiring a full, unrestricted license or registration, which is in conflict with BPC section 2290.5’s controlling provisions.

Subsections (c)(3) and (d)

Purpose: Replace gendered language with gender-neutral language.

Rationale: These changes are necessary to bring the regulations into compliance with Assembly Concurrent Resolution No. 260 of 2018 which specifies that state

agencies should use gender neutral pronouns and avoid the use of gendered pronouns.

Subsection (d)(3)

Purpose: This section currently requires that each time a therapist provides services via telehealth, they must “utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium.” Stakeholders have raised concerns that it is unclear what “industry best practices for telehealth” specifically means. The proposal would instead specify the federal and state laws and regulations that must be followed to ensure that the technology, method and equipment use to provide services for telehealth comply with all client confidentiality, privacy and security laws and regulations, including the Confidentiality of Medical Information Act (CMIA) (Part 2.6 (commencing with section 56) of Division 1 of the Civil Code), the Health Insurance Portability and Accountability Act (HIPAA) of 1996 (42 U.S.C. §§ 1320d - 1320d-8) as amended by subsequent legislation, and regulations promulgated under HIPAA including 45 Code of Federal Regulations parts 160 and 164, as are currently in effect or as later amended. The proposal also replaces the phrase “communication medium” with language that instead specifies “the technology, method and equipment used to provide services via telehealth”.

Rationale: Stakeholders have expressed concern that “industry best practices” is vague and therefore may be inconsistently applied in practice by licensees. The Board’s licensees are a type of licensed health care professional (as defined in Civil Code section 56.05(h)) that must comply with the CMIA including its standards and prohibitions on unauthorized disclosure in Civil Code sections 56.10, 56.36 and 56.101, as well as HIPAA and its implementing regulations when transmitting protected health information (PHI as set forth in 45 CFR § 160.103) in electronic form in connection with certain administrative and financial transactions (as a health care provider that is considered a “covered entity” per 45 CFR § 160.103). The CMIA specifies how health care providers, including Board licensees, may and may not disclose confidential medical information. For example, Civil Code section 56.101 in the CMIA provides, in part:

“A health care provider that creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information shall do so in a manner that preserves the confidentiality of the information contained therein...”

Civil Code section 56.101(b) further sets standards for an electronic health record system or electronic medical record system and for maintaining the confidentiality of medical information under the CMIA.

In addition, HIPAA and its implementing regulations establish national standards for the protection of PHI and sets forth security standards for protecting that health information that is held or transferred in electronic form as set forth in 45 CFR parts 160 and 164. These laws and regulations address the technical and non-technical

safeguards licensees must put in place to secure individuals' electronic PHI including: (1) administrative safeguards to implement policies and procedures to manage the selection, development, implementation, and maintenance of security measures, (2) physical safeguards to protect physical access to electronic information systems and related buildings and equipment; and, (3) technical safeguards to implement technology and related policies to protect PHI and control access to it. To ensure that the standards are continuously met according to current federal law and regulations, the Board adds the words “as amended by subsequent legislation” in reference to HIPAA and “as are currently in effect or as later amended” in reference to the HIPAA privacy rule regulations. This is consistent with similar regulations references to maintain currency of reference to these federal laws and regulations that have been adopted by other agencies (see Cal. Code Regs., tit. 11, § 820 and Cal. Code Regs., tit. 22, § 126020).

By specifying that the licensee must follow these laws and regulations, it clarifies what is meant by industry best practices to ensure client confidentiality and security of the communication medium, thereby strengthening consumer protection and avoiding confusion regarding the minimum standards expected to be met in this area. In addition, it may increase awareness of CMIA and HIPAA provisions pertaining to telehealth among Board licensees and thus increase compliance, which will benefit consumers of mental health services as it could lead to fewer confidentiality violations by the Board's licensees.

Lastly, replacing “the communication medium” with “the technology, method and equipment used to provide services via telehealth” resolves ambiguity about what is intended by “communication medium” and is necessary to ensure that the licensee understands which components used to provide telehealth services are vulnerable to security threats that could lead to a breach of client privacy and confidentiality.

Subsection (f)

Purpose: This proposal would repeal subsection (f) of section 1815.5 which specifies that “Failure to comply with these provisions shall be considered unprofessional conduct”.

Rationale: “Failure to maintain confidentiality” is listed as unprofessional conduct in statute for each of the Board's license types (BPC sections 4982(m), 4989.54(q), 4992.3(n) and 4999.90(m).). In addition, BPC sections 4982(e), 4989.54(f), 4992.3(f) and 4999.90(e) state that unprofessional conduct includes “Violating, attempting to violate, or conspiring to violate any of the provisions of this chapter or any regulation adopted by the board.”

Repealing subsection (f) is necessary because provisions that are already in statute do not need to be repeated in regulation. Should a licensee fail to comply with the telehealth regulations, they would be charged under one of the BPC sections listed above.

In addition, stakeholders expressed concern about subsection (f) being included in this section of regulations because subsection (e) pertains to services provided to clients located in another state. However, the Board only has authority to discipline a licensee for unprofessional conduct with a client located within California, and therefore the inclusion of subsection (f) could be misleading.

This change helps to ensure that the Board's licensing law is clear and concise. Striking language duplicated in statute achieves the nonduplication standard of the Administrative Procedure Act (Government Code section 11349(f); Title 1, California Code of Regulations, section 12).

Further General Technical Clean-Up Changes

Under the Executive Officer's delegation of authority by the Board at its March 1, 2024 Board meeting, the Executive Officer has made the following non-substantive changes to conform terminology consistent with its use throughout the Board's regulations and correct an acronym, capitalization, punctuation, and add legal citations to the note already cross-referenced in the approved text. These changes include:

Subsections (a) and (c)(1): changing the capital "S" in the word "Section" to a lower case "s" consistent with how sections are referenced in other board regulations,

Subsection (d)(3)(ii.): correcting the incorrect acronym for Health Insurance Portability and Accountability Act from "HIPPA" to "HIPAA",

Subsection (d)(3)(iii.): removing an extraneous comma after "including",

Note: removing the comma after section 4999.30 in the Reference portion, as it is not currently in existing text nor needed before the word "and"; and,

Note: adding additional citation to the applicable statutory sections of the Civil Code for the Confidentiality of Medical Information Act (CMIA) provisions in the Reference section (Civil Code section 56 et seq.) since the proposed changes would implement the CMIA by adding references to the CMIA in the text.

The Board considers these changes to be non-substantive in accordance with California Code of Regulations, Title 1, section 100 since the Board believes these changes would not alter the existing regulations' requirements, rights or responsibilities for any person affected by the proposed regulations as they are merely technical cleanup of these above-mentioned sections.

Underlying Data

Documents relied upon:

1. Telehealth Committee Meeting December 15, 2023: Agenda, Relevant Meeting

Materials and Meeting Minutes

2. Policy and Advocacy Committee Meeting January 19, 2024: Agenda, Relevant Meeting Materials and Meeting Minutes
3. Board Meeting March 1, 2024: Agenda, Relevant Meeting Materials and Draft Meeting Minutes

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 including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

The Board indicates this regulation will not affect businesses. This proposal would only impact licensees or registrants who provide services via telehealth. However, the Board believes the impact to individual licensees or registrants would not be significant for the following reasons:

- Striking regulations that duplicate statute has no adverse economic effect because the statutory provisions will continue to be in effect.
- Adding references to the CMIA and HIPAA has no adverse economic effect because these laws already apply to Board licensees and registrants providing services pursuant to these state and federal laws.

The rulemaking file includes the facts, documents, and other evidence which supports this determination.

Economic Impact Assessment

This Board has determined that this regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California.
- It will not create new businesses or eliminate existing businesses within the State of California.
- It will not affect the expansion of businesses currently doing business within the State of California.

The above determinations were made for the following reasons:

- Striking language duplicated in statute has no economic effect on jobs or businesses since those laws and their legal effects would remain unaffected by the Board's repeal of such language.
- The CMIA and HIPAA, which are being added into the Board's regulations, already apply to the Board's licensees and registrants under state and federal law or regulation.
- This proposal merely restates the requirements of existing law and regulations related to maintaining privacy, confidentiality and security but does not change those existing requirements.

This regulatory proposal affects the health and welfare of California residents because the proposed regulation will increase awareness of and compliance with telehealth-related confidentiality, privacy and security laws among Board licensees, which strengthens confidentiality and privacy for consumers of mental health services by potentially leading to fewer violations of client confidentiality.

This regulatory proposal does not affect worker safety because the proposal does not address worker safety.

This regulatory proposal does not affect the state's environment because the proposed regulations are not related to the state's environment.

Specific Technologies or Equipment

The proposed regulations do 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 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 laws being implemented or made specific.

No such alternatives have been proposed, however, the Board welcomes comments from the public.

Description of reasonable alternatives to the regulation that would lessen any adverse impact on small business:

No such alternatives have been proposed, however, the Board welcomes comments from the public.