

BOARD OF OPTOMETRY

ADDENDUM to the INITIAL STATEMENT OF REASONS

Sections 1516 and 1582 of Title 16 of the California Code of Regulations

On November 30, 2015, the Office of Administrative Law (OAL) disapproved the Board of Optometry's (Board) proposed amendment to Section 1516 of Title 16 of the California Code of Regulations (CCR) and the proposed adoption of 16 CCR Section 1582. The Office of Administrative Law (OAL) disapproved the proposed regulations on the basis of the clarity and necessity standards established in section 11349.1 of the Government Code. OAL required the Board to prepare an addendum to its Initial Statement of Reasons (ISR) to resolve these issues prior to approval.

Item Number 1- The Necessity of Requiring the Applicant Pay the Full Cost of Examination

The Board proposed to amend 16 CCR Section 1516 to require an applicant to pay for an examination conducted by a physician and surgeon or psychologist when it reasonably appears that the applicant has a mental or physical illness that may affect the competent practice of optometry. OAL deemed that the Board did not demonstrate the necessity of having the applicant pay for said examination.

The necessity for the applicant to pay for the examination, if so ordered by the Board, is derived from the understanding that the applicant has the burden to demonstrate that he or she is fit for licensure. The Board, as a state licensing agency, has the discretion to deny a license if a determination is made that the issuance of a license would be contrary to the public welfare. (See *Weiss v. State Board of Equalization* (1953) 256 P.2d 1.) For the Board to issue a license to an applicant with a mental or physical illness affecting competency would not honor its statutory consumer protection obligation. As the applicant must show fitness for licensure, it is equitable that he or she bears the cost of the examination.

Item Number -2 – The Addition of “Reasonably” in the Modified Regulation Text

The Board, at a regularly scheduled meeting, added the word “reasonably” to proposed subdivision (a) of 16 CCR Section 1516 such that the proposed subdivision read as follows:

“(a) In addition to any other requirements for licensure, whenever it **reasonably** appears that an applicant may be unable to practice optometry safely because his or her ability to practice may be impaired due to mental or physical illness affecting competency, the Board, may require the applicant to be examined by one or more physicians and surgeons or psychologists designated by the Board. The applicant shall pay the full cost of the examination. An applicant's failure to comply with the requirement shall render his or her application incomplete. If after receiving the report of the evaluation the Board determines that the applicant is unable to safely practice, the Board may deny the application. The report of the evaluation shall be made available to the applicant. “

Upon review, OAL determined that the Board had not demonstrated the necessity for this change. The Board believes that the addition of the word 'reasonably' is necessary in that the discretion to deny a license may not be exercised arbitrarily, capriciously or without factual basis. (*McDonough v. Goodcell* (1939) 91 P.2d 1035.) With this addition, the Board must have a basis in fact to order the examination; it cannot order the examination on impulse. In real world terms, after a Board review of the application and supporting information, if it reasonably appears that the applicant has a mental or physical illness that may affect competency, the Board can order the examination.

Item Number 3 – Clarity with Respect to 16 CCR Section 1516 and the Denial of a License

In its review, OAL determined that the Board had not met the clarity standard because of a conflict between the ISR and the proposed text. Specifically, OAL's concern was with the exercise of the Board's discretion ("the Board may deny the license") set forth in the proposed text as compared to the ISR's comment that if an applicant's fitness to practice was compromised, the individual would be denied a license.

To be clear, as reserved in the proposed regulation, the Board would carefully exercise its discretion as whether or not to deny a license based upon a finding of compromised competency. There would be no automatic denial. After an overall evaluation and consideration of all pertinent information, and consistent with its statutory obligation of consumer protection set forth in section 3010.1 of the Business and Professions Code, the Board will make a decision whether or not to issue a license.

Item Number 4 – Incorrect Authority Citation

OAL found that the Board cited the incorrect authority for the proposed revision to 16 CCR Section 1516. The Board will circulate the revised and corrected text for comment.