

## PHYSICAL THERAPY BOARD OF CALIFORNIA

### INITIAL STATEMENT OF REASONS

**Hearing Date:** May 11, 2011

**Subject Matter of Proposed Regulations:** Enforcement

**Section(s) Affected:** Amend Section: 1398.4  
Adopt Sections: 1399.23 & 1399.24

#### **SPECIFIC PURPOSE:**

The Physical Therapy Board of California (Board) is mandated to protect California consumers of physical therapy services. The process by which the Board meets this mandate are: issue licenses to eligible physical therapist and physical therapist assistant applicants; investigate complaints against physical therapist and physical therapist assistant licensees; discipline physical therapist and physical therapist assistant licensees for violation of the Physical Therapy Practice Act (PTPA); monitor physical therapist and physical therapist assistant licensees who have been placed on probation; and manage a diversion program for physical therapist and physical therapist assistant licensees whose practice may be impaired due to chemical dependency.

The Board is proposing the regulatory changes described below in order to enhance its disciplinary function and strengthen its Enforcement Program to better achieve its public protection mandate. The proposed changes are the result of extensive reviews of the Board's Enforcement Program, including services rendered by the Department of Consumer Affairs (DCA) Division of Investigation (DOI) and the Attorney General's (AG) Office. The proposed regulatory changes will facilitate achievement of the Board and DCA's goal to improve the discipline case processing timeframes and the completion of case resolution of 12 to 18 months.

#### **FACTUAL BASIS:**

Section 1398.4-Delegation of Certain Functions – Amend

The regulatory proposal would delegate to the Board's Executive Officer (EO) the authority to approve settlement agreements for revocation, surrender, interim suspension of a physical therapist or physical therapist assistant license or; in his or her absence, delegate this function to the Assistant Executive Officer (AEO) or other designee by the EO.

Existing statute allows the Board to delegate to the EO specific duties relative to disciplinary matters including filing accusations, receiving notices of defense, and issuing subpoenas. The Board has retained for itself the authority to render decisions on proposed decisions prepared by Administrative Law Judges (ALJ) and settlement agreements prepared by Deputy Attorneys General (DAG). The ALJ's proposed decision is issued after the physical therapist or physical therapist assistant has had an opportunity to dispute the charges at an administrative hearing.

In most cases, prior to a hearing, the physical therapist or physical therapist assistant and the DAG may negotiate a settlement agreement to resolve the case. In these settlement agreements, the physical therapist or physical therapist assistant admits specific charges and agrees to the proposed disciplinary action. In both the proposed decisions and settlement decisions, the Board members must vote to adopt the decisions.

Because the physical therapist or physical therapist assistant willingly and voluntarily admit to charges and agree to a proposed disciplinary action that is among the severest the Board can impose, there is little discretion for the Board to exercise in these cases. Staff is unaware of any case in which the Board has not adopted such a settlement agreement.

The regulatory proposal would not only enable the Board's EO to approve of the settlement agreements for license revocation, surrender, or interim suspension of the physical therapist or physical therapist assistant license but would also allow the EO in his or her absence to delegate to the EAO or other designee all functions necessary to the dispatch of business of the Board in connection with investigative and administrative proceedings under its jurisdiction. This delegation of function would allow the Board to act on matters timely.

#### Section 1399.23-Required Actions against Registered Sex Offenders – Adopt

This proposed regulatory action specifies that the Board will deny or revoke a license if an applicant or licensee is required to register as a sex offender pursuant to Penal Code Section 290. The Board will also deny any petition to reinstate or reissue a license if the petitioner is a registered sex offender, except under specified conditions.

Because of the seriousness of sex offenses and sexual misconduct, and the potential threat to consumers that sex offenders pose, the Board proposes to deny licensure of applicants and to revoke physical therapist or physical therapist assistant licenses in any disciplinary matter where there is a finding that the applicant or licensee was convicted of a sex offense that requires registration as a sex offender. The regulatory proposal (1) interprets and makes specific B&P Code Section 2661.7(f), which prohibits physical therapists or physical therapist assistants whose licenses have been revoked and who are subject to an order of registration pursuant to Penal Code Section 290 from petitioning the Board for reinstatement of the license, and (2) provides consistency by imposing the same disciplinary action for applicants for licensure and all other physical therapist and physical therapist assistants who are required to register as sex offenders.

#### Section 1399.24-Unprofessional Conduct -Adopt

B&P Code Section 2660 define acts that constitute unprofessional conduct. This regulatory proposal specifies additional acts that constitute unprofessional conduct. The specific acts and rationale for defining the act as unprofessional conduct are as follows:

1. In a civil settlement agreement, including or permitting to be included provisions prohibiting a party in the dispute from contacting, cooperating with, or filing a complaint with the Board, or requiring another party to the dispute to attempt to withdraw any complaint filed with the Board.

These actions can delay and prevent the Board's efforts to investigate possible misconduct; thereby, preventing the Board from protecting the public. The use of such provisions deny consumers their rights to file complaints; inhibits the Board in fulfilling its mandate to investigate complaints and take disciplinary action for violation of the PT Practice Act; and ultimately, places consumers at risk.

It has been argued by some that subjecting a licensee to review by a board after a civil settlement has been reached, constitutes double jeopardy. The Board points out that the United States Supreme Court has ruled that the protection offered by double jeopardy only applies to repeated criminal proceedings. Double jeopardy protection does not attach to civil proceedings or subsequent administrative proceedings. Criminal, civil, and administrative proceedings each serve entirely different legal functions.

2. Failure to provide to the Board lawfully requested documents under the physical therapist or physical therapist assistant's control, within the specified timeframe.

Investigators from the DOI, who conduct the majority of Board investigations, and Board staff frequently encounter difficulty in obtaining pertinent and legally requested documents and records. The Board recognizes that physical therapist or physical therapist assistant may not be in possession of or have control over the requested items. However, when the physical therapist or physical therapist assistant does, the requested records or documents are an essential part of the investigation and should be provided in order to conduct a thorough and timely investigation. Defining failure to provide the records as unprofessional conduct and grounds for Board disciplinary action will facilitate and expedite obtaining records.

3. Failure to cooperate and participate in any Board investigation, as long as such action does not infringe upon the physical therapist or physical therapist assistant constitutional or statutory privileges.

As with failure to produce records or documents, the failure to participate or cooperate in the investigation impedes and delays the investigative process and erodes the Board's public protection mandate. The proposal would not deprive the physical therapist or physical therapist assistant of any constitutionally or statutorily guaranteed privileges or rights.

4. Failure of a licensee to notify the Board within the specified timeframe of an arrest; criminal charges; charges or indictment; conviction including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor; or disciplinary action by another licensing entity.

As part of the licensing process, all applicants for physical therapist or physical therapist assistant 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 and conviction reports from DOJ. Currently the Board does not receive subsequent reports from the FBI; however, is proposing to in the future. The Board also requires physical therapist and physical therapist assistants report healthcare professional license discipline by any governmental agency and any convictions, with specified exceptions, at the time of their biennial license renewal.

In addition, the Board receives reports from the National Practitioners Data Bank regarding disciplinary action taken against physical therapist and physical therapist assistant in other states.

Problems with the existing system include: (1) Board does not always receive subsequent arrests and conviction reports from DOJ; (2) the self-reporting requirement is biennial, resulting in a significant delay in Board awareness of the arrest, conviction, or discipline of the license in another state. Requiring the physical therapist or physical therapist assistant to report the required information within a specified timeframe will allow the board to act on in a timely manner.

5. Failure to comply with a court ordered subpoena to release records.

Failure or refusal to comply with a court order mandating the release of records to the Board has an adverse impact upon the Board's ability to conduct investigations in a timely manner. This delays the investigative process placing the consumers at risk.

#### **UNDERLYING DATA:**

Technical, theoretical or empirical studies or reports relied upon:

- PTBC Enforcement Plan– February 2010
- Department of Consumer Affairs “Consumer Protection Initiative – January 21, 2010”

#### **BUSINESS IMPACT:**

These regulations will not have a significant adverse economic impact on businesses; however it will impact the individual license (physical therapists and physical therapist assistants) and applicants for physical therapy licensure. The Physical Therapy Board does not have authority to require licensees to report place of employment and therefore does not have information or data regarding employment.

These regulations could affect small businesses if the licensee is the sole owner of the business. Physical therapists placed on probation could be subject to restrictions of ownership for certain type of violations. The Physical Therapy Board does not have the authority to require information regarding ownership of small businesses and therefore does not have information on the number of small businesses owned by physical therapists.

#### **SPECIFIC TECHNOLOGIES OR EQUIPMENT:**

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

#### **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.

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 changes proposed by this regulatory action are based on months of internal and external review of the Board's enforcement processes and procedures and are necessary to improve the Board's enforcement operations. The regulatory proposal will assist in achieving the Board and Department goal of reducing the average enforcement completion timeline from the current 36 months to between 12 and 18 months.

2. Adopt the regulation. The Board determined that this alternative is the most feasible because the proposed regulatory changes would enhance the Board's ability to conduct its investigations in a timely manner and protect the public.