



Physical Therapy Board of California

STATE AND CONSUMER SERVICES AGENCY - GOVERNOR EDMUND G. BROWN JR.

# Physical Therapy Board of California

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Agenda Item #3

## Physical Therapy Board of California Draft Meeting Minutes

Wednesday, November 2, 2011 – 1:00 p.m.  
Thursday, November 3, 2011 – 8:30 a.m.

Ohlone College Newark Campus  
39399 Cherry Street Room NC 1100  
Newark, CA 94560

For the sake of clarity, the meeting minutes are organized in numerical order to reflect their original order on the agenda; however, issues were taken out of order during the meeting.

### 1. Call to Order and Roll Call.

Sara Takii, PT, D.P.T., M.B.A, President  
Debra J. Alviso, PT, D.P.T., Vice-President  
Donald A. Chu, Ph.D., PT, ATC, CSCS  
Marty Jewell, Ph.D., PT  
James E. Turner, M.P.A.  
Carol Wallisch, M.A., M.P.H.

Sara Takii, PT, D.P.T, M.B.A, President	November 2, 2011 – Present November 3, 2011 – Present
Debra J. Alviso, PT, D.P.T, Vice-President	November 2, 2011 – Present November 3, 2011 – Present
Donald A. Chu, Ph.D., PT, ATC, CSCS	November 2, 2011 – Present November 3, 2011 – Present
Marty Jewell, Ph.D., PT	November 2, 2011 – Present November 3, 2011 – Present
James E. Turner, M.P.A.	November 2, 2011 – Present November 3, 2011 – Present
Carol Wallisch, M.A., M.P.H.	November 2, 2011 – Present November 3, 2011 – Present

The Physical Therapy Board of California (Board) November 2011 meeting was called to order by Dr. Takii at 1:11 p.m. All members were present and a quorum was established. In the absence of Shela Barker, Board Legal Counsel, Anita Scuri, Supervising Senior Counsel, was present. The following Board staff members were in attendance: Sarah Conley, Liz Constancio, Jason Kaiser, Rebecca Marco and Elsa Ybarra.

### 2. Sunset Review Report – Sarah Conley

Sarah Conley presented the final draft of the 2012 Sunset Review Report to the Board.

35 Prior to submitting the report to the Senate Business, Professions and Economic  
36 Development Committee (BP&ED), the Board directed staff to make the following  
37 changes:  
38

39 Page 2

40  
41 Identify academic degrees for the public members.  
42

43 Page 8

44  
45 The Board members' roster should reflect that Mr. Turner has been reappointed with a  
46 term expiration date of June 1, 2015.  
47

48 Page 24

49  
50 In the chart demonstrating the PTBC Board members' participation in FSBPT activities,  
51 the following events should be removed:

52 Sara Takii, PT, DPT:	Annual Meeting 2010: Alternate Delegate
53 James Turner:	Annual Meeting 2008: Alternate Delegate
54	Annual Meeting 2010: Alternate Delegate
55	Annual Meeting 2011: Alternate Delegate

56  
57 **MOTION: To adopt the 2012 Sunset Review Report as amended.**

58  
59 **MOVED: Dr. Jewell**

60  
61 **SECOND: Dr. Chu**

62  
63 **VOTE: 6-0 Motion carried**  
64

65 Ms. Conley thanked the Board for their involvement and assistance in completing the  
66 2012 Sunset Review Report.  
67

68 **3. Adoption of PTBC Administrative Manual – Sarah Conley**  
69

70 Ms. Conley presented the final draft of the Board Administrative Manual to be included  
71 with the 2012 Sunset Review Report. After discussion, the Board identified numerous  
72 edits and charged staff with incorporating these edits prior to submission with the 2012  
73 Sunset Review Report. Dr. Chu directed staff to research if a system can be developed  
74 for Board members to report per diem electronically.  
75

76 **MOTION: To adopt the Physical Therapy Board of California Administrative**  
77 **Manual as amended.**

78  
79 **MOVED: Dr. Jewell**

80  
81 **SECOND: Mr. Turner**

82  
83 **VOTE: 6-0 Motion carried**  
84

85 4. **Disciplinary Decisions –**  
86 **The Board will convene in CLOSED SESSION to deliberate on disciplinary actions**  
87 **pursuant to Government Code Section 11126(c)(3).**

88  
89 The Board had no closed session items.

90  
91 5. **Approval of Minutes**

92 **(A) August 3 & 4, 2011 Board Meeting**

93  
94  
95 Corrections were made to the minutes as follows:

96  
97 Page 1, Line 15

98  
99 Mr. Turner requested staff identify Legal Counsel in attendance.

100  
101 Page 5, Lines 200-201

102  
103 *The professors were confused as to what the students should study to prepare for the*  
104 *exam CLE.*

105  
106 Page 5, Lines 238-239

107  
108 *Mr. Stiger petitioned the Board to postpone taking action on complaints received against*  
109 *physical therapist working for physicians.*

110  
111 Page 7, Lines 303-304

112  
113 *Mr. Turner shared his experience ~~in~~ working with in the Legislature and suggested it*  
114 *may be politically advantageous for the Board to support Mr. Stiger's recommendations.*

115  
116 **MOTION: To adopt the draft August 3 & 4, 2011 Board meeting minutes as**  
117 **amended.**

118  
119 **MOVED: Dr. Alviso**

120  
121 **SECOND: Dr. Jewell**

122  
123 **VOTE: 6-0 Motion carried**

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126 **(B) September 21, 2011 Board Meeting**

127  
128 Corrections were made to the minutes as follows:

129  
130 Agenda Item 2

131  
132 *At the conclusion of closed session the Board announced the appointment of Rebecca*  
133 *Marco as Executive Officer. Ms. Marco was serving as the Board's Interim*  
134 *Executive Officer.*

135  
136 **MOTION:** To adopt the draft minutes of the September 21, 2011 Board meeting  
137 as amended.  
138  
139 **MOVED:** Dr. Jewell  
140  
141 **SECOND:** Dr. Alviso  
142  
143 **VOTE:** 6-0 Motion carried  
144

145 **(C) October 13, 2011 Board Meeting**

146 The Board determined the minutes accurately reflect the actions of the Board.

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148  
149 **MOTION:** To adopt the draft minutes of the October 13, 2011 Board meeting as  
150 presented.  
151  
152 **MOVED:** Dr. Jewell  
153  
154 **SECOND:** Ms. Wallisch  
155  
156 **VOTE:** 6-0 Motion carried  
157

158 **6. Application & Licensing Services Report – Liz Constancio**

- 159  
160 **(A) Statistics**  
161 **(B) Continuing Competency Audits**  
162

163 Rebecca Marco, Executive Officer (EO), introduced Liz Constancio who was recently  
164 appointed as Staff Services Manager to the Licensing and Application Services  
165 Program. Ms. Constancio reported application and licensing statistics for the first  
166 quarter of the current fiscal year. Dr. Jewell requested again that staff separate  
167 statistics on physical therapist applications submitted from foreign educated physical  
168 therapist assistant applicants and foreign educated physical therapist applicants who  
169 downgrade to a physical therapist assistant application. Dr. Alviso brought to staff's  
170 attention the years in the tables need to be updated to reflect the current fiscal year.  
171

172 Ms. Marco explained a continuing competency audit backlog has occurred due to  
173 staffing shortages.  
174

175 **7. Consumer Protection Services Enforcement Report – Jason Kaiser**

- 176  
177 **(A) Performance Measures**  
178 **(B) Disciplinary Summary**  
179  
180

181 Ms. Marco shared Jason Kaiser was recently appointed as Staff Services Manager to  
182 the Consumer Protection Services (CPS) Program. Mr. Kaiser previously served as the  
183 Interim Lead of the Licensing and Application Services Program. While CPS is still in  
184 transition, CPS Lead, Elsa Ybarra, presented statistics for the CPS program. Ms.

185 Ybarra explained in the enforcement statistics report, the "YTD" column was fixed to  
186 reflect averages instead of a total sum. Additionally, Ms. Ybarra updated Performance  
187 Measure targets for case intake, from five to nine days, and probation intake, from five  
188 to ten days. Ms. Ybarra changed these targets at the request of the Board at the  
189 October 13, 2011 Board meeting after staff explained the current targets do not take  
190 into consideration hours of operation (items received after close of business on last  
191 target day), weekends, holidays and staff absences. The Board requested staff add a  
192 footnote to explain why the number of "complaints received" and the number of  
193 "complaints assigned for investigation" are not the same.  
194

195 **8. President's Report – Dr. Sara Takii**

196  
197 **(A) Report on DCA Monthly Teleconference of Board Presidents**

198  
199 Dr. Takii shared the following Boards are involved with the monthly Department of  
200 Consumer Affairs (DCA) teleconference: Acupuncture Board, Board of Behavioral  
201 Sciences, Dental Board, Dental Hygiene Committee, Medical Board, Naturopathic  
202 Medical Board, Occupational Therapy Board, Optometry Board, Osteopathic Medical  
203 Board, Pharmacy Board, Physical Therapy Board, Physician Assistant Committee,  
204 Board of Podiatric Medicine, Psychology Board, Board of Registered Nursing, Speech-  
205 Language Pathology and Audiology Board, and Vocational Nursing and Psychiatric  
206 Technicians Board.  
207

208 Dr. Takii reported Brian Stiger, DCA Acting Director, explained at the September  
209 teleconference, enforcement is top priority for Governor Brown. Mr. Stiger provides a  
210 monthly report to Governor Brown regarding boards' enforcement programs. Also,  
211 during the teleconference, boards were notified Governor Brown is making  
212 appointments; however, the focus is specifically on boards lacking a quorum.  
213

214 Dr. Takii shared there has been some relief from the hiring freeze. Ms. Marco explained  
215 DCA, boards and bureaus who submitted freeze exemptions are no longer required to  
216 go to the Department of Finance (DOF) and the Governor's Office, but continue to  
217 require approval by the State and Consumer Services Agency (SCSA). This relief was  
218 provided to DCA, boards and bureaus since all achieved a 5% reduction of their  
219 individual budgets.  
220

221 Dr. Takii shared the BreEZe project is on track and the Board is scheduled to have  
222 BreEZe in spring 2013.  
223

224 **(B) 2012 PTBC Meeting Dates**

225  
226 The Board discussed a location for the February 2012 Board meeting. Ms. Marco  
227 informed the Board, staff is awaiting a response from University of St. Augustine as to  
228 whether the meeting may be held there. San Diego Mesa College is having  
229 accreditation issues preventing them from hosting a Board meeting. Staff researched  
230 holding meetings at hospitals; however, hospital schedules would not allow for  
231 interested parties to attend the Board meeting.  
232

233 Ms. Marco informed the Board the sunset hearings may occur around that same time as  
234 the February Board meeting; therefore, it may be helpful to hold the meeting in

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Sacramento.

Ms. Scuri explained the basis of holding Board meetings within 100 days of each other. Discipline cases held for discussion at Board meetings must be acted upon within 100 otherwise the proposed decision is automatically effective. The 100 days may be extended by a maximum of thirty additional days if necessary, e.g. if the 100 days will expire immediately before an upcoming Board meeting.

### **(C) 2013 Proposed PTBC Meeting Dates**

The Board discussed the proposed 2013 Board meeting calendar and all members indicated they had no conflicting engagements with the proposed dates. Ms. Conley explained the first meeting in 2013 will fall outside the 100-day window in which meetings are routinely scheduled in the event a discipline case is held for discussion. Ms. Conley recommended the Board keep the proposed dates for 2013 despite the extended time between the November 2012 Board meeting and the February 2013 Board meeting, and in the event a discipline case is held for discussion in between, a teleconference meetings may be held to resolve the matter. The Board concurred with Ms. Conley's recommendation.

The Board assessed its current practice of meeting at schools with physical therapy or physical therapist assistant programs and if it is facilitating the Board's outreach goal as set in the 2009 Strategic Plan. The Board permitted staff to explore holding meetings at schools that are not located in the areas in which regular meetings are held, but still in the surrounding region; however, if staff cannot coordinate with a school, the alternative location should be the most cost efficient. The Board directed staff to contact California State University, Long Beach and California State University, Northridge as potential meeting locations for the February 2013 Board meeting.

### **9. Executive Officer's Report – Rebecca Marco**

Dr. Jewell requested background on the Board's need to comply with the Financial Integrity and State Managers Accountability Act (FISMA). Ms. Marco replied the DCA previously responded on behalf of the boards, but is no longer doing this. The Board will report to the DCA and the DCA will forward all boards' report to the Department of Finance (DOF). The Board directed staff to include the issue of the General Fund loan in the FISMA report.

Ms. Marco provided an update on relocation negotiations with DCA. DCA wants the Board to move into the vacant space, but discussions were put on hold because staff has been focused on completing the Sunset report. Additionally, Ms. Marco provided an update on the audit of the Board, ordered by the Joint Legislative Audit Committee. The audit cost is incorporated in the Board's budget for two fiscal years; half of the cost will be paid this fiscal year (FY) 2011/12 and the remaining balance in FY 2012/13. While the audit is funded initially by the General Fund, the Board must repay the General Fund for the full cost of the audit. Finally Ms. Marco reported the Board contracted with the Office of Professional Exam Services (OPES) to review and update the California Law Exam (CLE). OPES has held three workshops with Subject Matter Experts (SME) to compare the current CLE to the current laws and regulations and OPES anticipates review will be completed by April 2012. Additionally, the Board is

285 under negotiations with OPES to establish a multi-year contract to annually review and  
286 update the CLE and to complete a one-time review of the Electromyography exams.

287  
288 The Board expressed appreciation for Ms. Marco's written Executive Officer's report.

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290 **10. Consumer and Professional Associations and Intergovernmental Relations**  
291 **Report**

292  
293 **(A) California Physical Therapy Association (CPTA)**

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295 Dr. Dagostino, representing the CPTA, shared a record 1,200 physical therapists  
296 attended the CPTA Annual Conference. The Board's attendance was missed. Dr.  
297 Dagostino requested, on record, the Board attend all future CPTA Annual Conferences.  
298 The 2012 CPTA Annual Conference will be held in Santa Clara, California. Ms. Marco  
299 shared the Board appreciates the opportunity to participate in the CPTA Annual  
300 Conferences providing as a great outreach opportunity.

301  
302 **(B) Federation of State Boards of Physical Therapy (FSBPT)**

303  
304 Dr. Jewell indicated she was unable to attend the FSBPT Annual Meeting due to the  
305 State's travel restriction; however, an Executive Summary of the Annual Meeting is  
306 available on the FSBPT's Web site.

307  
308 **11. Update on Practice of Physical Therapy in Corporate Settings**

309  
310 **(A) Chapter 448, Statutes of 2011 (SB 543)**

311  
312 Ms. Marco updated the Board on the status of employment settings of physical  
313 therapists. As of January 1, 2012, the Board is prohibited from taking action on  
314 complaints received against physical therapists working for medical, podiatric medical,  
315 and chiropractic corporations. At the August 2011 Board meeting, Dr. Chu requested  
316 demographic information on the complaints received based upon physical therapists  
317 employed by physicians. Although the motion failed, Ms. Ybarra reported the  
318 information she was able to obtain on those complaints received since the August 2011  
319 Board meeting.

320  
321 The Board expressed concern regarding staff's ability to manage enforcement cases  
322 given the motion it made at the August 2011 Board meeting. Events occurred since that  
323 meeting, including the passage of Chapter 448, Statutes of 2011, which have impacted  
324 the issue. The Board discussed ways to address these cases; however, Ms. Scuri  
325 advised the Board that although the Board has concern over the effect of the August  
326 motion, it should not enter into specific direction of how enforcement cases are handled.  
327 The Board acts as the judge in enforcement matters and the Executive Officer acts as  
328 the prosecutor. It is inappropriate for the judge, i.e. the Board, to have any involvement  
329 in, or to direct the EO in any way during the investigation prior to imposing discipline.

330  
331 The Board recognized the motion it made at the August 2011 Board meeting did not  
332 capture its true intent since the Board did not intend for cases to be left open; therefore,  
333 it revisited the original motion which is as follows:

334

335 *I move, in consideration of the recommendation made by Acting Director Stiger,*  
336 *that where complaints arise as a result of allegations solely of violations of the*  
337 *Moscone-Knox Professional Corporation Act, that the Board staff not conclude*  
338 *any investigation of such complaints until the Legislature clarifies the law*  
339 *regarding the employment of licensed physical therapists in a corporate practice*  
340 *setting. This issue shall be placed on each agenda until such time as the board*  
341 *decides that the issue is resolved.*

342  
343 In light of the passage of Chapter 448, Statutes of 2011 (SB 543), Dr. Chu put forth the  
344 following motion:

345  
346 **MOTION:** To comply with Chapter 448, Statutes of 2011 (SB 543) that will take  
347 effect January 1, 2012 and that this item be on the agenda at future  
348 meetings and watch progress of the issue.

349  
350 **MOVED:** Dr. Chu

351  
352 **SECOND:** Ms. Wallisch

353  
354 **VOTE:** 6-0 Motion carried

355  
356 The Board directed staff to include, on the February 2012 Board meeting agenda,  
357 clarification of the motion made at the August 2011 Board meeting regarding complaints  
358 received against physical therapists working for physicians. This agenda item shall  
359 include 1) physical therapists working for professional corporations other than physical  
360 therapy corporations and 2) physical therapy corporations formed as a general  
361 corporation.

362  
363 **12. Adoption of 2012 Rulemaking Calendar– Sarah Conley**

364  
365 Ms. Conley presented the 2012 Rulemaking Calendar.

366  
367 Dr. Jewell inquired how the Board may assist in facilitating the completion of items on  
368 the 2012 Rulemaking Calendar. Ms. Marco responded that if the Board members are  
369 interested, it would be helpful to assign a Board member to each rulemaking file to  
370 assist staff. The members expressed interest in assisting staff with rulemaking files to  
371 facilitate completion of the 2012 Rulemaking Calendar. Ms. Marco explained some of  
372 the items may be included in one rulemaking package. Dr. Jewell recommended  
373 grouping the proposed rulemaking items to reflect how the items will be filed.

374  
375 The Board changed the priority on the following rulemaking items:

- 376  
377
  - *PTA – Equivalency Training and Experience: Amend California Code of*  
378 *Reguatlions section 1398.47: Priority 3 2*
  - *Fees: Add new CCR section (Application and Licensing fees previously CCR*  
380 *section 1399.50 & 1399.52): Priority 2 1*
  - *Pathways for recovery: Add new CCR section: Priority 2 1*

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- Continuing Competency: Amend CCR section 1399.94: Priority 3 2

**MOTION:** To adopt the 2012 Rulemaking Calendar as modified.

**MOVED:** Dr. Chu

**SECOND:** Dr. Jewell

**VOTE:** 6-0 Motion carried

- 13. Special Order of Business – November 3, 2011 9:00 a.m.  
Regulatory Hearing on Proposed Language for Sponsored Free Health Care  
Events from Chapter 27, Statutes of 2010 (AB 2669), Sections 1400-1400.3 of  
Division 13.2 of Title 16 of the California Code of Regulations**

Please see attached transcripts for this agenda item.

- 14. Special Order of Business –November 3, 2011 9:15 a.m.  
Regulatory Hearing on Proposed Language for Model Guidelines for Issuing  
Citations and Imposing Discipline, Section 1399.15 of Division 13.2 of Title 16 of  
the California Code of Regulation**

Please see attached transcripts for this agenda item.

- 15. Legislation Matrix Update – Sarah Conley**

**(A) Summary of 2011 Legislation**

Ms. Conley presented a summary of proposed legislation the Board followed in 2011. Since the Board adopted new positions on legislation, Ms. Conley inquired if the Board wished to change its position on any of the 2-year bills. The Board did not change its position on any of the 2-year bills; the positions remain as Watch.

**(B) Proposed Definitions of Legislation Positions**

The Board amended the legislation positions as follows:

Oppose: ~~The Physical Therapy Board of California (PTBC) opposes the addition/amendment/repeal of the statutory provision(s) set forth by the bill.~~

The Board will actively oppose proposed legislation and demonstrate opposition through letters, testimony and other action necessary to communicate the oppose position taken by the Board.

Oppose, unless amended: ~~The PTBC opposes the addition/amendment/repeal of the statutory provisions(s) set forth by the bill unless amendment are made to the bill as specified by the PTBC.~~

The Board will take an oppose position and actively

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lobby the legislature to amend the proposed legislation.

The Neutral position was not amended.

The Watch position was re-defined.

Watch: The watch position adopted by the Board will indicate interest regarding the proposed legislation. The Board staff and members will closely monitor the progress of the proposed legislation and amendments.

Support, if amended: The PTBC supports the addition/amendment/repeal of the statutory provision(s) set forth by the bill if amendments are made to the bill as specified by the PTBC.

The Board will take a support position and actively lobby the legislature to amend the proposed legislation.

Support: The PTBC supports the addition/amendment/repeal of the statutory provision(s) set forth by the bill.

The Board will actively support proposed legislation and demonstrate support through letter, testimony and any other action necessary to communicate the support position taken by the Board.

**MOTION:** To adopt the legislation positions as amended.

**MOVED:** Dr. Jewell

**SECOND:** Dr. Alviso

**VOTE:** 6-0 Motion carried

**16. National Physical Therapy Exam and California Law Exam Contract Update**

Ms. Marco reported Ms. Barker is continuing to work with the FSBPT to address the Department of General Services' concerns with the contract.

**17. Elections**

**(A) President**

Dr. Chu nominated Dr. Alviso for Board President. Dr. Alviso accepted the nomination.

**MOTION:** To nominate Dr. Alviso for Board President

**MOVED:** Dr. Chu

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**SECOND: Mr. Turner**

**VOTE: 6-0 Motion carried**

**(B) Vice-President**

Dr. Takii nominated Dr. Jewell for Board Vice-President. Dr. Jewell accepted the nomination.

**MOTION: To nominate Dr. Jewell for Board Vice-President**

**MOVED: Dr. Takii**

**SECOND: Mr. Turner**

**VOTE: 6-0 Motion carried**

**(C) FSBPT Delegate**

**(D) FSBPT Alternate Delegate (Primary)**

**(E) FSBPT Alternate Delegate (Back-up)**

**MOTION: To appoint the Board President as the FSBPT Delegate, the Board Vice-President as the FSBPT Alternate Delegate (Primary), and, in order, Board members, Legal Counsel, then the Executive Officer as the FSBPT Alternate Delegate (Back-up).**

**MOVED: Dr. Chu**

**SECOND: Mr. Turner**

**VOTE: 6-0 Motion carried**

**18. Public Comment on Items Not on the Agenda**

Lauren Robertson, PT, expressed concern regarding the Board's continuing competency program. Ms. Robertson requested the Board consider the following 1) separating the application process for a course provider and approval agencies; 2) conflict of interest issues and commercial support for continuing competency; 3) requiring approval agencies to have physical therapist input in approving courses; and 4) not implementing a per course fee for approval agencies.

**19. Agenda Items for Next Meeting – February 8 & 9, 2012  
San Diego, CA**

The Board directed staff to include clarification of the motion made at the August 2011 Board meeting regarding complaints received against physical therapists working for physicians. This agenda item shall include 1) physical therapists working for

535 professional corporations other than physical therapy corporations and 2) physical  
536 therapy corporations formed as a general corporation.

537  
538 Dr. Jewell will work with staff to prepare an issue paper on implementation and  
539 emerging issues in continuing competency for the February 2012 Board meeting. All  
540 other Board members will provide their concerns in writing to the EO.

541  
542 Dr. Alviso directed staff to include proposed language for CCR 1398.4, Delegation of  
543 Functions, for Board reconsideration. Dr. Alviso will prepare an issue paper.

544  
545 Dr. Takii will submit a letter to the EO regarding how medication knowledge applies in  
546 physical therapy practice and what is being taught to current physical therapist students  
547 on this issue.

548  
549 Ms. Wallisch and staff will draft an issue paper regarding pathways for recovery to  
550 initiate progress on the rulemaking file.

551  
552 **20. Adjournment**

553  
554 The meeting adjourned at 10:43 a.m. on Thursday, November 3, 2011.

555  
556 **MOTION: To adjourn the meeting.**

557  
558 **MOVED: Dr. Jewell**

559  
560 **SECOND: Mr. Turner**

561  
562 **VOTE: 6-0 Motion carried**

Physical Therapy Board of California

Public Board Meeting

2005 Evergreen Street, Suite 1350  
Sacramento, California 95815

Thursday, November 3, 2011

8:30 A.M.

Reported by  
Kent Odell

 COPY

## APPEARANCES

Present:

Sara Takii, PT, D.P.T., M.B.A., President

Debra J. Alviso, PT, D.P.T., Vice-President

Marty Jewell, Ph.D., PT

Donald A. Chu, Ph.D., PT, ATC, CSCS

James E. Turner, M.P.A.

Carol Wallisch, M.A., M.P.H.

Sarah Conley

Rebecca Marco

Anita Scuri

Luis Portillo

Stacy DeFoe

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1 PROCEEDINGS

2 NOVEMBER 3, 2011

8:35 A.M.

3 -oOo-

4 MS. TAKII: Good morning, everyone. This is the  
5 Physical Therapy Board of California. The date is November  
6 3, 2011. We are at Ohlone College in Newark, California.  
7 This is day two of our meeting. And so I'd like to start  
8 with roll call.

9 MS. CONLEY: Shela Barker - Here; Debra Alviso -  
10 Here; Marty Jewell - Here; Donald Chu - Here; James Turner -  
11 Here; Carol Wallisch - Here.

12 All members are present and a quorum is  
13 established.

14 MS. TAKII: This would be the Regulatory Hearing  
15 on Proposed Language -- and there's two -- there's the one  
16 for Regulatory Hearing on Proposed Language for Sponsored  
17 Free Health Care Events from Chapter 27, Statutes of 2010  
18 (AB 2669), Sections 1400 through 1400.3 of the Division 13.2  
19 of Title 16 of the California Code of Regulations.

20 I am going to read some instructions, but I've  
21 been told by Legal that I can also introduce Number 14  
22 because the instructions are the same. Special Order of  
23 Business, Item 14 on the agenda, is a Regulatory Hearing on  
24 Proposed Language for Model Guidelines for Issuing Citations  
25 and Imposing Discipline, Section 1399.15 of Division 13.2 of

1 Title 16 of the California Code of Regulations.

2 So, starting this hearing, my name is Sara Takii.  
3 I'm the President of the Physical Therapy Board and I will  
4 be presiding over this hearing. This is the time and place  
5 set for the Physical Therapy Board to conduct a public  
6 hearing. Again, this is November 3, 2011 and it's  
7 approximately 9:00 a.m. in the morning. And we are having a  
8 public hearing on the Proposed Regulatory changes. This one  
9 is Division 13.2 of the California Code of Regulations as

10 described in the Notice published in the California  
11 Regulatory Notice.

12 I just described - is that adequate what I just  
13 described. Okay. And then for the record, I gave today's  
14 date as November 3, 2011, and this hearing is beginning at  
15 approximately 9:00 a.m. Will the Secretary please call the  
16 roll to establish for the record that a quorum is present?

17 MS. CONLEY: Sara Takii -- Here; Debra Alviso --  
18 Here; Marty Jewell -- Here; Donald Chu -- Here; James Turner  
19 -- Here; Carol Wallisch -- Here.

20 All members are present and a quorum is  
21 established.

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1 Item 13. Special Order of Business - Regulatory Hearing on  
2 Proposed Language for Sponsored Free Health Care Events from  
3 Chapter 27, Statutes of 2010 (AB 2669), Sections 1400-1400.3  
4 of Division 13.2 of Title 16 of the California Code of  
5 Regulations.

6 MS. TAKII: Okay. I'm just looking as far as written  
7 comments. Let me see which this applies to -- I'm sorry.

8 MS. SCURI: It does not apply to this one.

9 MS. TAKII: Pardon me?

10 MS. SCURI: It applies to the next one.

11 MS. TAKII: That's what I was thinking. On Agenda  
12 Item 13, the Sponsored Free Health Care Events, there was no  
13 written comments received. Do I have the author on this  
14 one? That's just relating to the public -- there's no  
15 public comment on it. But for general reference, because  
16 there is public comment on the next one, the Board will not  
17 be responding to comments during the hearing, but will  
18 consider your comments in making its decision. So if there  
19 is anyone making comment, please limit your comments to five  
20 minutes.

21 At this time, the hearing will be open to take  
22 oral testimony and/or documentary evidence by any person  
23 interest in these regulations for the record, which is now  
24 being made by tape recorder. All oral testimony and  
25 documentary evidence will be considered by the Physical

1 Therapy Board pursuant to the requirements of the  
2 Administrative Procedures Act before the Board formally  
3 adopts the proposed amendments to these regulations, or  
4 recommends changes which may evolve as a result of this  
5 hearing.

6 If any interested person desires to provide oral  
7 testimony, it will be appreciated if he or she will stand,  
8 come forward with his or her name and address and, if he or  
9 she represents an organization, the name of such  
10 organization so that we will have a record of all those who  
11 appear. It is the desire of the Board that the record of  
12 the hearing may be clear and intelligible and that the  
13 hearing itself may be orderly, thus providing all parties  
14 with fair and ample opportunity to be heard.

15 Are there any questions concerning the nature of  
16 the proceedings or the procedure to be followed here before  
17 we begin? There are no comments from the public. Sorry.

18 MS. WALLISCH: When I look at the first section,  
19 there appears to be some errors in here because it talks  
20 about vocational nurse --

21 MS. SCURI: Yes, I have a couple of suggestions  
22 for possible changes, as well, when your hearing is closed.

23 MS. TAKII: So, but first are there any questions  
24 regarding -- not the procedure, okay. So we can open it up  
25 for 13 first. And this is public comment first. Is there

1 anyone here for public comment? Okay, there is none. Now  
2 we can open it for --

3 MS. SCURI: Now you're going to close the hearing.

4 MS. TAKII: That's correct, the hearing is now  
5 closed for public comment. And we will proceed to consider  
6 any comments from the Board. Please.

7 MS. WALLISCH: Okay, on page 1, Sponsored Events --

8 MS. TAKII: That's 14, isn't it? Is that 14 or  
9 13?

10 MS. WALLISCH: Article 14.

11 MS. TAKII: We're on 13 right now. You're on  
12 Section 13, right, Agenda Item 13? Is your comment on 14?

13 MS. WALLISCH: No, it's on Item 13 under the  
14 specific language.

15 MS. TAKII: Okay. Where are we locating that?

16 MS. WALLISCH: Page 1 of the specific language.

17 MS. TAKII: Okay.

18 MS. WALLISCH: On Article 14, I'm definite that  
19 it's 1400 --

20 MS. ALVISO: Oh, there it is.

21 MS. TAKII: Right.

22 MS. SCURI: I would offer as an alternate to that  
23 language which says "an out-of-state practitioner means a  
24 person who is not licensed in California as a vocational  
25 nurse," it should rather read, "an out-of-state practitioner

1 means a person who is not licensed in California to engage  
2 in the practice of Physical Therapy." That would cover both  
3 of your PTAs and your PTs if you choose that language.

4 MS. JEWELL: At one point in time, didn't we  
5 intentionally not include PTA?

6 MS. SCURI: If you don't wish to, then we would  
7 give you a different language.

8 MS. JEWELL: I believe we did not include them  
9 from the standpoint of supervision and seeing people  
10 initially.

11 MS. SCURI: So then you would want to change it to  
12 "means a person who is not licensed in California as a  
13 Physical Therapist."

14 MS. JEWELL: How did we ever get that far?

15 MS. SCURI: There -- I would like you to look at  
16 your -- I just want to point out two additional things, one  
17 is in your section on page 4 of the specific text, it's  
18 under "Denial of the Request for Authorization to  
19 Participate." It says -- "E" says -- "The Board has not  
20 received a criminal history report for the Applicant from a  
21 California Department of Justice." And some alternate  
22 language you may wish to consider is that the Board has been  
23 unable to obtain a timely report of the results of the  
24 criminal history check.

25 MS. JEWELL: I can't find where you are.

1 MR. CHU: Top of the page.

2 MS. SCURI: Top of page 4.

3 MS. JEWELL: Oh, thank you, okay. Now I'm with  
4 you.

5 MS. SCURI: Okay.

6 MS. TAKII: Has been able to receive a timely? Is  
7 that what you --

8 MS. SCURI: Yes, "...report of the results of the  
9 criminal history check." And the reason for that is you  
10 don't want somebody coming in the day of the event waiving  
11 their clearance from the Department of Justice. So you  
12 might want to give your staff the ability to have that to  
13 make sure they receive it timely.

14 MS. WALLISCH: Could we go back to page 3? Under  
15 E, Denial of Requests? Under B, again, we have Vocational  
16 or Practical Nurse here, and in the next paragraph, National  
17 League for Nursing, and Examination for Practical Nurses.

18 MS. JEWELL: Embarrassing.

19 MR. CHU: You could just delete that whole  
20 paragraph under ii there.

21 MS. ALVISO: Well, then, they both need  
22 correcting.

23 MR. CHU: Yeah.

24 MS. ALVISO: And then it's like what was their  
25 purpose.

1 MS. SCURI: The law gives you the ability to set  
2 the requirements that you're willing to accept for someone  
3 coming from -- licensed out-of-state coming into California  
4 to participate in a sponsored free health care event. So at  
5 some point, someone determined that the application would be  
6 denied if they had not completed a particular course of  
7 instruction or taken the exam, but it doesn't sound like  
8 that's an issue for you, and if it's not an issue for you,  
9 ~~deleting the exam is certainly within your purview.~~

10 MS. ALVISO: Was ours more simply based on their  
11 licensure in another jurisdiction? Or do we need to be more  
12 specific, that they also meet these two things? That means  
13 you have to be willing to verify it, though.

14 MR. CHU: Yeah, I think if they're licensed in  
15 another jurisdiction, they've passed the national exam, and  
16 so that's our main checkpoint, if you will, on minimal  
17 competence, so....

18 MS. SCURI: So does that mean you're expressing a  
19 desire to delete all of (C) (1) (B)?

20 MS. ALVISO: No.

21 MS. SCURI: Or just the education and exam  
22 portion?

23 MS. ALVISO: I think we want to keep (B) (i), but  
24 not (B) (ii).

25 MS. SCURI: Okay.

1 MR. CHU: Yeah.

2 MS. ALVISO: And what that says to me is that  
3 (B)(i) is U.S. educated.

4 MS. SCURI: Yes, that's what it says.

5 MR. CHU: Yup.

6 MS. ALVISO: But does the application process tell  
7 us where somebody was educated? Or are we just going to  
8 know that they were licensed in another jurisdiction?

9 MS. JEWELL: I think we would have to look at the  
10 application.

11 MS. MARCO: So what you're saying is that, if they  
12 are a Canadian licensed in another state, we wouldn't let  
13 them come and participate?

14 MS. JEWELL: What I'm saying is that is what it  
15 says.

16 MS. SCURI: That is exactly what it says, yes.

17 MS. MARCO: But, I mean, is that what we would  
18 want?

19 MS. JEWELL: I don't know, I'm opening it up to  
20 discussion with the group.

21 MS. SCURI: The proposed form does not ask for the  
22 individual's education, by the way.

23 MS. TAKII: So how do we feel about that?

24 MS. ALVISO: I'm not very familiar with this, but  
25 it makes me want to look at where we are saying what they do

1 have to do. This is what you would deny them on.

2 MS. SCURI: Most of the requirements are in  
3 Section 901 of the Business and Professions Code. If one of  
4 the staff can pull that up, then we can look at it.

5 MS. TAKII: Okay. Do we need more time on this?  
6 It seems like, you know, Debra comment -- does it seem like  
7 we need a little more time to review this?

8 MR. CHU: Well, again, I would use the National  
9 Exam as the qualifying point and if they're licensed within  
10 the United States, regardless of state, I would think to do  
11 a free healthcare event, then they would be competent.

12 MS. JEWELL: And I think your qualifier is the  
13 definition of out-of-state practitioner on the first page.

14 MR. CHU: Right.

15 MS. JEWELL: It means a person who is not licensed  
16 in California, but who holds a current valid and active  
17 license in good standing in another state district or  
18 territory. So that pretty much covers educational criteria,  
19 licensure exam.

20 MS. TAKII: Okay, that means that anyone,  
21 Canadian, whomever, whoever, would not be accepted; right  
22 now, we're talking about only United States license.

23 MS. JEWELL: I think the point that Don is making  
24 is that, if we use that definition, we don't need B. Is  
25 that correct, Don?

1 MR. CHU: Yeah, I agree.

2 MS. TAKII: I agree with that too. Is there any  
3 other comment here? Jim, Carol?

4 MR. TURNER: I'm just trying to keep up because I  
5 had to -- I thought I had my phone on vibrate, but it  
6 wasn't, I had to take an emergency call. But did you just  
7 say that (B)(i) is okay, but (B)(ii) is not?

8 MS. JEWELL: Now we're saying that we don't need  
9 (B) at all.

10 MR. TURNER: Oh, okay.

11 MS. SCURI: Would you like to know what the  
12 statute actually says about the qualifications? Would that  
13 be helpful?

14 MS. JEWELL: Which statute?

15 MS. SCURI: The section that authorizes these  
16 regulations.

17 MS. JEWELL: Yes.

18 MS. SCURI: Okay. Section 901 of the Business and  
19 Professions Code permits a health care practitioner licensed  
20 or certified in good standing in another state, district, or  
21 territory of the U.S. to offer or provide health care  
22 services for which he or she is licensed without getting a  
23 license in California if they obtain authorization from the  
24 Board at the sponsored health care event and they satisfy  
25 the following requirements: "The health care practitioner

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1 has not committed any act, or been convicted of a crime  
2 constituting grounds for denial of licensure or registration  
3 under Section 480," that's usually you haven't lied, you  
4 haven't done something that would be grounds for discipline,  
5 etc., that's what 480 generally covers, "...if they submit to  
6 the Board they agree to comply with all applicable practice  
7 requirements set forth in this division, which is Division  
8 2, and the regulations adopted pursuant to...", sorry, I'm  
9 technologically impaired and unfamiliar. Okay, I've got it.

10 "They submit to the Board on a form prescribed by the Board,  
11 a request for authorization to practice without a license,  
12 pay a fee, etc." And that's pretty much all it says. It  
13 says that the Board may deny health care practitioner  
14 authorization to practice without a license if that person  
15 fails to comply with the requirements of the section, or for  
16 any act that would be grounds for denial of an application  
17 for licensure. And there are registration requirements for  
18 the sponsoring entity. And grounds for terminating  
19 authorization to provide health care services -- somewhere  
20 in here, I believe it said that you could set the parameters  
21 of the qualifications. "The Health Care Practitioner has  
22 the appropriate education and experience to participate in  
23 the sponsored health care event, as determined by the  
24 Board." So the reason you have the educational and exam  
25 component is that somebody thought that you needed to have

1 that. If you believe you don't need to have that, then you  
2 can certainly take it out. I will tell you later when  
3 you're all done what the process is that you have to follow  
4 in order to do that.

5 I noted that your regulations have the sponsoring  
6 entity applying to you for approval; many of the Boards are  
7 choosing to put a provision in that permits them to delegate  
8 to the Department that aspect, not the providers, just the  
9 sponsoring entity, to the Department of Consumer Affairs, so  
10 that there is one central location because the health care  
11 event could include physical therapists, dentists,  
12 physicians, optometrists, a whole wide range of people, and  
13 it would be kind of awkward if one Board said yes to the  
14 sponsoring entity, and another Board said no. So I don't  
15 know whether you wish to consider that or not, that the  
16 responsibility for saying yes to the provider remains with  
17 the licensing agency in question. The question is whether  
18 you are willing to delegate that to the Department with  
19 respect to approving the sponsoring entity.

20 MS. TAKII: Well --

21 MS. SCURI: Sorry, not meaning to throw things at  
22 you. The Medical Board was -- not that there was a model,  
23 but they happened to be the first ones to do these  
24 regulations and they've gone through about five versions of  
25 them before they finally came up with the one. And this is

1 one part of what they have in theirs, is a provision that  
2 authorizes the Department that says the Board may -- may --  
3 delegate its authority to the Department. So if you wanted  
4 to add similar language, I have wording for it if that was  
5 your desire. If it is not your desire, that's fine, it's  
6 totally a policy call.

7 MS. ALVISO: When you talk about a sponsoring  
8 entity, then in that case do the individual practitioners  
9 apply separately?

10 MS. SCURI: Yes.

11 MS. ALVISO: Or they're a part of this big  
12 application process?

13 MS. SCURI: No. The entity applies separately,  
14 and then the providers apply to the individual boards.

15 MS. JEWELL: So if I look at the way things  
16 currently are, you go to page 1 and where it says "1400.1  
17 Sponsoring Entity Registration Recordkeeping Requirements,"  
18 that would be modified, and what would be relevant would be  
19 going to the second page where it says "14.2 Practitioner  
20 Authorization to Practice, Request for Authorization to the  
21 Board." So that's the one that we're really interested in.

22 MS. SCURI: Yes.

23 MS. TAKII: Okay.

24 MS. JEWELL: I'm having trouble trying to edit it  
25 as a group.

1 MS. SCURI: What I'm going to suggest is, since  
2 there are a number of possible changes to this, that you  
3 sort of work through what you would like, staff can then do  
4 what's called the 15-day notice and comment period, which is  
5 required under the law, and this can come back to you with  
6 the changes shown as you saw at your last meeting, in double  
7 underline, double-strikeout, whatever it happens to be, as  
8 modified text.

9 MS. JEWELL: On the agenda for the February  
10 meeting?

11 MS. SCURI: Yes.

12 MS. JEWELL: That's what I'd like to do.

13 MS. TAKII: That's what I was asking of our  
14 thinking earlier, it's just --

15 MS. SCURI: So one of the things that you would  
16 like is all the changes referencing another Board, and there  
17 are several, be turned into the licensed as a Physical  
18 Therapist, or a reference to your Board instead?

19 MR. CHU: Correct.

20 MS. JEWELL: And language necessary to take 1400.1  
21 and defer that to DCA?

22 MS. SCURI: The authorize -- or give yourselves  
23 the authority to delegate that to the Department, the  
24 approval of the sponsoring entities.

25 MS. TAKII: Okay.

1 MS. SCURI: We have some language I can borrow  
2 from and give to your staff, but let me make a note,  
3 otherwise I may forget.

4 MS. TAKII: Okay, that sounds -- everybody  
5 agreeing?

6 MS. JEWELL: One more question. If you go to --

7 MS. SCURI: Could you just give me two seconds?

8 MS. JEWELL: Sure.

9 MS. SCURI: Thanks. Okay, I'm sorry.

10 MS. JEWELL: No, it's okay. As you read the  
11 statute, it appears to me that all of the issues brought up  
12 under 1400.2(C) -- let's see, I'm getting my alphabet  
13 screwed up here -- 2(C)(i), all of the denials are already  
14 covered in statute.

15 MS. SCURI: Not quite. (C)(1)(A) has a timeframe  
16 and a requirement that the respondent not -- applicant not  
17 have responded within seven calendar days; (B), if you left  
18 it in, is one of the areas where you get to determine that  
19 the individual has met the education and experience  
20 requirements. You can make that determination if you wish  
21 simply by determining that their license to practice in  
22 another state qualifies them. So (B) is something that --

23 MS. JEWELL: So strike (B).

24 MS. SCURI: Pardon?

25 MS. JEWELL: I think we've already decided to

1 strike (B).

2 MS. SCURI: Okay, so that's the question. So if  
3 you've decided to strike (B)... (C), you would need to leave  
4 in because you want to be able to, if the person has failed  
5 to comply with the requirement of the article, you want to  
6 be able to say no to them coming in. (D) has a definition  
7 of the term what a license in good standing, as that term is  
8 used in the statute means, so that is definitely something  
9 that should stay.

10 MS. ALVISO: The other thing that's part of that  
11 is the requirement uses the phrase "current, valid, and  
12 active." And yet I don't see anywhere that it says that  
13 they do have to have a -- for example, under the -- this is  
14 the denial -- that if they don't have a current license.

15 MS. SCURI: Well, that is a requirement in the  
16 statute.

17 MS. TAKII: So it doesn't have to be in there.

18 MS. SCURI: Correct. The regulations have to  
19 comply with six standards, one of which is authority,  
20 another of which happens to be non-duplication, so we try  
21 not to duplicate the statute and the regulations, although  
22 some parts of it are pretty close to the statutory language,  
23 as Dr. Jewell has pointed out. But the basic requirement  
24 that the person be licensed is found in the statute itself.

25 MS. ALVISO: And so it doesn't need to be a point

1 of denial -- not having, I mean, it's the opposite, I mean  
2 not having it.

3 MS. SCURI: Not having it is a basis for denial,  
4 yes. It's down here.

5 MS. ALVISO: I don't see it.

6 MS. SCURI: If the applicant does not possess a  
7 current valid license in good standing. So that's the  
8 reason --

9 MS. ALVISO: Okay, okay.

10 MS. TAKII: Oh, there it is, yeah.

11 MR. CHU: Okay, so that's coming back.

12 MS. ALVISO: Oh, and "active" is missing there.

13 MS. SCURI: "Active" should be in there.

14 MS. ALVISO: Is "current" the same as "active?"

15 MS. SCURI: No.

16 MS. ALVISO: Okay. Current, valid and active.

17 MS. SCURI: Okay, that's a good addition. And  
18 then, so am I hearing that you want 1400.2(C)(1)(B) removed?  
19 Is that sort of a consensus? Because you're going to get to  
20 vote on this all over again the next time.

21 MR. CHU: Yup.

22 MS. SCURI: Okay. And did you want to make the  
23 change to (E) on top of page 4 so that it allows you to deny  
24 if you have not received a timely report?

25 MR. CHU: Yes.

1 MS. JEWELL [presumed]: Yes.

2 MS. SCURI: Okay. I'm going to throw out one more  
3 thing for you and you can say yes or no to this. The  
4 Medical Board currently has a regulatory provision requiring  
5 notification that physicians are licensed by the Board. And  
6 they placed into their regulations in two places, 1) a  
7 requirement by the sponsoring agency, and 2) where the  
8 agency is a local government and therefore does not register  
9 with the Department or the Board, a requirement placed on  
10 the provider to have a notice visible to patients at every  
11 station where they're being seen by, in that case, a  
12 physician and surgeon, indicating that the medical doctors  
13 providing health care services at this health fair are  
14 either licensed and regulated by the Medical Board of  
15 California, or hold a current valid license from another  
16 state and have been authorized to provide health care  
17 services in California only at this specific health fair  
18 with a website and a toll-free telephone number. I didn't  
19 know if you wanted something similar in your regulations or  
20 not. So you would like to add that both as a requirement  
21 for the sponsoring entity? Or a requirement for the  
22 individual provider if it's a local government entity that's  
23 not registering?

24 MR. CHU: Yup.

25 MS. TAKII: Sounds good. Do you have any more  
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1 comments, Anita?

2 MS. SCURI: Some changes would have to be made to  
3 the forms in accordance with this. And other than that, no,  
4 I don't.

5 MS. TAKII: Okay.

6 MS. SCURI: So if you are so inclined, you could  
7 make a motion to send these modifications out for public  
8 comment, come back to the Board. If you felt really  
9 comfortable with the language that's going to be put in

10 here, you could also as an alternative vote to authorize  
11 your Executive Officer to adopt the regulations at the  
12 expiration of the 15-day comment period if there are no  
13 adverse comments. So you have choices in how you do it.

14 MS. TAKII: I first would like to see them. I  
15 don't know about anybody else, but I would like to see them  
16 after the changes have been made.

17 MS. WALLISCH: I just want to make sure that  
18 somebody checks the citations in here about Business and  
19 Professions Codes and so forth.

20 MS. SCURI: I think it sounds like what you're  
21 looking for is a motion to send the modified text out for  
22 comment, and then it will come back to you in February.

23 MS. TAKII: Comes back. Okay, if there's no more  
24 comment from the Board, and I'm not asking for public  
25 comment at this time, we already had that, right?

1 MS. SCURI: Yes.

2 MS. TAKII: So is there a motion to that effect?

3 Anyone? Is there a motion?

4 MR. CHU: I'll make the motion, that we send it  
5 out for 15-day notice to modify the comments.

6 MS. JEWELL: Okay and do I understand that then it  
7 comes back to the Board meeting in February?

8 MS. SCURI: Yes, it does.

9 MS. TAKII: Then we'll all have time to look  
10 through it again.

11 MS. SCURI: That would be good.

12 MS. TAKII: Okay, is there a second?

13 MS. JEWELL: Second.

14 MS. TAKII: Any other comment here? Any public  
15 comment on the motion? Okay, all in favor say "aye."

16 (Ayes.) Opposed? Okay.

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1 Item 14. Special Order of Business - Regulatory Hearing on  
2 Proposed Language for Model Guidelines for Issuing Citations  
3 and Imposing Discipline, Section 1399.15 of Division 13.2 of  
4 Title 16 of the California Code of Regulations.

5 Ms. Takii: Now we're moving on to Agenda Item 14,  
6 and this is the Regulatory Hearing on Proposed Language  
7 for Model Guidelines for Issuing Citations and Imposing  
8 Discipline, Section 1399.15 of Division 13.2 of Title  
9 16 of the California Code of Regulations.

10 Now, we do have one public comment that came in  
11 and they don't have copies of this, I need to read the  
12 entire thing, correct?

13 MS. JEWELL: "They," the audience?

14 MS. TAKII: You, the Board.

15 MS. JEWELL: We have it.

16 MR. CHU: We have it in an email. It came as a  
17 PDF.

18 MS. TAKII: Yeah. Do you -- but I need to read  
19 the whole thing?

20 MS. SCURI: No, it's part of the record.

21 MS. TAKII: Okay, it is part of the record, but I  
22 can comment that this came from Maeve Curran, PT, CWS, CLT,  
23 California, Physical Therapy License No. 20369, Palm  
24 Springs, California, and she made her comment. So it's part  
25 of the record at this time.

1                   Okay. So at this time, the hearing is open and  
2 we're taking any public comment on this. Will you step  
3 forward?

4                   MR. PORTILLO: Hi, my name is Luis Portillo with  
5 the Department of Consumer Affairs. First of all, I want to  
6 say thank you for the opportunity to come here and speak to  
7 you today. The Department has a couple suggested changes to  
8 the regulation which we think would help improve it and we  
9 ~~wanted to put those forward today, so I'm going to kind of~~  
10 go over the changes we're recommending, as well as I have a  
11 letter from the Director that I would like to add to the  
12 record of the regulation package.

13                   The first change that the Department recommends is  
14 the language as currently drafted allows the Board to  
15 deviate from the Uniform Standards. The Department's belief  
16 is that, while Boards have the ability to determine which  
17 standards are applicable to them, meaning some Boards don't  
18 have diversion programs, in which case those standards that  
19 relate to the vendor would not be applicable; however, once  
20 those standards are determined to be applicable, the law  
21 does not allow for deviation from them, that they have to be  
22 followed. That was the intent of SB 1441, to set what was  
23 known as a minimum standard. So we would recommend amending  
24 the regulation to make sure that there is no deviation from  
25 the standards.

1 MS. SCURI: Mr. Portillo, could I ask where in the  
2 text you are looking?

3 MR. PORTILLO: Oh, I apologize. In the proposed  
4 language under 1399.15(B), it states, second sentence --

5 MS. TAKII: Wait a minute, help us find it here.

6 MS. SCURI: What page are you on?

7 MR. PORTILLO: It's only the -- it's the proposed  
8 language, so --

9 MS. SCURI: The order of the regulation itself,  
10 not the guidelines?

11 MR. PORTILLO: Yeah.

12 MS. JEWELL: Can you help us find it?

13 MR. PORTILLO: Sure. You should have two  
14 documents, one is the language and one is the disciplinary  
15 guidelines. The language is only two pages.

16 MS. JEWELL: And it's in that?

17 MR. PORTILLO: Yeah.

18 MS. SCURI: It references 1399.15.

19 MS. JEWELL: Is that page 84?

20 MS. SCURI: No.

21 MS. JEWELL: That's it.

22 MS. TAKII: Right there, Marty.

23 MR. PORTILLO: And so everyone has it? Item B  
24 says, second sentence, "If the Licensee does not rebut that  
25 presumption, then the Uniform Standards for substance abuse

1 in Licensees shall apply unless the Licensee established  
2 that, in his or her particular case, appropriate public  
3 protection can be provided with modification or omission of  
4 a specific standard as a term of probation." And so, again,  
5 that just falls into that the standards are meant to be  
6 applied uniformly, there is no deviation.

7 MS. SCURI: So are you suggesting that they strike  
8 the word "with modification?" That phrase?

9 MR. PORTILLO: Yeah, I would probably suggest that  
10 they just strike that whole second sentence, to begin with.

11 MS. SCURI: Okay, well, let Mr. Portillo make his  
12 points.

13 MR. PORTILLO: Another recommendation would be, is  
14 in the Initial Statement of Reasons, the Board states that  
15 -- and I'm looking on the Initial Statement of Reasons,  
16 looking at page 1, the bottom; second to last paragraph.

17 MS. TAKII: Did you say the first page 1 of the  
18 Initial Statement of Reasons --

19 MR. PORTILLO: Yes, so page 1 of the Initial  
20 Statement of Reasons, and it's second to the last paragraph.

21 MS. TAKII: Second to the last. Does it start,  
22 "The PT Board is proposing...?"

23 MR. PORTILLO: Yes.

24 MS. TAKII: Okay.

25 MR. PORTILLO: In there it states -- and it's

1 going to be it looks like the third sentence -- it says,  
2 "Those Uniform Standards that are specific to the Division  
3 Program Vendor contracted by the Physical Therapy Board of  
4 California do not serve the purpose of Guidelines,  
5 therefore, those Uniform Standards were not incorporated as  
6 part of the disciplinary guidelines. The Uniform Standards,  
7 SB 1441, is incorporated by reference in its entirety in  
8 Section 1399.15 of the California Code of Regulations.  
9 Further, on page 11, again it states -- and I'm looking at  
10 the last paragraph of the ISR -- on page 11 it says, "The  
11 Board is not adding the following standards as indicated  
12 above since some of those standards are specific to the  
13 Board's expectations of the vendor and are not consistent  
14 with the purpose of the guidelines or other reasons as  
15 documented. However, the document as a whole will be  
16 incorporated by reference." The Department feels this is a  
17 little bit contradictory because they're saying, on the one  
18 hand, we're not including them in the Guidelines, but in the  
19 other point, you're saying we're incorporating them as a  
20 whole by reference. So the Department's recommendation  
21 would be to, 1) incorporate all the Guidelines into the  
22 regulation, and the reason for that is specifically, even  
23 those Guidelines that relate to the Vendor is the contract  
24 with the Vendor is actually between the Department and the  
25 Vendor. Additionally, since it's a contract, those could

1 change. And when changes are made to that contract, those  
2 changes are not subject to API, so the public wouldn't have  
3 an opportunity to, you know, weigh in whether they think  
4 it's a good idea, bad idea, some of those changes. So our  
5 recommendation would be to have those Guidelines, even those  
6 that apply to the vendor, to be inputted in your regulations  
7 or disciplinary guidelines to ensure that they're properly  
8 reflected.

9 MS. SCURI: May I ask a question?

10 MR. PORTILLO: Yes.

11 MS. TAKII: Please.

12 MS. SCURI: If the Guidelines pertain to the  
13 vendor and the Department changes the contract, how does  
14 that mesh with something that the Board puts in its  
15 disciplinary guidelines? I'm not saying the Department is  
16 going to enact something that -- or enter into a contract  
17 that is inconsistent, but I certainly think that possibility  
18 is there if the Board has placed vendor requirements into  
19 its regulations, and yet the Department is in control of the  
20 vendor and makes different arrangements, it's just sort of  
21 Devil's Advocate here.

22 MR. PORTILLO: No, I definitely understand it and  
23 I think the sense is, 1) the regulations, the guidelines  
24 that are being implemented into regulations or guidelines  
25 that are part of the Uniform Standards, again, the

1 Department cannot unilaterally change those guidelines,  
2 there's a substance abuse coordinating committee that exists  
3 that can -- that only has the authority to amend those. And  
4 so the contract with the vendor should comply; however,  
5 nonetheless, the sense is that we're trying to put the  
6 standards into regulations and to simply avoid putting them  
7 in the regulations using the contract -- again, for clarity  
8 we think it should be in the regulations to ensure that 1)  
9 individuals are clear that it goes through the APA process,  
10 that people had a chance to weigh in on those standards, as  
11 well.

12 MS. JEWELL: Could I ask a question?

13 MS. TAKII: Please, yes.

14 MS. JEWELL: I understand that these are minimum  
15 standards. By saying that, may a Board establish standards  
16 that are higher than those? For example, lab tests, blood  
17 level tests, I'm presuming the contract sets the minimum  
18 standard for the vendor and if the Board somehow decided  
19 that that wasn't adequate to meeting the public safety, then  
20 it would be up to the Board to set a higher standard?

21 MR. PORTILLO: My understanding is that the Board  
22 -- and I would have to double-check on this, but my  
23 understanding is that the Board wanted to exceed, so I  
24 believe the current regulation requires 54 and 102 --

25 MS. JEWELL: It's just a --

1 MR. PORTILLO: Yeah, but so let's say if you  
2 wanted to say, "No, we want to double that," that my  
3 understanding is that the Board would be able to do that --  
4 again, this is the minimum standards, so if you want to go  
5 above and beyond that, you can, but this is kind of the base  
6 level. But I can double-check on that and, if for some  
7 reason I'm wrong --

8 MS. JEWELL: No, that's fine. And the other thing  
9 that strikes me now that we're looking at this and vendors  
10 is that we're also discussing looking at alternatives to the  
11 vendor. And does that put us in violation of the standards?

12 MS. TAKII: Becky.

13 MS. MARCO: Yeah. Go ahead.

14 MS. JEWELL: I mean, are we wasting our time here?  
15 Not here, but then?

16 MS. SCURI: No. If you're following the Uniform  
17 Standards and you're using the vendor requirements in those  
18 Uniform Standards, it should not matter whether it's the  
19 Department's contract or your contract.

20 MS. JEWELL: Thank you.

21 MS. SCURI: On the other hand, to put contractual  
22 provisions into your disciplinary guidelines does seem  
23 inappropriate because these are terms and conditions that go  
24 into stipulations in proposed decisions, and to say in a  
25 stipulation and proposed decision "and the vendor has to be

1 blah, blah, blah, blah, blah," doesn't really fit. It's not  
2 to say you couldn't put them somewhere else, but they really  
3 are a contractual -- a contract with a different kind of a  
4 person than the Licensee.

5 MS. JEWELL: Well, but what I think we're  
6 considering is are there alternatives that a probationer may  
7 choose that meet the minimal standards? And we might not  
8 need a contract per se. I mean, one of the things we  
9 considered is are there programs that exist that meet the  
10 minimal standards that somebody could choose besides  
11 Maximus.

12 MS. SCURI: In which case you would set out a  
13 different kind of a regulation that had the criteria by  
14 which you would accept those particular programs. That's  
15 different than putting it into your Disciplinary Guidelines.

16 MS. JEWELL: Thank you.

17 MS. MARCO: And this might be a question for you  
18 that you can answer. There are other Boards that do not  
19 contract with Maximus. So how is the Department guiding  
20 them as far as what to put in their guidelines?

21 MR. PORTILLO: Our recommendation to every Board  
22 that has diversion is not to put -- I mean, they can still  
23 have them in their contract, which is appropriate, but to  
24 also put them in the regulations, as well. That's going to  
25 be the recommendation from the Department to all Boards,

1 that all the Uniform Standards go into the Regulations, not  
2 -- and that they simply not be only placed in the contract.

3 MS. MARCO: But if the ones that are missing --  
4 that we don't include in the Guidelines, that are specific  
5 to the vendor, how does that apply to a Board that doesn't  
6 contract with a vendor? So --

7 MR. PORTILLO: Yeah, no, I guess what I'm saying  
8 is, for those Boards that have diversion programs, I believe  
9 there's about six or seven that Maximus provides a service  
10 for --

11 MS. MARCO: Right.

12 MR. PORTILLO: -- but I'm trying to identify if  
13 there's anyone that doesn't use Maximus, but --

14 MS. MARCO: Yeah, there are. I mean, there are  
15 health care boards that do not use Maximus -- psychology,  
16 BBS, two off the top of my head that they do not contract  
17 with the vendors. So how are they addressing this issue?

18 MR. PORTILLO: I would have to take a look at the  
19 regulation packages. But what the Department's  
20 recommendation to all Boards who use a vendor for their  
21 diversion program is to not simply put those standards into  
22 the contract, but also put them into the Regulations, as  
23 well.

24 MS. MARCO: So if the Board chooses not to use the  
25 vendor --

1 MS. JEWELL: That's in Reg.

2 MR. PORTILLO: Well, but the question about the  
3 vendor ultimately, it's not who the vendor is, I mean, if  
4 you were to theoretically decide to go away from Maximus and  
5 use a different vendor, you're going to want to set it up in  
6 such a way so that there isn't a gap meeting, so that there  
7 isn't a break. And so that new contract would in effect --  
8 you would want to have those standards set out with that new  
9 vendor.

10 MS. MARCO: And I'm not disagreeing that you could  
11 put those in Regulations, I just don't think they are  
12 appropriate in the Disciplinary Guidelines because those are  
13 the terms and conditions that get inserted into a decision.  
14 However, you could set up those standards in a separate  
15 place as the criteria that you're going to use. That would  
16 be fine, but I don't think that they belong in your  
17 Disciplinary Guidelines; they're not Disciplinary  
18 Guidelines.

19 MS. JEWELL: Right, so what I hear us saying is  
20 that it's okay to enumerate the standards for a diversion  
21 program, but it's appropriate in regulation, not in  
22 Disciplinary Guidelines?

23 MS. SCURI: That's my advice, yes.

24 MR. PORTILLO: Yeah, and from the Department's,  
25 whether you put them in the Disciplinary Guidelines or in a

1 separate regulation that relates to the Board is a decision  
2 for the Board. But our sense is that we want them somewhere  
3 where they go through the normal APA process, that if  
4 they're going to be amended down the line, they can go  
5 through the public comment and people will be noticed of  
6 those changes.

7 MS. TAKII: Okay.

8 MR. PORTILLO: And then the last thing I wanted to  
9 point to, just the review of the regulation package. It  
10 seemed a little unclear whether Standards 8 and 9 had fully  
11 been incorporated into the regulation. The ISR kind of  
12 skips over those, so just the recommendation would be is if  
13 you could kind of go through the regulations to ensure that  
14 Standards 8 and 9 are fully incorporated.

15 MS. TAKI: Okay. I'm sorry, help us out here.

16 MS. JEWELL: First, you'd have to have Standards 8  
17 and 9 in front of you.

18 MR. CHU: So on a specific page.

19 MS. TAKII: Okay, that's their Standards 8 and 9.

20 MR. PORTILLO: And this is kind of just my  
21 statement based on the ISR. If you look at the ISR, it  
22 begins on page 5, it kind of breaks it down by different  
23 sections, Evaluation, it talks about Standard 1, then at the  
24 bottom it talks about Standards 2 and 6, talks about  
25 Standard 7, talks about Standards 10, it talks about

1 Standard 4, again, Standard 1 again. Standards 8 and 9 are  
2 not mentioned specifically outright, so it's a little  
3 unclear whether they're being fully incorporated. Our  
4 recommendation, I know that looking at the language, there  
5 were some parts we were able to identify some of the  
6 language from Standards 8 and 9, but we had a little hard  
7 time finding, so you may want to just either clarify how  
8 they're being incorporated, or, if they're not being  
9 incorporated fully, you may want to try to incorporate those  
10 fully into the Regulation.

11 MS. SCURI: Could you tell us just generally what  
12 the subject matter of Standards 8 and 9 are?

13 MR. PORTILLO: Yes. The Standards, I'm sure as  
14 you'll see when you turn to it, Standard 8 just outlines the  
15 procedures to be followed when the Licensee tests positive  
16 for a banned substance, and then Standard 9, procedures if  
17 they have ingested a banned substance. So, again, the ISR  
18 went through and kind of outlined how a lot of those  
19 standards were being incorporated and these two seemed  
20 absent, so either, I think, clarify that, I think that would  
21 be helpful.

22 MS. SCURI: Are these taken care of by the  
23 addition to the law of 13 -- is it 1315.2 through 4?

24 MR. PORTILLO: Uh --

25 MS. SCURI: Or 315, I'm sorry, 315.2 through

1 315.4? The requirement in the law for a ceased\* [1:17:07]  
2 practice?

3 MR. PORTILLO: Yes, SB 1792, right?

4 MS. SCURI: Yes. So would that not take care of  
5 -- would these need to be included if they are already in  
6 the law?

7 MR. PORTILLO: I mean, if they're already in the  
8 law, then no. However, you may want to at least either  
9 amend the Initial Statement of Reasons, or in your Final

10 Statement of Reasons explain how these are being addressed.  
11 Again, the Initial Statement of Reasons didn't really speak  
12 to these, so to the extent that you can at least say,  
13 "Here's how these were a part of -- these have been  
14 subsequently included in the BMP Code and, therefore, are  
15 unnecessary to implement the regulations," would be helpful.

16 MS. SCURI: Okay.

17 MR. PORTILLO: And those are the only comments I  
18 had. Thank you again for the opportunity.

19 MS. TAKII: Thank you so much for coming. And  
20 then you had the letter from Director/Speaker. Is that like  
21 a summary of what you said?

22 MR. PORTILLO: Yes.

23 MS. TAKII: Pretty much? Okay. Okay, so there's  
24 no other issues than that which we haven't heard?

25 MR. PORTILLO: Yeah, I outlined --

1 MS. TAKII: Because we don't have copies of it.  
2 Okay. All right, so thank you very much.

3 MR. PORTILLO: Thank you.

4 MS. TAKII: Is there any other public comment?  
5 Seeing none, then, the hearing is closed.

6 [Whereupon, the hearing was closed at 9:53 a.m.]

7 So now we'll move to Board comments. And there  
8 were three or four different issues that were brought up.

9 MS. JEWELL: It sounds to me like we need to take  
10 into consideration the comments and ask counsel and staff to  
11 make the appropriate modifications, especially in the  
12 Initial Statement of Reason to make sure that it's clear,  
13 the issues that were brought up, and also to look at is --  
14 to separate Regulations from Guidelines, to make sure that  
15 we're not duplicating -- putting Regulations in Guidelines.

16 MS. TAKII: I think that's good comment. Anita.

17 MS. SCURI: A law was passed that requires your  
18 Disciplinary Guidelines to be placed into regulation. One  
19 of the things that we did as a consequence was to try to  
20 leave you the flexibility to change -- to make sure that the  
21 terms and conditions that were being applied were  
22 appropriate for the specific facts. And as a result, your  
23 existing language permits deviation from your Disciplinary  
24 Guidelines and Orders. And most of the time when you adopt  
25 a stipulation, there is some deviation from your Guidelines

1 and it's explained, and that is a requirement of your  
2 existing guidelines.

3 I would not recommend that, with respect to the  
4 actual language of the regulation, which is the 1399.15,  
5 that you delete the second sentence in (B). If you wish to  
6 take out your ability to modify the terms, the Uniform  
7 Standards, that's fine, but I think you still need to have  
8 the flexibility to omit a specific standard if it's not  
9 appropriate in a given situation. So I would not recommend  
10 that you delete that sentence. The sentence reads --

11 MS. JEWELL: And could you read which page?

12 MS. SCURI: The page of the text amends Section  
13 1399.15 and has the text of 1399.15, that's the heading at  
14 the top.

15 MS. JEWELL: Page?

16 MS. SCURI: It doesn't have a page -- it's right  
17 before the Statement of Reasons. So you can see by the  
18 underlines what is new. Sub (b) is something that --  
19 subsection (b) is something that our office tried to wrestle  
20 with because there had to be a way of determining whether  
21 someone was a Substance Abusing Licensee. That's the  
22 trigger for imposing the Uniform Standards for substance  
23 abuse, is the person has to be a Substance Abusing Licensee.  
24 Since you don't have the ability to make that person go get  
25 an examination before you have the hearing, we've placed the

1 burden in this paragraph on the Licensee if the conduct  
2 found to be a violation involves drugs and/or alcohol, when  
3 there is a presumption that they are a Substance Abusing  
4 Licensee. They can bring in evidence to rebut that  
5 presumption. Subparagraph (b) says that if the Licensee  
6 does not rebut that presumption, then the Uniform Standards  
7 for Substance Abusing Licensee shall apply unless the  
8 Licensee established -- and that means evidence -- that in  
9 his or her particular case -- it's always done on a case-by-  
10 case basis -- appropriate public protection can be provided  
11 with modification or omission of a specific standard as a  
12 term of probation. Mr. Portillo has suggested that you  
13 should -- you should not be modifying the terms that the  
14 Department believes they should be adopted as is. If you  
15 wish to take away your ability to modify those Uniform  
16 Standards as a term and condition of probation, that's  
17 certainly up to you and it's a definite policy call. I  
18 still think that you should retain the ability to omit a  
19 particular term and condition if it's not necessary. So if  
20 you wish to modify the regulation to strike the reference to  
21 modifying the Uniform Standards, that's your call.

22 MS. JEWELL: So I'm trying to seek clarification.  
23 The distinction between modifying the standards and omitting  
24 a standard on a case-by-case basis.

25 MS. SCURI: So, for instance, let's use the drug  
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1 testing standard, if you decided -- if you have the word  
2 "modification" in here, you could decide that somebody only  
3 needed 20 drug tests in one year; if you take out that  
4 "modification," then this language that permits you to  
5 modify the term, then you must use the existing language of  
6 that term -- if it's appropriate.

7 MS. JEWELL: And if it's not appropriate?

8 MS. SCURI: Well, if it's not appropriate and you  
9 ~~leave in the word "omission," then you don't have to include~~  
10 it as a term and condition.

11 MS. ALVISO: Then your only choice is to not.

12 MS. SCURI: Right. So either use it or don't use  
13 it, but you can't change the text that's in here.

14 MS. JEWELL: Well, I'm fairly confused.

15 MS. ALVISO: It sounds as though this inclusion  
16 doesn't somehow make us not complying with SB 1441 or --

17 MS. SCURI: There are different points of view as  
18 to whether you have the authority to modify the Uniform  
19 Standards.

20 MS. JEWELL: And by "modify," you mean --

21 MS. SCURI: Change the text of the Uniform  
22 Standards.

23 MS. JEWELL: Not omit a standard?

24 MS. SCURI: No, no. Change the actual text of the  
25 Guideline itself.

1 MS. JEWELL: That was my question.

2 MS. SCURI: So that's the difference between  
3 modification and omission. Sometimes you decide that a  
4 person has been, let's say they're an applicant for a  
5 license, or they're a Licensee and they've actually been  
6 clean and sober for three or four years, but by the time  
7 they come to you and you have to decide whether all of these  
8 terms are appropriate to be placed into a disciplinary  
9 order. If you leave in the word "omission," then you retain

10 that flexibility. If you take out that sentence --

11 MS. JEWELL: That's what I was after is we should  
12 be able to omit --

13 MS. SCURI: Yes. I believe you should be able --

14 MS. JEWELL: -- on a case-by-case basis.

15 MS. SCURI: Yes.

16 MS. JEWELL: The question is should we be allowed  
17 to modify? And I think "omit," we should be allowed to on a  
18 case-by-case basis.

19 MS. SCURI: And I would agree with that because I  
20 think that's how you have adequate due process of law.

21 MS. ALVISO: And you said there's --

22 MS. JEWELL: This text here under (B) says  
23 "modification or omission."

24 MS. SCURI: Correct.

25 MS. JEWELL: If we strike "modification" --

1 MS. SCURI: Then the Department will be very  
2 happy.

3 MS. JEWELL: And will that cause any problems that  
4 you foresee for us?

5 MS. SCURI: No. No.

6 MS. JEWELL: Well, that certainly makes it easy.

7 MS. MARCO: The one thing I do have to point out,  
8 it could cause you a problem during sunset because these are  
9 ~~these regulations were~~ -- I mean the statute was written  
10 by those in MP and they are very aggressively trying to get  
11 the Boards to adopt them and not be able to modify them. So  
12 I just have to put that out there and maybe you could  
13 comment.

14 MS. SCURI: I'm not suggesting that they not  
15 remove the word "modification."

16 MS. MARCO: No, I know, but I just want you to  
17 know that during sunset you may --

18 MS. JEWELL: Well, but I'm going to seek  
19 clarification on what you just said because if they are  
20 aggressively expecting Boards not to modify, are they also  
21 aggressively expecting Boards not to on a case-by-case base  
22 omit?

23 MS. MARCO: They want the Board to not alter the  
24 standards in any way, they want them to use them just as  
25 they've been drafted and not omit them, not modify them --

1 MS. JEWELL: Without flexibility on any case that  
2 someone has identified as a Substance Abusing Licensee?  
3 They all get the same set of standards applied?

4 MS. MARCO: Yeah, and I'm not advocating for that,  
5 I'm just letting you know that that's --

6 MS. JEWELL: I'm just clarifying what it is that  
7 we're being expected to do.

8 MS. ALVISO: And the differing viewpoints on  
9 ~~modification or omission would shake-out at OAL if this~~  
10 went?

11 MS. SCURI: The issue of modification might, but  
12 the omission certainly -- there's no -- in our office within  
13 the Legal Division, there's no suggestion that you give up  
14 your ability to determine which terms and conditions are  
15 appropriate on a case-by-case basis; the inclusion of the  
16 terms are appropriate.

17 MR. CHU: Have we not been doing this all along?

18 MS. SCURI: You have been doing this all along. I  
19 think the biggest objection, as I understand it from the  
20 Legislature is to your modifying the language, the text of  
21 the Uniform Standards.

22 MS. ALVISO: Modifying the text, but not modifying  
23 the application. I mean, is that what you mean?

24 MS. SCURI: Yes.

25 MS. JEWELL: I move to change in the Physical

1 Therapy Board proposed language the page just before the  
2 Guidelines, 1399.15(B). And I need to look at the grammar.  
3 I'd like to strike "modification or" from the text.

4 MS. TAKII: So language-wise, appropriate public  
5 protection, what are you saying --

6 MS. JEWELL: Can be provided with or by omission  
7 of specific standard as a term of probation.

8 MS. TAKII: So with or by --

9 MS. JEWELL: Well, I'm asking for a grammatical  
10 assist.

11 MS. SCURI: I would leave it "with."

12 MS. JEWELL: Okay.

13 MS. TAKII: What did you just say?

14 MS. JEWELL: She said leave it "with."

15 MS. TAKII: With omission is what you're saying?

16 MS. JEWELL: Correct.

17 MS. TAKII: Okay. This is a motion. Is there a  
18 second?

19 MR. CHU: I'll second.

20 MS. TAKII: Any other comment here? Public  
21 comment?

22 MS. ALVISO: But we're not talking about modifying  
23 the text. I mean, isn't that what you're against? It  
24 wouldn't be modifying the text in this instance. I mean,  
25 unless we're talking about modifying meaning something

1 different, we're not talking about that we would go change  
2 what that Uniform Standard is. We are just saying that, in  
3 the application of this person --

4 MS. SCURI: It would be that you could deviate  
5 from the language of that. You could put in a testing  
6 requirement that would be different than what the Uniform  
7 Standard says, that's what modification means in this  
8 context.

9 MS. ALVISO: For a particular --

10 MS. SCURI: For a particular individual.

11 MS. JEWELL: So it's not going through and  
12 changing the text, but it's modifying --

13 MS. SCURI: It's going through and changing the  
14 text for that individual. So that's what we're giving up.

15 MS. JEWELL: And the text of that standard.

16 MS. SCURI: Yes, the text of the standard.

17 MS. WALLISCH: And is legislative staff concerned  
18 that there will be some kind of favoritism towards some  
19 individual by, you know, omitting something?

20 MS. MARCO: Yeah, I'm trying to -- I don't know.  
21 All I know is that we've been told that they want the Boards  
22 to adopt the Standards as they are written and not to modify  
23 or omit --

24 MS. JEWELL: Not only adopt the standards, but  
25 apply them.

1 MS. MARCO: Apply them, excuse -- thank you.

2 MS. JEWELL: That's right, to apply them as  
3 written.

4 MS. MARCO: Correct.

5 MS. TAKII: And you just used the word "omit" just  
6 then, too, so it's modify or omit the standard.

7 MS. MARCO: That's my understanding. I don't know  
8 if Luis wants to add to that, but that's my understanding.

9 MS. WALLISCH: Well, perhaps we could ask of them  
10 again about this and the purpose of not allowing omission.

11 MS. MARCO: Can we invite Luis back up to address  
12 this?

13 MS. TAKII: I would like to. Can you comment on  
14 what we're -- the modification and omission.

15 MR. PORTILLO: Yeah, I think the Department, I  
16 would say, I think the assessment by your EO is correct,  
17 that the Senate BMP staff and I would say the Department  
18 believes that they should be applied as the standards. The  
19 goal was to -- there were problems in the past where you  
20 have how Substance Abusing Licensees were treated, so the  
21 goal was to set minimum standards of how we want to deal  
22 with these individuals so that they are applied uniformly.  
23 So it doesn't matter -- so one Board is not doing one thing  
24 and one Board is not doing the other, they're all uniform.  
25 When it provides for modification, that goes completely --

1 omission, I think you could still have a problem in the  
2 sense that if you -- the Department's view has been that,  
3 again, there are certain standards that apply to certain  
4 Boards, again, I'll go back to the diversion ones, if you  
5 don't have a diversion program, some of the standards  
6 relating to the diversion vendor would not be applicable;  
7 however, once a standard has been deemed relevant, it has to  
8 be applied as is. The concern with the omission would be  
9 that you have an individual who does fall under a substance  
10 -- who is [quote unquote] "a Substance Abusing Licensee" and  
11 for all intents and purposes should have one of the  
12 standards applied to them, but it's not, not because the  
13 sense is that it doesn't apply, but simply the sense that  
14 we'd rather not -- we don't want to apply it. And I think  
15 you could still have some troubles in that respect because,  
16 yeah, instead of modifying, now you're just not doing it.  
17 And so I would urge a little caution on that side. I think  
18 it's an interesting approach kind of to take that way and I  
19 don't think people will want to eliminate the ability of a  
20 Board to make those determinations, but I think that is  
21 where you could get into trouble is if it's clearly that it  
22 should have applied and you just don't want to apply it, so  
23 instead of saying we're not modifying it, we're just not  
24 going to do it. So, arguably... I know Senate BMP has been  
25 pretty consistent that they should be applied uniformly, and

1 so what I would say is, if the Board took a different  
2 position, that's something we would have to look at when the  
3 regulation comes to the Department, but also something I  
4 would say you would need to be prepared to discuss when the  
5 Board were to go through some review hearings with members  
6 of the Committee as to why you deviated from what the  
7 standards say.

8 MS. JEWELL: So if we have a Substance Abusing  
9 Licensee who comes to our attention through late

10 notification from a court that's, you know, three years ago  
11 they were -- or two years ago, they had a substance abuse  
12 problem, had two DUIs, they've gone through an extensive  
13 drug rehab program and been certified as sober and dry for  
14 over two years with completely negative drug tests, or  
15 alcohol tests, we still have to apply those standards.

16 MR. PORTILLO: Yeah, my sense would be that the  
17 Board would have to go through its normal -- because you  
18 essentially would be getting disciplinary action against  
19 this individual, wouldn't you?

20 MS. JEWELL: Right, right, we'd have to go through  
21 disciplinary action, but we wouldn't have to apply -- but we  
22 would also now have to apply the guidelines for discipline.

23 MR. PORTILLO: Yes.

24 MS. JEWELL: And so we would have to mandate that  
25 they go through a drug program.

1 MS. TAKII: Anita.

2 MS. SCURI: Could I ask Mr. Portillo a question?

3 The way subsection (B) is structured, if the conduct that is  
4 found to be a violation involves drugs and/or alcohol, then  
5 there is a presumption that the person is a Substance  
6 Abusing Licensee. And if the Licensee does not produce  
7 evidence to the contrary, then this regulation requires that  
8 the Uniform Standards will apply. On the other hand, if  
9 there is evidence of -- I'm going to call it

10 "rehabilitation" for shorthand -- and public protection can  
11 be provided, even if a specific Uniform Guideline or  
12 standard is not included, is it your position that that does  
13 not provide -- it does not set up the situation where the  
14 Board arbitrarily decides whether or not a term would apply  
15 its evidence-based. So do you take that position that this  
16 would not be sufficient protection?

17 MR. PORTILLO: I would say that the Guidelines are  
18 structured in such a way that it ensures the Board is kind  
19 of constantly monitored and keeping track of what's going  
20 on, kind of harking back to the example that was posed that,  
21 let's say, somebody went through drug rehabilitation for two  
22 years, they had drug tests, 1) none of that was done under  
23 the supervision of the Board, the Board is not sure if, 1)  
24 there is no guarantee that the company that did the drug  
25 test is the company that did them appropriately, they did

1 them with the frequency with which the standards require,  
2 but; 2) that they were done under the supervision of the  
3 Board. When you go through the standards, there is a  
4 certain assessment where staff can go through and do it.  
5 Depending on how the standards are implemented, the Board  
6 could say, "We're going to have this person tested once a  
7 week," or they could say, "We're going to do 10 tests 10  
8 days straight" and then not do another one for three months.  
9 So the Board has the flexibility to implement those in a way  
10 that is most effective for them. When some of these things  
11 occur, you chance that the way it was done are not  
12 consistent with the standards, or were inappropriate. And  
13 so my concern is you have a situation where you say, "This  
14 is a Substance Abusing Licensee who, under any normal  
15 situation, should be getting drug tested." There is no  
16 debate about that. But then, if the Board were to choose,  
17 "We're not going to have this person drug test because  
18 either we felt that the drug tests that this individual went  
19 through prior to us finding out was appropriate, or was  
20 enough," I would say that would probably be an area of  
21 concern of how that's done.

22 MS. SCURI: Even though the Licensee would have to  
23 establish to the Board's satisfaction that failure to  
24 include a specific term would still provide sufficient  
25 public protection? I mean, it's an evidence-based thing,

1 it's not a wish-based thing.

2 MS. JEWELL: So the Substance Abusing Licensee  
3 comes to the Board and says, "I've been clean and sober for  
4 two years and here are the results of my drug tests. I was  
5 tested weekly for two years and have two years worth of  
6 negative tests, and this is my program that I went through,"  
7 we don't have the right to evaluate that program on the  
8 Uniform Standards and compare that program to the Uniform  
9 Standards and decide that they don't need to attend a  
10 program?

11 MR. PORTILLO: My question would be -- I guess my  
12 question would be, 1) why was that never made aware to the  
13 Board that the individual had this problem? Why are they  
14 coming in after the fact? But I would say, in this sense,  
15 what the Legislature essentially did is it said this is an  
16 area where we think there are certain minimum standards of  
17 how these individuals should be treated. They established  
18 the Substance Abuse Coordinating Committee to come up with  
19 those standards and for those standards to be implemented by  
20 all the Boards, the Healing Arts Boards. It's an area where  
21 essentially it said that we want uniformity --

22 MS. JEWELL: So your answer is no.

23 MR. PORTILLO: They said we want uniformity and  
24 that we want it implemented a certain way.

25 MS. ALVISO: I think what you've picked up is  
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1 that, even in the most extreme case, this is a removal of  
2 some of our discretion.

3 MS. JEWELL: That's right.

4 MS. TAKII: To answer a comment you made,  
5 sometimes we don't learn for years later.

6 MR. PORTILLO: Uh huh.

7 MS. TAKII: I mean, you know, it's not our fault,  
8 we just --

9 MR. PORTILLO: No, I know --

10 MS. JEWELL: They don't give us that information.

11 MS. TAKII: -- and we don't know it.

12 MR. PORTILLO: No, and I meant that comment as  
13 more of the -- there's nothing prohibiting the individual  
14 from sharing that information from the Board, so for the  
15 individual to come after the fact.

16 MS. JEWELL: He doesn't have to until he renews  
17 his license and that's a two-year period. And he does have  
18 to check "I've been convicted of a crime" on his license  
19 renewal, but that's a two-year period.

20 MS. WALLISCH: There's no possible rebuttal.

21 MR. PORTILLO: Yeah, the Department's view is that  
22 the standards were meant to be implemented uniformly.

23 MS. TAKII: The motion on the floor is just to  
24 omit the word "modification," "omission" isn't in there.

25 MS. JEWELL: Remove the motion.

1 MS. TAKII: Right. I do not believe we are done  
2 discussing all the changes you've mentioned, but I've been  
3 asked to take a break at this point, take a brief break.  
4 It's 10:16 or 18 or 19 by that clock, so if we could take a  
5 quick 10-minute break and then be back again -- with smiles  
6 on our faces, ready to tackle the issues.

7 (Break at 10:16 a.m.)

8 (Reconvene at 10:29 a.m.)

9 MS. TAKII: Okay, we're back from our little  
10 recess here and I certainly want to say that, just a general  
11 comment, that in my experience with the Board, I think we  
12 have tried to follow the guidelines and the standards in our  
13 endeavors. I think that we've generally done a pretty good  
14 job of that. So, is there any other comment?

15 MR. CHU: Yes. Madam President, I'd like to make  
16 the suggestion that we table this particular topic until the  
17 February meeting and, in the interim, direct staff to  
18 develop language to make sure that incorporation of the  
19 Uniform Guidelines in the Regulation are appropriate.

20 MS. TAKII: Okay, and I know Anita had numerous  
21 grammatical changes --

22 MS. SCURI: Some missing pages and some grammar  
23 changes.

24 MS. TAKII: -- so that needed to be done. Is this  
25 a motion, then?

1 MR. CHU: Does it need to be a motion?

2 MS. SCURI: To table, you need a motion.

3 MR. CHU: Okay.

4 MS. JEWELL: Table it for action until the next  
5 Board Meeting.

6 MR. CHU: Yeah, I'll make that a motion.

7 MS. TAKII: Is there a second?

8 MR. TURNER: I'll give it a second.

9 ~~MS. TAKII: Okay, second. Is there anymore~~  
10 discussion here? No. Any public discussion?

11 MS. SCURI: May I ask a clarification? Is it --  
12 is it directing staff to develop regulatory language  
13 regarding standards 8 and 9, I believe it was?

14 MR. CHU: Oh, yeah, if you want to be that  
15 specific, sure.

16 MS. TAKII: Okay.

17 MS. JEWELL: I would perhaps ask for the maker of  
18 the motion's permission to add the editorial change of take  
19 into consideration comments received to date --

20 MS. TAKII: That's good.

21 MS. JEWELL: -- in their further editing of the  
22 document under Agenda Item 14.

23 MR. CHU: I accept that change.

24 MS. TAKII: Okay. Any other comments from the

25 Board? Any public comments? No. All in favor, say "aye."

1 (Ayes.) Opposed? Okay, that's what we'll do.

2 So, I think we can move on to general -- am I mistaken? The  
3 only thing left on here is Public Comment, yes, on Items Not  
4 on the Agenda.

5 **Item 18. Public Comment on Items Not on the Agenda.**

6 Public comment? I do believe the throngs are  
7 coming up because I know there's public comment. Is she  
8 allowed to come back and --

9 MS. SCURI: Which agenda item?

10 MS. TAKII: Which agenda item? That would be 14?  
11 Okay, so you missed the public part at the beginning. Is  
12 she allowed to do that?

13 MS. SCURI: If you wish.

14 MS. TAKII: It's not a problem, though?

15 MS. SCURI: No.

16 MS. TAKII: Okay, then step forth.

17 MS. DEFOE: I'm Stacy DeFoe, Executive Director  
18 for the California Physical Therapy Association. And just  
19 as a general comment, I guess I would say I wouldn't like to  
20 see the Board have to give up the ability to address those  
21 types of issues on a case-by-case basis based on evidence.  
22 I do, however, understand the timing of the issue and do  
23 understand why the Board may need to consider that. I had a  
24 question regarding the term which is actually in Item A,  
25 Substance Abusing Licensee. That term is in Item A and also

1 in Item B, and the term Substance Abusing Licensee seems to  
2 indicate that the Licensee is currently abusing, not has  
3 abused, even though you may have received the notice a  
4 couple years late and maybe it was determined that the  
5 Licensee was a few years ago abusing, it seems to me with  
6 the wording of B, which says "if the conduct found to be a  
7 violation involves drugs or alcohol, the Licensee shall be  
8 presumed to be a Substance Abusing Licensee for the purposes  
9 of Section...." And then it goes on to say "if the Licensee  
10 does not rebut that presumption, then the Uniform Standards  
11 shall apply." So what happens if the Licensee does rebut  
12 and is not currently using? Then does the Board have the  
13 ability to make changes, omissions, or whatever the case may  
14 be, in the Uniform Standard? And I would again refer you to  
15 Item A, which says "deviation from these guidelines and  
16 orders," and this is related to Abusing Licensees,  
17 "...including the standard terms of probation is appropriate  
18 for the Board in its sole discretion determines that the  
19 facts of the particular case warrant such a deviation, for  
20 example, the presence of mitigating or aggravating factors,  
21 the age of the case, and evidentiary problems." So it seems  
22 to me that the Board is covered by Item A. And Item B, it  
23 seems to me, to only apply to people who don't rebut the  
24 presumption that they are currently using drugs. So that  
25 would be my comment for you to consider in moving forward.

1 MS. TAKII: Thank you. That's a very interesting  
2 apropos comment. Anita, do you have any comment on that?

3 MS. JEWELL: You're not supposed to comment on the  
4 comment.

5 MS. TAKII: Oh, that's right, never mind. But I  
6 certainly appreciate you stepping forth. Okay, is there any  
7 other -- well, you can talk if you want.

8 MS. SCURI: If a Licensee, as I said before, we  
9 struggled with what does the term used in the law "Substance  
10 Abusing Licensee" mean, because it's not a DSMIV, or is it  
11 now V, diagnosis, as far as I'm aware. So we came up with a  
12 very broad criteria and that was that, if the violation that  
13 was established involved drugs or alcohol, then the person  
14 is presumed to be a Substance Abusing Licensee. On the  
15 other hand, if they rebut that presumption, then they don't  
16 fit within Subsection (B) and the Uniform Standards would  
17 not apply to them. But, again, it's evidentiary-based.  
18 They'd actually have to produce evidence at a hearing as  
19 attested through cross examination in order to rebut that  
20 presumption.

21 MS. ALVISO: And what about the application of (A)  
22 as an over-reaching -- what about that discretion?

23 MS. SCURI: You still have the ability under (A)  
24 as it's being modified, it says "notwithstanding Subsection  
25 (B), deviations from these Guidelines and Orders, including

1 the standard terms of probation is appropriate where the  
2 Board of its sole discretion determines the facts of the  
3 particular case warrant such a deviation." We were trying  
4 to develop -- we call this "trigger language" in (B), what  
5 triggers the application of the Uniform Standards for  
6 Substance Abusing Licensees, and that was the best way that  
7 we thought it could be handled because, as I said before,  
8 you have -- it's one thing to bring in evidence of a  
9 conviction, it's another thing when you don't have an  
10 evaluation of the Licensee to say they're not a Substance  
11 Abusing Licensee. That's why, if it involves drugs or  
12 alcohol, they should have to show you that they're not  
13 because the ability to do so is solely within their power,  
14 it's not within the power of the Deputy Attorney General  
15 presenting your case, it's only with the purview of the  
16 Licensee. So, yes, if they rebut the presumption, then  
17 they're not a Substance Abusing Licensee.

18 MS. TAKII: Thank you for your comments.

19 MS. JEWELL: I have a totally naïve question. If  
20 I receive a DUI, one DUI, am I a Substance Abusing Licensee  
21 according to this?

22 MS. SCURI: Yes, unless you can rebut it.

23 MS. JEWELL: I'm thinking about disciplinary cases  
24 we've had where we made one decision -- I mean, when you  
25 look at seriousness, you know, one DUI vs. repeated DUIs;

1 theoretically, they're all by this definition Substance  
2 Abusing Licensees.

3 MS. SCURI: Yes, but the person whose DUI involved  
4 a blood alcohol level of .08 may be able to show different  
5 evidence that they're not a Drug Abusing Licensee than a  
6 person whose blood alcohol is .23, for example, and we have  
7 had people in other professions with a DUI where they were  
8 still standing and they had a .23, which tells you that  
9 there's a problem there of longstanding duration, probably.

10 So it's fact-driven. Yes, one DUI would make you a  
11 Substance Abusing Licensee.

12 MS. TAKII: Are there any other comments on the  
13 Board?

14 MR. CHU: Thank you for that clarification. One  
15 reason not to drink!

16 MS. TAKII: And there's no other public comment on  
17 anything that's not on there. I guess that's it. We need a  
18 motion to adjourn.

19

20 (Adjourned at 10:42 a.m.)

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REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF,

I have hereunto set my hand this 30th day of November, 2011.

Kent Odell

Kent Odell  
CER\*\*00548