



REGULATORY AGENCY ACTION

Professions Code section 2530.6 and sections 1399.170-.177, Title 16 of the CCR, SPAEC clarified as follows:

- Aides may not carry out language therapy programs, as aides are not required to complete any educational requirements. To date, aides have not been approved to perform brief evaluations or screenings, nor to provide information to parents or patients regarding the findings or outcomes.

- There are no minimal training requirements for aides. Each individual supervisor should determine what type of training would best suit the proposed duties of a particular aide.

- The supervisor must be physically present while the aide is assisting with the provision of services. SPAEC interprets section 1399.172(c), Title 16 of the CCR, to require 100% supervision of the aide by the supervisor, unless SPAEC has approved an alternative plan outlining the specific duties of the aide and the percent of supervision proposed.

- With regard to billing for the services of aides, SPAEC stated that it has no jurisdiction over billing practices (except to the extent they constitute fraud by a licensee or unlicensed practice). While this issue might be of interest to Medi-Cal or other payors, SPAEC's attorneys have consistently advised it that billing is not within its jurisdiction.

- With regard to the corporate status of the employer, SPAEC stated that the corporate status of any organization has no bearing on the licensing requirements for individuals providing professional services. The only individuals who are exempt from SPAEC's licensing requirements are public school personnel (*see above*).

Employment of a Speech-Language Pathologist or Audiologist by a General Law Corporation. At SPAEC's meeting, DCA legal counsel Kelly Salter presented an updated legal memorandum on (1) whether speech-language pathologists and audiologists may be employed by general law corporations or other business entities, and (2) whether speech-language pathologists and audiologists may be employed by individuals who are unlicensed or licensed in a different profession. [13:4 CRLR 74]

Traditionally, California law has prohibited the employment of health care professionals by unlicensed or differently licensed individuals or businesses. However, this ban has been relaxed in recent years. Based on her analysis, Salter concluded that there is no express language in the statutes which would prohibit SPAEC from interpreting the law to permit the

employment of speech-language pathologists or audiologists by general law corporations or other business entities, should it so choose, provided that the employment agreement, whatever its form, does not involve referrals for consideration, and does not advertise or imply the licensure of unlicensed persons or impute the licensure of one type of professional to another type of professional. Salter noted that SPAEC's historical prohibition against individual non-licensed employers of speech-language pathologists and audiologists is backed both by legal opinions of DCA and the Attorney General's Office and by the "substantial risk that an individual non-licensed employer will exercise supervision and control over the practice of a professional employee," and stated that "this policy should probably continue."

The Committee decided to solicit members' views in writing, and placed this issue on its July agenda.

Future Rulemaking. At its January and April meetings, SPAEC continued its discussion of two future rulemaking proposals. The first regulatory change would revise section 1399.158 to increase the required number of hours of supervised clinical practice in order to be licensed by SPAEC to 300 hours, the current statutory maximum under Business and Professions Code section 2532.2(c). The other proposal would update sections 1399.198-.199, the Committee's citation and fine regulations, to specify particular sections of its statute and regulations which, if violated, should be sanctioned with a citation and/or fine, and to tailor the range of fines so that the fine better fits a particular violation. [15:1 CRLR 79] In April, the Committee also agreed to add a provision implementing its new authority to request the disconnection of the telephone service of an unlicensed individual who is advertising speech-language and/or audiology services in the telephone directory.

Also in April, Committee Executive Officer Carol Richards noted that the legislature is entertaining a proposal to limit the reserve funds of special-funded agencies (such as SPAEC) to four months' worth of operating expenses; any reserve fund amount in excess of that total must be refunded to licensees. Richards suggested—and the Committee agreed—that, if this provision is eventually included in the state budget and approved by the Governor, SPAEC may want to adopt regulatory changes reducing its fees during the next 24-month renewal period.

At this writing, none of these rulemaking proposals have been published for public comment in the *California Regulatory Notice Register*.

LEGISLATION

SB 563 (Rogers), as amended April 26, would increase the continuing education requirement for hearing aid dispensers licensed by the Hearing Aid Dispensers Examining Committee (HADEC) from six to nine hours per calendar year. This bill would affect a large number of SPAEC licensees, as 50% of SPAEC's licensee population dispense hearing aids as part of their practice and are cross-licensed by HADEC. [S. Floor]

RECENT MEETINGS

At its January 20 meeting, the Committee discussed a request by the International Association of Laryngectomies (IAL) for temporary waiver of the licensure requirement for professional-faculty attendees of IAL's annual meeting in San Francisco in July 1995. Legal counsel advised that SPAEC's statutes do not authorize it to grant such an exemption, and that such an action could subject the Committee and/or members to liability should a mishap occur. As an alternative to temporary waiver of the licensure requirement, the Committee agreed to advise IAL that participants in the annual meeting could apply for temporary licenses under Business and Professions Code section 2532.2(d) authorizing ASHA-approved or other-state-licensed professionals to practice in California for up to 150 days.

Also at its January 20 meeting, the Committee elected audiologist Stephen Sinclair as its chair for 1995. Dr. David Alessi was elected as the new Vice-Chair for 1995.

At SPAEC's April meeting, staff presented a revised version of SPAEC's *Student Manual for Licensure in the Speech-Language Pathology and Audiology*. The manual contains information on California licensure requirements, including academic coursework standards, clinical practice criteria, and RPE, as well as the licensure process in general.

FUTURE MEETINGS

July 21 in southern California.

BOARD OF NURSING HOME ADMINISTRATORS

Executive Officer: Kim Smith
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Pursuant to Business and Professions Code section 3901 *et seq.*, the Board of Nursing Home Administrators (BNHA),



formerly the Board of Examiners of Nursing Home Administrators, develops, imposes, and enforces standards for individuals desiring to receive and maintain a license as a nursing home administrator (NHA). The Board may revoke or suspend a license after an administrative hearing on findings of gross negligence, incompetence relevant to performance in the trade, fraud or deception in applying for a license, treating any mental or physical condition without a license, or violation of any rules adopted by the Board. BNHA's regulations are codified in Division 31, Title 16 of the California Code of Regulations (CCR). Board committees include the Administrative, Disciplinary, and Education, Training and Examination committees.

The Board consists of nine members. Four of the Board members must be actively engaged in the administration of nursing homes at the time of their appointment. Of these, two licensee members must be from proprietary nursing homes; two others must come from nonprofit, charitable nursing homes. Five BNHA members must represent the general public. One of the five public members is required to be actively engaged in the practice of medicine; a second public member must be an educator in health care administration. Seven of the nine members of the Board are appointed by the Governor. The Speaker of the Assembly and the Senate Rules Committee each appoint one member. A member may serve for no more than two consecutive terms.

On February 16, BNHA welcomed new member Barbra McClung, who was appointed by the Governor to fill the NHA position left vacant by Bill Knell; McClung is vice-president of Moyle's Central Valley Health Care in Visalia, a for-profit facility. At its May 11 meeting, BNHA welcomed new public member Marilyn Jesswein.

MAJOR PROJECTS

BNHA Hires New Executive Officer.

On April 1, BNHA Executive Officer Pamela Ramsey resigned from her position to become the Executive Officer of the Board of Barbering and Cosmetology; Ramsey had served as BNHA's EO since September 1993. Curt Augustine, Chief of the Department of Consumer Affairs' (DCA) Bureau of Electronic and Appliance Repair, served as BNHA's interim executive officer during its search for Ramsey's replacement; Augustine has served as interim executive officer on three other boards—the Acupuncture Committee of the Medical Board of California, the Board of Registration for Professional Engineers and Land Surveyors, and the Board of Behavioral Science Examiners. During a

closed session at its May 11 meeting, BNHA chose Kim Smith to fill the position permanently; Smith has a background in public relations and was previously employed by the state at the Governor's Appointments Desk.

BNHA Predicts Future Budget Shortfall. At BNHA's May 11 meeting, Interim Executive Officer Curt Augustine informed the Board that it has sufficient funds to end the 1994-95 fiscal year in the black by just over \$2,000. However, he warned that projected expenditures will begin to exceed revenues slightly during the 1995-96 fiscal year and to a greater extent thereafter; the projected deficit for the 1996-97 fiscal year is approximately \$85,000. Augustine explained that the increased expenditures are partially due to a budget change proposal which authorized three new staff members for an 18-month period ending June 30, 1996; although the Board's expenditures will decrease after that date, its workload probably will not, and the Board must decide whether it wants to fund those positions permanently. Augustine noted that the Board must decide how to handle the budget deficit—either by cutting costs, raising licensing fees, or a combination of both. The Board directed its Administrative Committee to consider the issue and formulate recommendations.

BNHA Prepares Memorandum of Understanding With Department of Health Services.

At BNHA's February 16 meeting, then-Executive Officer Pamela Ramsey presented a draft of the memorandum of understanding (MOU) between the Department of Health Services (DHS)—which licenses and inspects nursing home facilities—and BNHA regarding the transmission of information between DHS and BNHA and the applicable timeframes. [15:1 CRLR 82] Among other things, the MOU provides that both BNHA and DHS will designate one staff member to be the primary ongoing liaison with responsibility for the activities called for under the MOU. The MOU specifies that DHS has ten working days in which to notify BNHA of a temporary suspension order against the license of a nursing home facility, service of an accusation to revoke a facility's license, final decertification of a facility from the Medi-Cal or Medicare program, class "A" and "AA" citations, class "B" citations upon BNHA request, and final resolution of any court action or formal settlement agreement. The MOU further specifies the documents that DHS will provide to BNHA when notifying BNHA of the enumerated enforcement actions.

The MOU also outlines the procedures by which BNHA must transmit any complaints received by BNHA regarding long-

term facilities to DHS and the information to be transmitted; staff must send such complaints to DHS by fax within 24 hours of receipt of the complaint. BNHA must also forward to DHS copies of accusations filed, final decisions, and stipulated agreements within ten working days. Further, BNHA must promptly forward to DHS its semi-annual list of probationers, license suspensions, and revocations. Following discussion, BNHA approved the draft MOU; at this writing, the MOU is currently at DHS for modifications.

BNHA Approves Disciplinary Guidelines.

At its May 11 meeting, the Board completed the revision process begun in October 1994 and approved the fourth draft of BNHA's disciplinary guidelines with three minor changes. [15:1 CRLR 80] The first change pertains to telephone counseling by the Executive Officer with NHAs whose facilities have been cited by DHS; the draft policy stated that when the Executive Officer cannot reach an NHA for telephone counseling at the facility of record, he/she sends a letter to the NHA documenting the citations in lieu of telephone counseling. The Board adopted a change providing instead that the Executive Officer send a letter to the NHA's home address instructing the NHA to contact BNHA; this way, the administrator will be able to notify the Board of termination of appointment as an administrator of record, and BNHA staff can obtain a current telephone number where the NHA can be reached for telephone counseling.

The second change eliminated a redundancy in the procedure by which an administrator is requested to appear before the Board and show just cause why disciplinary action should not be initiated. The draft guidelines provided that an administrator will be notified to appear before the Board after the issuance of nine class "A" citations (those violations that seriously endanger a patient's safety, with a substantial probability of death or serious bodily harm); then, if disciplinary action is initiated, the NHA would receive a letter giving him/her thirty days to provide written information on why a disciplinary action should not be initiated. The adopted change provides that BNHA will now send a letter informing the NHA that nine class "A" citations have been issued and informing the NHA that he/she has fifteen days to request a personal appearance. The letter informs the administrator that the personal appearance is his/her opportunity to show just cause why remedial action should not be initiated, and that the Executive Officer and Discipline Committee Chair will consider the administrator's testimony and all written documentation provided in mak-



ing a final determination whether a disciplinary proceeding will be commenced.

The last change deals with the Board's complaint disclosure policy; the draft guidelines do not address a policy for complaints filed directly with BNHA. The Board adopted language which provides that only closed complaints which have resulted in remedial or disciplinary action will be disclosed to the public, upon written request.

The Board also voted to separate out its disciplinary guidelines and terms and conditions of probation into a separate document called *Guidelines of Discipline*, to be given to Deputies Attorney General and Administrative Law Judges.

Examination and Enforcement Statistics. The overall pass rate for the January 1995 state NHA exam was 39%; the national exam pass rate was 56%.

From November 1, 1994 to April 30, 1995, DHS referred to BNHA four citations for "AA" violations (those violations which result in the death of a patient) and 102 citations for "A" violations. During the same time period, BNHA conducted three telephone counseling sessions, issued four letters of warning, and issued one letter to appear before the Board. Further, BNHA revoked one license and stipulated to the revocation of another with \$1,000 in cost recovery from the former licensee. Two other licensees stipulated to probation with a total cost recovery of \$3,200. At this writing, thirteen cases are pending at the Attorney General's Office.

BNHA Rulemaking. On April 18, the Office of Administrative Law (OAL) approved BNHA's amendments to sections 3102, 3140, and 3180, and repeal of section 3150, Title 16 of the CCR. Among other things, the changes reflect the Board's new name; delineate procedures for BNHA's conversion to a birthdate-based license renewal program; increase examination fees; and repeal continuing education (CE) requirements which are now set out in section 3140. [15:1 CRLR 81]

On March 24, BNHA published notice of its intent to amend section 3120, Title 16 of the CCR. Existing law requires every applicant for a license as an NHA to be examined by the Board; section 3120 currently requires that the licensing examination be a two-part exam including a national exam and a state exam. The proposed amendment is a result of a recommendation made by the Board's Education Committee to generalize the language so the state exam could be changed or eliminated depending on the results of the ongoing occupational analysis. [15:1 CRLR 82] The proposed language would specify that the licensing examination shall cover the broad aspects of nursing home administration and may consist

of a national exam, a state exam, or both. On May 11, the Board held a public hearing in order to receive comments on the proposed change; no comments were made and BNHA adopted the change without modification. At this writing, this revision awaits review and approval by DCA and OAL.

At this writing, BNHA's proposed amendments to sections 3151, 3152, 3160, and 3162, Title 16 of the CCR, await review and approval by OAL. Among other things, these changes would provide that two hours of CE credit shall be given for attending a public meeting of BNHA, and eight hours of CE credit will be given for participating in a Board-sponsored state licensing examination item writing session; BNHA may, in lieu of conducting its own investigation, accept the findings of the National Association of Boards of Nursing Home Administrators regarding CE courses and providers, and adopt those findings as its own; any licensed NHA may be approved to serve as a preceptor if the individual, among other things, has an active NHA license and is not on probation by the Board; and establish sixty hours as the maximum number of hours an administrator-in-training may work and train each week. [15:1 CRLR 81-82]

Federal Rulemaking. At BNHA's February 16 meeting, DCA legal counsel Chris Grossgart reported on new federal regulations affecting nursing home facilities. Effective July 1, Part 401 *et seq.* of Title 42 of the Code of Federal Regulations (CFR) will apply to skilled nursing facilities receiving Medicare and Medicaid benefits, and set forth the process for certifying that these facilities meet the requirements for continued participation in those programs. The regulations also set forth alternative remedies which may be imposed against facilities if they are found not to be in compliance and for investigation of complaints of neglect, abuse, or misappropriation of residents' property. The final rules require that the state review all such allegations. If, after a review of the allegations, the state believes that a person has committed the acts, that person is entitled to a hearing. If the person waives his/her right to a hearing or is found guilty at the hearing, DHS has ten days to report this to BNHA. According to Grossgart, the federal government has not yet issued interpretive guidelines for these regulations and DHS is not implementing any new procedures until it receives such guidance.

Grossgart also reminded the Board of other pending federal regulations which have not yet been approved. These changes, in 42 CFR Part 418 *et seq.*, would implement section 4201 of the 1987 Omnibus Budget Reconciliation Act, which requires

the federal Health Care Financing Administration to establish standards to assure the competence of NHAs. Under the proposed regulations, a skilled nursing facility or nursing facility may not employ any person as an administrator unless that individual has a state NHA license and at least a baccalaureate degree. [12:2&3 CRLR 128] As California does not currently require a degree for NHA licensure, its laws must be changed if the pending federal regulations are approved. The proposed federal rules contain an exemption to the degree requirement for individuals who have been "continuously employed as a long-term care facility administrator by the same facility for at least one year on the date the final rule is published."

In addition, another section of the pending federal rules would require completion of an internship program of at least twelve weeks in duration to qualify for NHA licensure; this requirement is waived if an individual has at least one year of management experience in a nursing facility. The proposed rules would also require NHA licensure applicants to pass with a score of at least 75% one of the following: (1) a state-selected standardized examination tailored to the state, (2) a state-developed examination, or (3) a national standardized examination. Finally, NHA licensees would be required to complete 20 clock hours of CE per year.

LEGISLATION

Future Legislation. At BNHA's February 16 meeting, then-Executive Officer Pamela Ramsey asked the Board to consider two legislative proposals being considered by DCA; the first concerns generic language which would allow all DCA boards to promulgate regulations enabling them to issue probationary licenses. The second legislative proposal pertains to unlicensed practice; currently, if an individual is found to be practicing without a license, one recourse is to refer the case to the appropriate district attorney (DA) for a misdemeanor conviction. However, DAs typically have more serious cases requiring the attention of limited staff and will not press charges. The proposed legislative change would allow DCA's Division of Investigations to issue a fine to anyone found to be practicing without a license. The Board agreed to support these legislative changes.

SB 472 (Petris). Existing law requires skilled nursing facilities and intermediate care facilities to adopt an approved training program for certified nurse assistants that meets standards established by DHS. Existing law requires the program to consist of at least an orientation program for



new nurse assistants, a precertification training program, and continuing in-service training, and requires the facility to consider including training regarding the characteristics and method of assessment and treatment of AIDS. As amended May 2, this bill would require, in addition, that each facility consider the unique behavioral and functioning characteristics of individuals with Huntington's disease, Alzheimer's disease, and other dementing disorders so that the highest quality of care may be provided. [S. Floor]

LITIGATION

In *Rains v. Belshe*, 32 Cal. App. 4th 157 (Feb. 8, 1995), the First District Court of Appeal upheld the constitutionality of Health and Safety Code section 1418.8, which provides for the authorization of necessary but non-emergency medical treatment for nursing home patients who lack the mental capacity to consent and have no surrogate decisionmaker. Section 1418.8 authorizes a doctor to determine that a patient is both incompetent and has no surrogate decisionmaker; once the doctor makes these two findings, the patient's decisions are made by an "interdisciplinary team," consisting of the doctor and a nurse, possibly other staff members and, where practicable, a patient representative.

Esther Rains petitioned for a writ of mandate to invalidate section 1418.8 on the grounds that it violates the privacy and due process rights of the nursing home patients it affects. However, the First District Court of Appeal found that a nursing home patient's important interest in obtaining necessary medical treatment even when he/she is unable to provide consent for that treatment outweighs his/her legally protected privacy interest in his/her own personal bodily autonomy. Further, the court held that section 1418.8 does not violate the due process rights of mentally incompetent patients because the statute provides a clear test for the determination of a patient's incapacity to decide on medical care, the opportunity for judicial review of a determination of incapacity, and the participation of a patient representative in the decisionmaking process. Critics of the decision believe the court is improperly giving too much deference to professional medical judgment.

RECENT MEETINGS

At BNHA's February 16 meeting, then-Executive Officer Pamela Ramsey reported that DCA will be adding BNHA to its Applicant Tracking System (ATS); this requires BNHA to allocate one staff person to DCA for six months to assist in the design and implementation of the system.

Ramsey also reported that BNHA is the only DCA board that is not on DCA's enforcement tracking system; staff is looking into implementation of this system as well.

At BNHA's May 11 meeting, Interim Executive Officer Curt Augustine reported that some of the Board's planned activities may be delayed due to the change of executive officers. However, Board staff reported that office automation is under way with the purchase of two new computers. BNHA's new Executive Officer Kim Smith assured the Board and the public that the expert witness program is her top priority and she hopes to have the program finalized by early fall. [15:1 CRLR 81]

FUTURE MEETINGS

August 17 in San Francisco.
November 9 in San Diego.

BOARD OF OPTOMETRY

Executive Officer: Karen Ollinger
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Pursuant to Business and Professions Code section 3000 *et seq.*, the Board of Optometry is responsible for licensing qualified optometrists and disciplining malfeasant practitioners. The Board establishes and enforces regulations pertaining to the practice of optometry, which are codified in Division 15, Title 16 of the California Code of Regulations (CCR). The Board's goal is to protect the consumer patient who might be subjected to injury resulting from unsatisfactory eye care by inept or untrustworthy practitioners. The Board consists of nine members—six licensed optometrists and three public members.

MAJOR PROJECTS

Branch Office Restrictions As Applied to Independent Practice Associations. In December 1994, the Board consulted Department of Consumer Affairs (DCA) legal counsel Robert Miller about two applications for registration of optometric corporations. While the applications specified only one address, they were apparently intended to be vehicles for the establishment of "independent practice associations" (IPAs) and optometric services would actually be rendered through numerous optometrists practicing at different locations. Because Miller interpreted these offices to be "branch offices" subject to the restrictions and registration requirement of Business and Professions Code section 3077, and because both applicants expressly disclaimed having any branch offices, Miller recommended that

the applications be denied. However, the Board at its December meeting decided to revisit the section 3077 branch office restrictions, and scheduled a discussion of this issue for its March meeting. [15:1 CRLR 83]

At the Board's March 9-10 meeting, Miller reported that he had several conversations with California Optometric Association (COA) legal counsel Mark Andrews regarding this matter. Miller still contended that by arranging for optometric services to be provided by professional practitioners, IPAs are effectively practicing optometry at multiple locations in violation of the branch office limitations. However, Andrews argued that IPAs do not practice optometry but merely act as entities which market optometric services, and thus are not in violation of the branch office limitations. Miller conceded that COA's argument may have merit, and informed the Board that there may be alternative interpretations of the law in this regard. The Board generally agreed that further research should be conducted to assist it in determining whether IPAs are in fact practicing optometry. Accordingly, the Board unanimously agreed to appoint a committee, including representatives of the Board and COA, to study issues concerning IPAs and report its findings and recommendations to the Board at a future meeting.

Board Publishes Regulatory Proposals. On April 7, the Board published notice of its intent to adopt new sections 1523 and 1524, amend sections 1530, 1531, 1532, 1533, 1535, and 1536, and repeal section 1526, Title 16 of the CCR, regarding the Board's examination process and continuing optometric education requirements. [15:1 CRLR 82; 14:4 CRLR 89] Specifically, the Board proposed the following changes:

- New section 1523 would consolidate the Board's examination and application requirements into one reference source for licensure candidates.

- New section 1524 would provide for the approval of the applications for examination for those applicants who have paid the necessary fees and whose credentials have been approved by the Board's Executive Officer.

- Amendments to section 1530 would repeal the existing language and instead specify that each applicant for licensure must obtain a passing score of at least 75% in each of the required examination sections.

- Amendments to section 1531 would delete antiquated examination composition language and clearly delineate each examination section and its composition.