



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 Board 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.

#### MAJOR PROJECTS:

*Implementation of AB 1834.* At BENHA's December meeting, Education Committee Chair Dr. John Colen briefly discussed the implementation of the recommendations made by his committee regarding continuing education (CE) and the preceptor and administrator-in-training (AIT) programs. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 72 for background information on the recommendations of the Education Committee.)

Regarding continuing education, BENHA plans to take the following steps: (1) Executive Officer Ray Nikkel will track CE providers over the next two years to assess the effect of higher provider fees on the availability of CE courses; (2) the Executive Officer will also continue to review and approve CE home study courses that meet Board criteria for use in rural or isolated areas; and (3) no change is contemplated regarding the present requirement of forty hours of CE every two years.

Planned actions regarding the preceptor and AIT programs include the following: (1) the Executive Officer and Board secretary will review each AIT's quarterly report to assure that a minimum of twenty hours per week is being completed; (2) by July, the Board will convene a committee to review and revise regulations for educational standards at the baccalaureate level for entry into the AIT program; and (3) by June, BENHA will propose regulation changes to require visits to each AIT by a BENHA staff member. Nikkel admitted that budget change proposals to support added personnel to implement these

regulations are problematic, suggesting that AIT entrance fees be increased instead. Legal counsel Don Chang warned that any fee increase greater than \$100 would require a statutory amendment. Nikkel also noted that, in compliance with AB 1834, the agency had acquired two half-time enforcement positions for the next eighteen months.

#### LEGISLATION:

*AB 1886 (Quackenbush)* would provide that any person who has been directly responsible for planning, coordinating, directing, and implementing the patient care, physical plant, and fiscal administration of a distinct part skilled nursing facility (DP/SNF) of an acute care hospital in California for one year immediately preceding his/her application for a nursing home administrator's license, and who applies on or before July 1, 1990, shall be required to take the next scheduled nursing home administrator examination as a condition of licensure. This bill is pending in the Senate Appropriations Committee.

#### RECENT MEETINGS:

At BENHA's December meeting, Ray Nikkel reported on the midyear meeting of the National Association of Boards of Examiners of Nursing Home Administrators. He noted that a committee was being formed to analyze a NHA's duties and propose a standard NHA job description. He also noted that the association has published a booklet on the national exam for NHAs.

The results of the November licensing exams were announced: 62% of the examinees passed the state exam; 25% passed the national exam.

#### FUTURE MEETINGS:

To be announced.

#### BOARD OF OPTOMETRY

*Executive Officer: Karen Ollinger*  
(916) 739-4131

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 Chapter 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 are licensed optometrists and three are members of the community at large.

#### MAJOR PROJECTS:

*Foreign Graduates.* In an attempt to address some of its problems regarding the licensure of applicants who have graduated from foreign optometric schools (see CRLR Vol. 9, No. 4 (Fall 1989) p. 73 and Vol. 9, No. 3 (Summer 1989) pp. 64-65 for background information), the Board took several actions at its December 14 meeting. First, the Board passed a motion allowing pre-1980 graduates of foreign optometric schools to take the state practical exam and the National Board of Examiners in Optometry (NBE) examination in any order within a five-year period. To accomplish this, the Board must repeal regulatory section 1535, which currently requires applicants for the California exam to successfully complete the NBE before taking the California practical exam. There may be a problem with limiting the application of this new procedure to foreign graduates. The Board's Regulation Committee was directed to prepare a draft of proposed regulatory language for discussion at the February meeting.

In addition to addressing the order in which the exams may be taken, the Board also passed a motion to review its entire exam scoring system. There was some discussion of requiring an overall score of 75% with no score under 65% on any one area, but the Board decided to have its Examination Committee, consisting of Dr. Applebaum and Dr. Chun, conduct a detailed review of the scoring system.

Also in connection with the foreign graduate problem, the Board passed a resolution to have the Board President assign a member to work as a liaison with Senator Roberti's office.

The Board has also been exploring ways of providing remedial education to assist foreign graduates in supplementing their education to meet California standards, without requiring them to duplicate the studies they have already successfully completed. In connection with this, J. E. Knox, Dean at the UC Berkeley School of Optometry, indicated he would be willing to rent the optometric clinic there on weekends and



## REGULATORY AGENCY ACTION

evenings, but the school would not be involved in the training. No action has been taken on this option at this time.

*Board Investigates Compliance With Section 3148.* Section 3148 of the Business and Professions Code stipulates that \$8 from each optometrist's licensing fee will be paid to the University of California, to be used "solely for the advancement of optometrical research and the maintenance and support of the department at the university in which the science of optometry is taught." These fees currently amount to over \$40,000 per year. The Board is now concerned that this fund is not being used as required by the statute.

Board member Dr. Pam Miller requested and received an accounting from UC Berkeley on how the money has most recently been applied. Apparently, the money has been deposited into the Dean's Discretionary Fund. Eleanor Ka, Management Services Officer at UC Berkeley, explained in an October 29, 1989 letter to the Board that because there had been no indication from the Board in the past that a financial reporting would be required, the account number which has been assigned for these funds is not one for which detailed financial reports are electronically prepared. She said the funds were used in the past to support honoraria and travel expenses for weekly research seminar speakers; research travel for faculty and graduate students; books, subscriptions, and memberships in scientific organizations; and general supplies. Ms. Ka asked the Board to notify her in writing if it finds it needs more detailed accounting in the future, so that she can approach the Financial Services Department of the University to have the account software changed. Board member Dr. Applebaum is attempting to obtain additional input from UC Berkeley as well as Southern California School of Optometry regarding the section 3148 fund. Currently, SCSO receives no money from this fund.

### LEGISLATION:

The following is a status update of bills described in detail in CRLR Vol. 9, No. 4 (Fall 1989) at pages 73-74:

*AB 2114 (Bane)*, which is opposed by the Board, would amend section 3053 of the Business and Professions Code to require that any exam used to determine an applicant's fitness to practice optometry be developed and administered

solely by the Board, except that the Board would be authorized to use consultants and expert examiners to assist it in conducting the examinations and to use exams given by other agencies or organizations as a supplement to the Board's exam. This bill is pending in the Senate Business and Professions Committee.

*AB 2198 (Klehs)* would require the Board to administer its licensure examination at least twice per year; increase the maximum amount of the application fee from \$75 to \$195; increase the maximum refund to those found ineligible to take the exam from \$50 to \$150; and provide that a portion of the fees be used to fund a part-time position of examination coordinator. AB 2198 is pending in the Senate Business and Professions Committee.

*AB 881 (Hughes)*, which would authorize the Board to require proof of completion of continuing education as a condition for license renewal, is pending in the Senate inactive file.

*SB 929 (Seymour)*, which would prohibit licensees from dispensing or selling contact lenses through the mail unless the licensee or his/her agent has first determined the proper fit of the lenses by fitting the generic type of lenses to the person named in the prescription, is pending in the Assembly Health Committee.

*SB 1104 (Roberti)*, which would extend until January 1, 1992, the Board's authority to refuse to honor optometry degrees awarded by foreign universities if the Board finds the curriculum to be less than that required in the United States, is pending in the Assembly Health Committee.

*AB 1807 (Statham)*, which would have authorized optometrists having experience equivalent to specified educational and examination requirements to be permitted the use of pharmaceutical agents, died in committee.

### LITIGATION:

In *California State Board of Optometry v. Federal Trade Commission*, No. 89-1190 (consolidated) (U.S. Court of Appeals, District of Columbia Circuit), the Board and eleven other state optometry boards ("the States") challenge the validity of the FTC's "Eyeglasses II" regulation, 16 C.F.R. Part 456, which was issued on March 1, 1989 and scheduled to take effect on September 1, 1989. The rule would prohibit state restrictions within the follow-

ing categories: (1) limitations on the number of branch offices that optometrists may own or operate; (2) prohibitions on the practice of optometry in commercial locations, such as shopping malls; (3) prohibitions on optometrists' use of trade names; and (4) prohibitions on employer-employee or other affiliations between optometrists and persons who are not optometrists—these restrictions effectively prevent optometrists from working for corporations such as drug stores, department stores, and optical chains. (See CRLR Vol. 8, No. 2 (Spring 1988) p. 71; Vol. 8, No. 1 (Winter 1988) pp. 67-68; and Vol. 5, No. 4 (Fall 1985) p. 1 for extensive background information on "Eyeglasses II").

According to the FTC, 44 states had imposed one or more of these restrictions as of 1985. Following a lengthy investigation and an extensive rulemaking proceeding, which included presentation of two Commission-sponsored surveys, additional survey evidence, and expert economic, testimonial, and documentary evidence, the FTC concluded that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the overall quality of care provided in the market. Based upon the rulemaking record, the FTC also concluded that the presence of commercial optometric firms lowers the cost of eye care to patients of both commercial and noncommercial optometrists, and that these restrictions do not provide offsetting quality-related benefits to consumers. Thus, the Commission concluded that these restrictions are unfair acts or practices within the meaning of Section 5 of the FTC Act.

The States challenge the FTC's promulgation of the rule on numerous grounds. On a practical level, the States dispute the validity and methodology of the two studies principally relied upon by the FTC, which are seven and ten years old, respectively. On a more fundamental level, a major issue in this proceeding is the extent of the FTC's authority to declare state laws to be unfair acts or practices. The States assert that a complete review of the plain language of the 1914 FTC Act, including its legislative history, subject matter, and overall purpose, reveals that Congress did not intend that the States be included as "persons" under the Act or that the FTC has the authority to review state laws under its unfairness jurisdiction.



The States also raise a Tenth Amendment/federalism challenge to the rule. They argue that the FTC has improperly expanded its own statutory authority and has usurped the role of Congress in determining the extent of federal intervention in the governance of state activities.

The States further assert that the state laws declared "unfair" by the FTC are protected under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Supreme Court in *Parker* "...held that the federal antitrust laws do not prohibit a State 'as sovereign' from imposing certain anticompetitive restraints 'as an act of government.'" *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 391 (1978). The FTC counters that it promulgated Eyeglasses II pursuant to its rulemaking rather than its antitrust authority, and therefore the state action doctrine does not apply.

The States also urge that Eyeglasses II violates the Constitution's Guarantee Clause and the "guarantee" of freedom of the States to control their own affairs by majority rule. The States view Eyeglasses II as a fundamental threat to state sovereignty because it replaces the right to self-government with a scheme of how optometry should be regulated in each of the States, discounting various local conditions and the need for special or different types of regulation. The States argue that by directly regulating the "States as States," and prohibiting them from enforcing existing state laws or enacting new laws which in any way conflict with Eyeglasses II, the FTC has sought to set itself up as a "Super-State," inserting itself into the political process of each of the States and altering the structure of state government in our federal system.

On August 15, 1989, the U.S. Court of Appeals for the District of Columbia Circuit granted the States' motion for a stay of the effective date of the Eyeglasses II Rule. The court found that the Board and the other petitioners demonstrated the requisite elements warranting a stay, *i.e.*, irreparable harm and likelihood of success on the merits. The court's order stated that "...with respect to irreparable harm, it is clear that 'any time a state is enjoined from effectuating statutes enacted by representatives of the people, it suffers a form of irreparable injury.'"

A briefing schedule was set by the court on September 27, 1989. The States filed their brief on the merits on

November 27. Four other briefs have already been filed at this time. The FTC's brief was due to be filed on February 6; six more briefs were scheduled to be filed by March 7. Oral argument is scheduled for May 10.

#### RECENT MEETINGS:

At its December meeting, the Board directed Executive Director Karen Ollinger to send a letter to ARK Group regarding the use of the diagnostic drug, Dapiprazole Hydrochloride, stating that the Board is not interested in seeking legislation to allow its use by California optometrists.

Due to inevitable first-year confusion, the Board passed a motion on a one-time basis to allow optometrists 120 days in which to complete any deficiencies in continuing education for the 1990 renewal period. An extension through July 1, 1990 was also authorized for satisfaction of the CPR training requirement, due to lack of notification.

The Board also selected its 1990 officers: Dr. Steven Chun is the new President; Dr. Tom Nagy is Vice-President; and Dr. Pam Miller is Secretary.

#### FUTURE MEETINGS:

May 21-22 in San Diego.

July 5 in Berkeley.

August 13-14 in Sacramento.

November 29-30 in San Francisco.

#### BUREAU OF PERSONNEL SERVICES

Office Supervisor: Janelle Wedge  
(916) 920-6311

The Bureau of Personnel Services was established within the Department of Consumer Affairs (DCA) to regulate those businesses which secure employment or engagements for others for a fee. The Bureau regulates both employment agencies and nurses' registries. Businesses which place applicants in temporary positions or positions which command annual gross salaries in excess of \$25,000 are exempt from Bureau regulation; similarly, employer-retained agencies are also exempt from Bureau oversight.

The Bureau's primary objective is to limit abuses among those firms which place individuals in a variety of employment positions. It prepares and administers a licensing examination and issues

several types of licenses upon fulfillment of the Bureau's requirements. Approximately 900 agencies are now licensed by the Bureau.

The Bureau is assisted by an Advisory Board created by the Employment Agency Act. This seven-member Board consists of three representatives from the employment agency industry and four public members. All members are appointed for a term of four years. At this writing, funding has limited the bureau to two employees.

#### LEGISLATION:

*AB 2113 (Johnson)* abolished the Bureau, effective January 1, 1990, by repealing the entire Employment Agency Act in the Business and Professions Code, provisions of law which provided for the Bureau of Personnel Services, its funding, and its examining, licensing, and regulatory functions, and those provisions which provided for nurses' registries, prepaid computer employment agencies, and job listing services.

The bill reenacts certain of the above provisions in Title 2.91 of the Civil Code, sections 1812.500 et seq., entitled the Employment Agency, Employment Counseling, and Job Listing Services Act. The Act comprehensively regulates by statute the contents of employment agency, employment counseling service, and job listing service contracts, and advertising and the fees of such agencies. Among other things, the Act changes existing law by doing the following:

-The Act deletes licensing and regulation by the Bureau.

-Sections 1812.511 and 1812.516 of the Act provide for a three-day cancellation period in which a jobseeker may cancel a contract with an employment counseling service or a job listing service.

-Sections 1812.503 and 1812.515 of the Act require the filing of a copy of a required bond with the Secretary of State rather than requiring filing of the bond with the Bureau. The principal sum of the bond shall be \$3,000 for an employment agency, and \$10,000 for a job listing service. The bond shall be for the benefit of any person or persons damaged by any violation of the Act or by fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failures to provide the services of the employment agency in performance of the contract with the jobseeker, by the employment agency or its