

**CALIFORNIA ACUPUNCTURE BOARD
FINAL STATEMENT OF REASONS
IMPLEMENTATION OF AB 2699 – FREE AND SPONSORED HEALTH CARE
EVENTS**

HEARING DATE: July 20, 2015

SUBJECT MATTER OF PROPOSED REGULATIONS: Implementation of AB 2699 – Free and Sponsored Health Care Events

SECTION S AFFECTED: Title 16, Division 13.7, California Code of Regulations (CCR), Sections 1399.407, 1399.407.1, 1399.407.2 and 1399.407.3.

UPDATED INITIAL STATEMENT OF REASONS

The Initial Statement of Reasons (ISOR) is included in the file. The information contained therein is updated as follows:

On page 3 and 4 of the ISOR, the description of item number 5 under part 3 of Form 901-A (DCA/2016-revised) states that the applicant shall disclose each licensing authority that will have jurisdiction over an out-of-state licensed health-care practitioner. This description on the ISOR is incorrect. The Form 901-A requires listing the state of licensure in which each license is issued, not the licensing authority.

On the Underlying Data section of the ISOR, the Board meeting minutes from May 18, 2012 are listed. This reference was included in error. These minutes were not relied upon in connection with this rulemaking action. As such, the minutes are not included in the rulemaking file.

The Board initially included the November 17, 2011 meeting minutes as part of the rulemaking file. However, these minutes were not properly noticed to the public in connection with this rulemaking action. As such, these minutes are not included in the rulemaking file.

Upon receiving final approvals from DCA, Agency and Department of Finance, the Board submitted the AB 2699 rulemaking package to the Office of Administrative Law (OAL) for approval in September 2016. OAL disapproved the submitted rulemaking on October 12, 2016, on the grounds of clarity and incorrect procedure and returned the rulemaking to the Board, with the Board having until February 16, 2017 to resubmit. In response, the Board met on December 14, 2016, to consider changes made to the approved text and Forms 901-A and 901-B. The changes were approved by the Board. The modified text and modified Forms 901-A and 901-B incorporated by reference were noticed and made available for a 15-day public comment period ending on January 11, 2017. No comments were received during the 15-day comment period.

The following modifications have been made to the initially proposed text:

General spelling, grammar and capitalization errors have been corrected throughout the text.

The initially proposed text was placed in CCR Sections 1399.480, 1400.1, 1400.2 and 1400.3. The Board does not have these CCR Sections allocated to it under the CCR. The modified text changed the text to CCR Sections 1399.407, 1399.407.1, 1399.407.2 and 1399.407.3.

1399.407 – The subsection numbering was streamlined for clarity. Relocated the definition of “in good standing”, which was previously located in CCR Section 1399.407.2 b(1)(C), to this section. The previous location may have made the meaning vague and not easily understood, and placement into 1399.407 allows the definition to apply to all out-of-state practitioners and makes it clear that it defines “good standing” from the governing statute. Also, the conjunctive word ‘and’ was added to the section in order to make clear that all conditions of in good standing are required to be met by the out-of-state applicant. Lastly, the word “or” was changed to “of” in 1399.407(a)(3)(C) in order to alleviate a clerical error.

Finally, page 10 of the Initial Statement of Reasons (ISOR) states: “The first section specifies that ‘in good standing’ means that a practitioner is not currently the subject of any investigation by a governmental entity....” This statement is incorrect, as the Board defines in the modified text of (a)(3) what ‘in good standing’ means. The terms “currently the subject of any investigation by a governmental entity” were included based upon model language the board originally based the regulation on; however subsequently did not adopt and therefore the language was erroneously included in the ISOR.

1399.407.1 – Several capitalization corrections were made to this section. In addition, the “Registration of Sponsoring Entity Under Business & Professions Code Section 901” Form 901-A (DCA/2014) incorporated by reference into the text was updated with a more current revision date of 2016 and correctly cited within the revised text.

1399.407.2 – Various grammar and capitalization corrections were made to this section. Additionally, the authority reference of BPC Section 144 has been changed to a reference citation.

In subsection a, the “Request For Authorization To Practice Without a California License at a Registered Free Health Care Event (CAB/2016)” form incorporated by reference was not correctly cited in the originally proposed text. The modified text has the correct citation. Additionally, the revision date was updated to reflect the current version of the form required.

In subsection c (1), the originally proposed text, setting out conditions in which the Board may deny an application, may have been unclear if one or all the conditions are required to be met. Therefore, the conjunctive word “or” were added in order to require that any one of the conditions which are not met by the out-of-state applicant may allow the Board to deny an application. Additionally, page 9 of the ISOR states that “failure to meet any of the specified requirements determined by the Board and discussed under

section 1400.2 of these proposed regulations will constitute an automatic denial of the application.” This statement is incorrect. Subdivision c (1) does not clearly provide that failure to meet any of the specified requirements will constitute an automatic denial of the application. It only provides that the Board shall deny the application after it has been received and reviewed by the Board, instead of automatically denying it.

Subsection (c)(1)(C) the definition of “in good standing” was relocated to the modified text section 1399.407 as described above.

Subsection (c)(2) in the originally proposed text, set out conditions in which the Board may deny an authorization to participate. Those conditions may have been unclear if one or all the conditions are required to be met. Therefore, the conjunctive word “or” were added in order to require that any of the conditions which are not met by the out-of-state applicant may allow the Board to deny an authorization to participate.

In subsection (c) (2)(D), page 11 of the ISOR states that “it would be against the public interest to permit an applicant to practice, even temporarily for a limited purpose, in this State without a license for more than four (4) sponsored events per year (maximum of 30 calendar days per year). As a result, the Board has specified that grounds for denial of authorization to practice to an out-of-state practitioner would include that an applicant had participated in four (4) sponsored events during the 12-month period immediately preceding the current application.” This statement is incorrect. BPC Section 901(a) (3) limits a “Sponsored event” to not exceed 10 calendar days. However, the Board does not specify in the proposed modified text the total number of days allowed for an out-of-state practitioner may participate in an event, only that a total of four may be allowed per 12-month period. Additionally, the Board does not intend to enforce a maximum total of 30 calendar days per year of participation, only that an applicant may not exceed a total of 4 events per year.

Finally, the proposed modified text now specifies that the 12-month period is calculated beginning on the date the current application for an out-of-state practitioner is received by the Board. This clarifies how a 12-month period is calculated.

1399.407.3 – Various grammar and capitalization corrections were made to this section. Additionally, subsection (d) of the originally proposed text the reference to the Administrative Procedure Act was not correctly cited; the correct citation is listed in the modified text.

The following changes have been made to the proposed forms incorporated by reference:

Form 901-A (DCA/2016-revised) – The revision date is updated to the current 2016 version. Several grammar, spelling and capitalization errors have been corrected. The contact name and phone numbers for the Department of Consumer Affairs (DCA) have been updated to the current information. This assists the applicant in contacting DCA to check the status of their application.

Form 901-B (CAB/2016) – The revision date is updated to the current 2016 version. Several grammar, spelling and capitalization errors have been corrected.

In part 1, a short description that all applicants must submit the \$25 processing fee has been added to make clear that any out-of-state applicant must submit the fee in order to be processed. Additionally, the form was revised to include more detailed information about fingerprinting and the two options for fingerprinting: Live Scan inquiry or fingerprints on cards. It includes a detailed explanation to the applicant how to apply for a live scan background check within the state of California, and how the applicant, if out of state, must use the Board's hard fingerprint cards with ink on them in order for a background check to be processed. These additions provide greater clarity for applicants from out of state who may be unfamiliar with the process to complete a background check in California. It also benefits consumer protection by ensuring all applicants follow the correct procedures to apply for a temporary license.

On page 7 of the ISOR, a note that a \$49 fee is required for processing of hard fingerprint cards. However, the original version of Form 901-B did not refer to a \$49 fee. Therefore, the modified Form 901-B has been updated to include this requirement and that the fee is payable to the Board.

In part 2, a disclosure was added describing the use of the applicant's personal information by DCA and that the information may be shared with other Governmental Agencies and a reference to Civil Code Section 1798.40 was added. It also details that the applicant has a right to request a copy of those records and how they may contact the Board's Executive Officer to obtain a copy.

Also on page 7 of the ISOR, a description of applicant background information which the Board requests includes information regarding pending investigations, any pending investigations by any governmental entity; any past or pending charges against a Acupuncture license; disciplinary actions taken against any healing arts license; surrender of an Acupuncture license; malpractice settlements or judgments; criminal convictions; permits to prescribe controlled substances from the federal Drug Enforcement Agency (DEA); current physical or mental impairment related to drugs or alcohol; and, mental incompetency or conservatorship. This statement is incorrect; the originally proposed Form 901-B does not contain questions regarding any pending investigations by any governmental agency; malpractice settlements; criminal convictions; permits to prescribe controlled substances from the DEA; current physical or mental impairment due to drugs and alcohol; and any mental incompetency or conservatorship. As a result, the modified Form 901-B in part 3 now contains questions for the applicant regarding any investigations by any governmental entity; listing of any criminal convictions and commission of act or conviction of a crime constituting grounds for denial of a license. These questions have been added in order to further public protection by verifying the applicant's licensure status and criminal background. It will also ensure out-of-state applicants have a clear and valid license to practice on a temporary basis in California. The form also requires the applicant to list any licenses,

registrations, and registrations that allow them to practice acupuncture and attach a copy of those. Finally, this section has also been re-numbered for clarity.

Additionally, on page 7 and 8 of the ISOR, a note is made that the applicant must acknowledge and certify the following that the applicant's signature on the application authorizes the National Practitioner Data Bank (NPDB) and the Drug Enforcement Administration (DEA) to release any and all information required by the Board. This statement is incorrect. Neither the originally proposed Form 901-B nor the modified version contains this acknowledgment.

Lastly, on page 7 and 8 of the ISOR, a note states that the applicant shall acknowledge and certify that authorization will not be issued until clearance has been received from the California Department of Justice and the Federal Bureau of Investigation. This statement is incorrect. This acknowledgment was not included on the originally proposed Form 901-B. A notice to the applicant has been added to the modified version to provide the applicant a warning that their temporary license will not be issued unless clearance from these agencies is received by the Board.

In part 5 of the modified Form 901-B, the acknowledgement that the applicant must hold a current valid license with another state, district or territory of the United States has been re-written for clarity.

LOCAL MANDATE

A mandate is not imposed on local agencies or school districts.

SMALL BUSINESS IMPACT

The Board has made a determination that this regulation will not have a significant adverse economic impact on small businesses. The proposed regulations affect community-based organizations that sponsor free health care events and out-of-state licensed acupuncturists who wish to volunteer their services at these events.

BENEFITS

The Board has determined that this regulatory proposal benefits the health and welfare of California residents, specifically, uninsured or under-insured Californians that are currently unable to receive Acupuncture care due to lack of funding and resources who prefer an alternative approach to medicine. These proposed regulations will permit sponsoring entities to have access to out-of-state acupuncturists as an additional resource for volunteer recruitment purposes. This will prevent a shortage of acupuncturists at sponsored free health-care events, in turn increasing access to care. There may also be benefits to private businesses that are not able to provide basic health care. These regulations will benefit the health of Californians who attend sponsored events, in addition to providing public protection through registration of out-of-state volunteer Acupuncturists.

CONSIDERATION OF ALTERNATIVES

No alternative considered by the Board would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

One possible alternative would be to not promulgate these regulations. This alternative was rejected by the Board. This alternative is unreasonable because the statute provides that the Board is required to comply with the requirements of BPC section 901.

Another possible alternative would be to delay implementation of these regulations. This alternative was rejected by the Board. A delay is unreasonable due to the express statutory requirement of compliance; therefore, the Board must act to implement the statutory requirement as soon as possible.

DUPLICATION

The proposed text is duplicative of enabling statute of BPC Section 901. This overlap is necessary for clarity purposes in order for the regulation to satisfy the requirements of Government Code Section 11349.1(a)(3). BPC Section 901 allows the Board to enact regulations in order to collect information and implement a way of allowing individuals not licensed in California to participate in free sponsored health care events. The duplication is necessary to implement the statute and require individuals that would like to practice acupuncture in California under this scheme to submit the necessary information to the Board and adhere to the proper standards.

INCORPORATION BY REFERENCE:

1. “Registration of Sponsoring Entity Under Business & Professions Code Section 901” Form 901-A (DCA/2016 – revised)
2. “Request For Authorization To Practice Without a California License at a Registered Free Health Care Event” Form 901-B (CAB/2016)

The incorporation by reference method was used for the above documents because it would be impractical and cumbersome to publish the listed documents in the California Code of Regulations (CCR). The “Registration of Sponsoring Entity Under Business & Professions Code Section 901” Form 901-A (DCA/2016 – revised) and the “Request For Authorization To Practice Without a California License at a Registered Free Health Care Event” Form 901-B (CAB/2016) are four and five pages, respectively, and if incorporated into the CCR it would increase the size of Division 13.7 and may cause confusion to the user. Both documents were made available to the public and also posted on the Board’s website.

OBJECTIONS OR RECOMMENDATIONS/RESPONSES

The following recommendations were made regarding the proposed action: None

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD

One comment received. The following comment was received from Richard Friberg during the 45-day comment period via email (sent to Acupuncture@dca.ca.gov):

“Hi, you probably don’t need any more work, but I have a suggestion. You are proposing to allow out of state non CAB licensed acupuncturists serve at “Free Health Care Events” because there were not enough volunteers at a “Free Health Care Event” to serve all the people that someone projected, could have been served. These events do not last more than a few days. Why is this is being proposed when we know that most acupuncture treatments are usually separated by two days to a week apart and need to be repeated three to four times before some of these treatments are fully effective? Getting one treatment at a “Free Health Care Event” does not make sense to me, but I guess it does to you.

Anyway- how about supporting California first! Why not allow graduated students from an ACAOM accredited college who have not taken the CAB licensing exam due to their date of graduation and the very next CAB exam, apply for a “Temporary License” to serve at a “Free Health Care Event,” as defined, until the first upcoming CAB licensing exam is offered? Perhaps even under a CAB licensed acupuncturist. California has the highest standards for TCM. A few states have NO standards for licensing acupuncturists. California graduates could do less harm than the acupuncturist who comes from a state that has NO requirements even though these out of state people have taken and passed a national test! If there are four of these “Free Health Care Events” in a year as you predict and they are evenly spaced, this temporary license issued to the just graduated scholar would only be good for one of these events! Think about it.”

Comment: *“Why is this is being proposed when we know that most acupuncture treatments are usually separated by two days to a week apart and need to be repeated three to four times before some of these treatments are fully effective? Getting one treatment at a “Free Health Care Event” does not make sense to me, but I guess it does to you.”*

The comment is rejected. BPC section 901 provides for the provision of services by out of state licensees at health care events when meeting certain criteria. This proposed regulation is consistent with Section 901. Additionally, Section 901 indicates that a person not licensed in this state can only participate in any particular sponsored event for no more than 10 days. Hence, the number of days cannot be enlarged by the Board. However, if the length of the event allows, a person may be able to receive more than one treatment.

Comment: *“Why not allow graduated students from an ACAOM accredited college who have not taken the CAB licensing exam due to their date of graduation and the very next CAB exam, apply for a “Temporary License” to serve at a “Free Health Care Event,” as defined, until the first upcoming CAB licensing exam is offered? Perhaps*

even under a CAB licensed acupuncturist...if there are four of these "Free Health Care Events" in a year as you predict and they are evenly spaced, this temporary license issued to the just graduated scholar would only be good for one of these events! Think about it."

This comment and recommendation is rejected. BPC Section 4938 sets out the requirements to obtain an acupuncture license, and BPC Section 4937 sets out the scope of practice for a person holding an acupuncture license. As established by the Acupuncture Act, there is only one type of license currently established and a new license type would need to be created by the Legislature in order to issue the license recommended. Therefore, it is outside the scope of the proposed regulation.

Comment: *"California has the highest standards for TCM. A few states have NO standards for licensing acupuncturists. California graduates could do less harm than the acupuncturist who comes from a state that has NO requirements even though these out of state people have taken and passed a national test!"*

The comment is rejected. Business and Professions Code section 901 allows for persons not licensed in California to participate in these events if certain criteria are met. The proposed regulation is consistent with, and cannot override, Section 901.

SUMMARY OF COMMENTS RECEIVED DURING THE 15-DAY MODIFIED TEXT PERIOD

No comments received.