

TITLE 16. CALIFORNIA BOARD OF BEHAVIORAL SCIENCES

NOTICE OF PROPOSED REGULATORY ACTION CONCERNING:

Telehealth

NOTICE IS HEREBY GIVEN that the California Board of Behavioral Sciences (Board) is proposing to take the action described in the Informative Digest below, after considering all comments, objections and recommendations regarding the proposed action.

Public Hearing

The Board has not scheduled a public hearing on this proposed action. However, the Board will hold a hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days prior to the close of the written comment period. A hearing may be requested by making such request in writing addressed to the individuals listed under **Contact Person** in this Notice.

Written Comment Period

Written comments relevant to the action proposed, including those sent by mail, facsimile, or e-mail to the addresses listed under **Contact Person** in this Notice, must be received by the Board at its office not later than **by Monday, December 16, 2024**, or must be received by the Board at the hearing, should one be scheduled.

Availability of Changed or Modified Text

After considering all timely and relevant comments, the Board, upon its own motion or at the request of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as Contact Person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 4980.60 and 4990.20 of the Business and Professions Code (BPC), and to implement, interpret, or make specific BPC Sections 2290.5, 4980, 4989.50, 4996, 4999.30 and 4999.82 and Civil Code sections 56 et seq., the Board is considering changes to Division 18 of Title 16 of the California Code of Regulations (CCR) as follows:

Informative Digest / Policy Statement Overview

The Board of Behavioral Sciences (Board) licenses and regulates Licensed Marriage and Family Therapists (LMFTs) (Bus. & Prof. Code (BPC), §§ 4980 et seq.), Licensed Educational Psychologists (LEPs) (BPC §§ 4989.10 et seq.), Licensed Clinical Social Workers (LCSWs) (BPC §§ 4991 et seq.), and Licensed Professional Clinical Counselors (LPCCs) (BPC §§ 4999.10 et seq.).

The Board also registers and regulates individuals gaining supervised experience toward meeting the requirements for licensure. This includes registered Associate Marriage and Family Therapists (AMFTs), Associate Professional Clinical Counselors (APCCs) and Associate Clinical Social Workers (ASWs), and applicants pending registration. While the Board does not register, nor does it directly regulate individuals enrolled in a degree program designed to lead an individual to licensure, the Board's law for two of its professions does set forth certain provisions applicable to these students, and designates these individuals as "trainees" (Marriage and Family Therapist (MFT) Trainees and Professional Clinical Counselor Trainees).

BPC section 4990.16 mandates that the protection of the public shall be the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

BPC section 4990.20 authorizes the Board in accordance with the Administrative Procedure Act (APA) (Government Code sections 11400 et seq.), to adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable it to carry into effect the provisions of BPC Chapters 13, 13.5, 13.7, 14 and 16.

The Board's current telehealth regulations were adopted in 2016. The practice of psychotherapy via telehealth continues to evolve, and the Board has received feedback from stakeholders that some provisions of the telehealth regulations need to be updated or clarified to avoid inconsistent compliance and enforcement of the requirements in CCR section 1815.5. This proposal would address these concerns by amending existing regulations as follows.

The proposal would be revised to more accurately reflect the status that an individual needs to hold (either as a trainee in accordance with BPC section 2290.5 or a licensee with a current and active license). In addition, existing regulation at subsection (d)(3) simply states that each time a licensee or registrant provides services via telehealth they shall utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium, without further specification. This proposal would address such ambiguity by removing references to "industry best practices" for ensuring the security, privacy and confidentiality of the communication medium. Instead, this proposal would specifically list those laws and regulations that a licensee or registrant would need to comply with to ensure that the technology, method and equipment used to provide services via telehealth comply with existing state and federal laws and regulations regarding privacy, confidentiality and security of

information. The proposal would also make non-substantive changes that strike language duplicating statute in subsection (f) of CCR section 1815.5, and make other non-substantive changes.

Aside from non-substantive changes for easier comprehension and consistency of use, including the use of gender-neutral terms (removal of references to his/her and replacing them with “they” or “their”), and correction of punctuation and the addition of further legal citations in the Note section of the regulation, the proposed amendments include the following specific changes.

Existing Section 1815.5(a) specifies that in order to practice via telehealth with a client located in California, a “valid and current” California license or registration is required. This proposal would instead require the license to be “current and active” which is the specific license status that the Board requires to practice with all clients, including those seen via telehealth. In addition, this section does not currently address MFT Trainees and Professional Clinical Counselor Trainees who are authorized to provide telehealth services under BPC section 2290.5. These individuals are not registered or licensed by the Board but are instead under the purview of their school while pursuing their qualifying degree. This proposal would add a reference to the statute at BPC section 2290.5 that allows trainees to provide services via telehealth despite not being licensed or registered with the Board.

Section 1815.5(d)(3) currently requires that each time a therapist provides services via telehealth, they must “utilize industry best practices for telehealth to ensure both client confidentiality and the security of the communication medium.” The proposal would instead require a licensee or registrant to ensure that the technology, method, and equipment used to provide services via telehealth comply with applicable state and federal laws and regulations and further specify the laws which contain the requirements for confidentiality, privacy and security; specifically, the Confidentiality of Medical Information Act (CMIA), the Health Insurance Portability and Accountability Act (HIPAA) and regulations promulgated under HIPAA by the U.S. Department of Health and Human Services.

The Board proposes to repeal subsection (f) of existing CCR 1815.5 as duplicative of existing law. “Failure to maintain confidentiality” is already listed as unprofessional conduct in statute for each of the Board’s license types (BPC sections 4982(m), 4989.54(q), 4992.3(n) and 4999.90(m)). In addition, BPC sections 4982(e), 4989.54(f), 4992.3(f) and 4999.90(e) state that unprofessional conduct includes “Violating, attempting to violate, or conspiring to violate any of the provisions of this chapter or any regulation adopted by the board.” As a result, this proposal would repeal subsection (f) of section 1815.5, which specifies that “Failure to comply with these provisions shall be considered unprofessional conduct”.

Anticipated Benefits of Proposal

The objectives of the amendments and anticipated benefits in this regulatory proposal include the following:

- Increase clarity and conciseness in regulation by removing unnecessary language that duplicates statute; by clarifying the license status necessary to provide telehealth services; and resolve ambiguity in regulation regarding the meaning of industry best practices.
- Increase awareness of and compliance with telehealth-related confidentiality, privacy and security laws among Board licensees, which strengthens confidentiality and privacy for consumers of mental health services.

Evaluation of Consistency and Compatibility with Existing State Regulations

During the process of developing this regulatory proposal, the Board has conducted a search of any similar regulations on these topics and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

DISCLOSURES REGARDING THIS PROPOSED ACTION

Fiscal Impact Estimates

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: The proposed regulations do not result in a fiscal impact to the state. This proposal would merely provide clarity of existing law and strike regulations that duplicate existing statute. The Board does not anticipate additional workload or costs from the proposed regulations. Any workload or costs of implementation are a result of current law. There is no fiscal impact to the State in the form of federal funding or any cost or savings to any state agency.

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Sections 17500 - 17630 Require Reimbursement: None

Significant Effect on Housing Costs: None

Business Impact Estimates: The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

The Board indicates this regulation will not affect businesses. This proposal would only impact licensees or registrants who provide services via telehealth. However, the Board believes the impact to individual licensees or registrants would not be significant for the following reasons:

- Striking regulations that duplicate statute has no adverse economic effect because the statutory provisions will continue to be in effect.
- Adding references to the CMIA and HIPAA has no adverse economic effect because these laws already apply to Board licensees and registrants providing services under telehealth pursuant to these state and federal laws.

The rulemaking file includes the facts, documents, and other evidence which supports this determination.

Cost Impact on Representative Private Person or Business: The Board is not aware of any cost impacts that are representative private person or business would necessarily incur in reasonable compliance with the proposed action for the reasons set forth above in the “Business Impact Estimates” section.

Effect on Small Business: The Board has determined that the proposed regulations will not have an impact on small businesses. This is because striking language duplicated in statute has no effect on small businesses as described in the “Business Impact Estimate” section above. In addition, the CMIA and HIPAA already apply to Board licensees.

Results of Economic Impact Assessment / Analysis

Impact on Jobs / Businesses: The Board has determined that the proposed regulatory action would not have a significant statewide adverse economic on the following:

- 1) The creation or elimination of jobs within the state,
- 2) The creation of new businesses or the elimination of existing businesses within the state, or,
- 3) The expansion of businesses currently doing business within the state.

This proposal would not have any of the above-referenced impacts as explained in the “Business Impact Estimates” section of this notice.

Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment: The Board has determined that this regulatory proposal will benefit the health and welfare of California residents, as it may increase awareness of the telehealth requirements of CMIA and HIPAA among Board licensees and increase compliance, which strengthens confidentiality and privacy for consumers of mental health services by potentially leading to fewer violations of client confidentiality.

The proposal will have no effect on worker safety or the State’s environment because it does not relate to worker safety or the environment.

Business Reporting Requirements: This proposed regulation does not require businesses to file a report with the Board.

Consideration of Alternatives

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed; would be as effective and less burdensome to affected private persons than the proposal described in this Notice, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Any interested person may submit comments to the board in writing relevant to the above determinations at 1625 North Market Blvd, Suite S200, Sacramento CA 95834 during the written comment period, or at the hearing if one is scheduled or requested.

Availability of Initial Statement of Reasons and Rulemaking File

The Board has compiled a record of for this regulatory action, which includes the Initial Statement of Reasons (ISOR), proposed regulatory text, and all the information on which this proposal is based. This material is contained in the rulemaking file and is available for public inspection upon request to the Contact Persons named in this notice.

Text of Proposal

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the person designated in this Notice under Contact Person listed below, or by accessing the Board's website at https://www.bbs.ca.gov/about/law_reg.html.

Availability and Location of the Final Statement of Reasons and Rulemaking File

All of the information upon which the proposed regulations are based is contained in the rulemaking file, which is available for public inspection by contacting the Contact Person named below.

You may obtain a copy of the Final Statement of Reasons once it has been prepared, by making a written request to the Contact Persons named below or by accessing the website listed below.

Contact Person

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Christy Berger
Address: Board of Behavioral Sciences
1625 North Market Blvd, Suite S200
Sacramento CA 95834
Telephone: 916-574-7995
Fax: 916-574-8625
Email: BBS.Rulemaking@dca.ca.gov

The backup contact person is:

Name: Rosanne Helms
Address: Board of Behavioral Sciences
1625 North Market Blvd, Suite S200
Sacramento CA 95834
Telephone: 916-574-7939
Fax: 916-574-8625
Email: Rosanne.Helms@dca.ca.gov

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations with modifications noted, as well as the Final Statement of Reasons when completed, and modified text, if any, can be accessed through the Board's website at: https://www.bbs.ca.gov/about/law_reg.html.