

Division VIII of Title 5 of the California Code of Regulations

Proposed Addition to Title 5 of the California Code of Regulations Pertaining to the Handling of Applications from Qualified Individuals with Disabilities

Final Statement of Reasons

Public Problem

There is no change to the public problem information since the original submission of the Initial Statement of Reasons.

Purpose of Proposed Action

There is no change from the original purpose of the proposed action in the Initial Statement of Reasons.

15-Day Notice

Modifications to the originally proposed text were made prior to the public hearing based on written comments received during the 45-day comment period. The Commission approved the modified text at the public hearing held on February 8, 2019. A 15-day Notice, herein incorporated by reference, describing the modified text was mailed to the four individuals who submitted written responses during the 45-day comment period and to the one individual who provided oral comments at the public hearing. The 15-Day Notice was also posted on the Rulemaking page of the Commission's website.

The Commission received one comment in response to the modifications proposed in the 15-Day Notice. The comment and the Commission's response are provided in the section titled, "Written Response to 15-Day Notice" on page 5.

Documents Relied Upon: None

Documents Incorporated by Reference: None

Updated Tally of Responses

Written Responses Received During 45-Day Comment Period and Oral Response at Public Hearing

The Commission received the following written responses to the public announcement during the 45-day comment period and during the public hearing held on February 8, 2019:

Support

2 organizational opinions
1 personal opinion

Opposition

1 organizational opinion
1 personal opinion

Written Response Representing Organization in Support

Susan Fernandez, Support Services Manager, Orange County Department of Education

Written Response Representing Individual in Support

Jenny Teresi, Credential Services Administrator, Riverside County Office of Education

Written Response Representing Individual in Opposition

Dale L. Brodsky, Attorney, Beeson, Tayer & Bodine

Comments:

I am writing in response to Coded Correspondence No. 18-05, which seeks to add section 80002.1 to Title 5 of the California Code of Regulations, pertaining to the Commission's handling of applications by qualified individuals with disabilities or medical conditions. The purpose of the letter is to submit public comment and to suggest a revised version of the proposed regulation (see below).

The Commission's treatment of credential applicants with disabilities has been of particular interest to me since 2015, when I first advocated on behalf of an individual with a disability whose application for a Variable Term Waiver Speech-Language Pathology Services credential had been denied. The matter was resolved and the Commission has taken laudable steps to address issues raised by the individual. It now pleases me greatly that the Commission is intent on adopting a reasonable accommodation policy, and I want to do what I can to ensure that the regulation provides effective guidance to the public and all stakeholders.

Generally, agencies promulgate regulations which are necessary to implement, interpret, or make specific the law that an agency enforces or administers, or to govern the agency's procedure. (Gov. Code § 11342.600.) To be effective, regulations must provide clarity and guidance as to the meaning of laws that impact people's lives. To that end, I urge the Commission to develop a regulation that accurately describes and clarifies the parameters of an applicant's right to reasonable accommodation.

The suggested, revised version embedded in this letter incorporates standards and procedures that are widely recognized under a number of state and federal laws, including the Fair Employment and Housing Act (FEHA), Government Code sections 12000 (*sic*) *et seq.*; Education Code section 220; the Unruh Civil Rights Act, Civil Code sections 51 and 52; and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. sections 12131 *et seq.*, and regulations interpreting the ADA. Most important is section 12944 of FEHA, which makes it unlawful for any licensing board in California to require an examination or establish qualifications that adversely impact individuals on bases protected by FEHA, and further requires licensing agencies to provide reasonable accommodation for those with disabilities or qualifying medical conditions. In its entirety, section 12944(b) imposes this unqualified directive: "It shall be unlawful for a licensing board to fail or refuse to make reasonable accommodation to an individual's mental or physical disability or medical condition."

As you will see, my suggested revision addresses both the right of individuals with disabilities to reasonable accommodation and elaborates on the authority of the Commission to grant or

deny a request for reasonable accommodation. First, I have added language to clarify that unless the applicant's request is promptly approved, the Credentialing Division ("Division") must conduct an individualized assessment and engage in an interactive process. (*See, e.g.,* Gov. Code § 12940(n); 2 CCR §§ 11068(a), (e), and (i).) Second, I suggest providing more guidance than simply stating that the Division may "approved or deny" a request for reasonable accommodation by an individual with a disability or medical condition. Instead, the regulation should clarify that the Division must give preference to an applicant's requested accommodation, but it may approve a different accommodation so long as it is equally effective. And, while affirming the Division's authority to deny reasonable accommodation, the regulation should also provide guidance, consistent with the ADA, that reasonable accommodation will be denied only if it "would fundamentally alter the nature of the public entity's service, program, or activity." (*See, 28 CFR § 35.130(b)(7), interpreting Title II of the ADA, 42 U.S.C. §§ 12131 et seq.; U.S. Department. (sic) of Justice Technical Assistance Manual, II-3.600.*) Third, I have added a provision ensuring the confidentiality of medical records. In the credentialing context, individuals with disabilities may be reluctant to request reasonable accommodation if they believe their personal medical information will be shared with a school district, for example. This addition provides guidance to the public that is consistent with other privacy statutes, including the Confidentiality of Medical Records Act, Civil Code sections 56 *et seq.*, and the Information Practices Act of 1977, Civil Codes sections 1798 *et seq.*

Using the Commission's proposed section 80002.1 as a starting point, I suggest retaining the first sentence of the Commission's current proposal, deleting (strike-through) the next sentence, and adding text (underline) as follows:

§ 80002.1. Request for Reasonable Accommodation by Applicant: Qualified Individual with a Disability or Medical Condition; Confidentiality

(a) An individual applying for a credential, as defined in Education Code Section 44002, who has a mental disability, physical disability, or medical condition as defined in Government Code Section 12926, may request a reasonable accommodation pursuant to subsection (b) of Government Code Section 12944. ~~Requests for reasonable accommodation shall be approved or denied following an evaluation by the Certification Division.~~ Upon receipt of a request for reasonable accommodation from an individual with a disability or medical condition, the Certification Division ("Division") shall promptly approve the request unless, after conducting an individualized assessment and engaging in an interactive process with the applicant, the Division determines that there is an alternative, equally effective reasonable accommodation. The Division shall give preference to the applicant's requested accommodation. The Division may deny reasonable accommodation only if it would fundamentally alter the nature of the Commission's services, programs, or activity.

(b) All materials submitted in support of requests for reasonable accommodation shall be kept strictly confidential and shall not be disclosed to any third party unless required by law or with the applicant's express written permission.

Thank you very much for taking action to promulgate a regulation that will provide much needed guidance and for giving me an opportunity to assist you in this important undertaking.

Response:

Commission staff agreed with Ms. Brodsky that additional language would help clarify the proposed addition of 5 CCR section 80002.1. The original language proposed by the Commission was modified prior to the public hearing on February 8, 2019 to incorporate Ms. Brodsky's suggestions with the following exceptions:

- *The second sentence in the original proposed language for which deletion was recommended has remained, as the sentence is required to clarify the division of the Commission that will be responsible for processing requests for reasonable accommodation.*
- *The word "promptly" related to the Commission's approval of a reasonable accommodation request is not included as the Commission has 50 days to process an application from the date of receipt (reference Education Code section 44350 and 5 CCR section 80043); and*
- *The word "strictly" related to the confidentiality of materials submitted to support a reasonable accommodation request is not included as the conditions under which the materials may be disclosed is clearly defined.*
- *The word "may" related to the circumstances under which the Commission will deny a reasonable accommodation. The word "shall" is used instead to clarify that if a reasonable accommodation request will alter the fundamental nature of the Commission's services, programs, or activity, then said accommodation request will be denied.*

Written Response Representing Organization in Opposition

Laura P. Juran, Chief Counsel, California Teachers Association (CTA)

Comments:

On behalf of the California Teachers Association ("CTA"), I write in response to the Commission on Teacher Credentialing's ("CTC's") consideration of adding Section 80002.1 to the California Code of Regulations.

CTA applauds the CTC for seeking to add a regulation that clarifies how the CTC will handle credential applicants' request to obtain reasonable accommodations for their disabilities and medical conditions. However, CTA does not believe that the proposed regulation, in its current form, contains the specificity or detail needed to provide sufficient clarity and guidance to the public on this important issue.

Thus, CTA urges the CTC to expand the proposed regulation to address matters including: (1) minimum information the applicant should provide with the request to the Certification Division for purposes of receiving an individualized assessment; (2) clarification that the CTC will approve the request if it makes requisite findings that the applicant is a qualified individual with a disability, the requested accommodation is reasonable, and the requested accommodation will not fundamentally alter the nature of the CTC's services, program, or activity; (3) a provision preserving the confidentiality of any medical records provided to the CTC; and (4) a provision addressing whether and how a Certification Division's decision can be appealed to the Commissioners (including any deadline for submitting such an appeal).

CTA believes that addressing the four items above in the proposed regulation would provide helpful, clarifying guidance to the public and thus render the regulation more effective than it would be in its current form. While we support the CTC's interest in promulgating a regulation

that specifies how it will handle requests for reasonable accommodations, we respectfully submit that the regulation should provide further detail regarding that process.

Thank you for considering CTA's views on this important topic.

Response:

The recommendations (2) and (3) made by CTA are very similar to the recommendations made by Ms. Brodsky and the language proposed by Ms. Brodsky addressing the two recommendations was added prior to the public hearing on February 8, 2019. The proposed language was been further modified prior to the public hearing to address recommendations (1) and (4) made by CTA.

Oral Comment at Public Hearing

Danette Brown, California Teachers Association

Comments:

We would like to say "thank you" to the Commission staff and to the Commission. We really appreciate the opportunity to give feedback on this important item and we especially appreciate the collaborative culture that we have. And we appreciate that you have really listened to that feedback and incorporated that into the revisions. And, because of that, I'm coming to speak in favor of the revised language and that we support Item 2K. Thank you very much.

Written Response to 15-Day Notice

The Commission received one response to the 15-day Notice from Dale L. Brodsky, Attorney, Beeson, Tayer & Bodine. Ms. Brodsky's comments and the Commission's responses follow:

Comments:

I am writing to express my appreciation for the Commission's attention to revising Title 4, CCR § 80002.1, the proposed regulation regarding the handling of applications submitted by individuals with disabilities and medical conditions.

In my opinion, the modified text significantly improves the original draft of the proposed regulation and provides very useful direction and information. I have only two minor revisions to suggest: First, I think it would be helpful to provide more clarity with respect to the time frame in which decisions about reasonable accommodation will be made by adding just one word to the proposed language in subsection (a), as follows:

Upon receipt of a request for reasonable accommodation from an individual with a disability or medical condition, the Division shall ***promptly*** approve the request unless, after conducting an individual assessment and engaging in an interactive process with the applicant, the Division determines that there is an alternative equally effective reasonable accommodation.

Second, for clarity and syntactic accuracy, I suggest the non-substantive change of replacing the word "Where" at the beginning of the second sentence in subsection (b) with the word "***If.***"

Thanks to the Commission for considering this additional comment, and especially for recognizing and addressing the needs of individuals with disabilities and medical conditions.

Response:

The suggestion to add the word “promptly” to subsection (a) is the same suggestion made by Ms. Brodsky in the comments she submitted during the 45-day comment period. The Commission again rejects the suggested modification to add “promptly” because the term is vague and lacks definition as related to the processing of an application. Per the language at the beginning of subsection (a) that reads, “An individual applying for a credential...,” requests for reasonable accommodation must be accompanied by an application. Commission staff has 50 days to process an application from the date of receipt (reference Education Code section 44350 and 5 CCR section 80443).

The Commission also rejects the suggestion to change the word “where” to “if” at the beginning of the second sentence in subsection (b). The word “where” is clear as used in the proposed language and is consistent with several sections of the Education Code that include conditional clauses (reference Education Code sections 17040.2, 17040.8, and 69507).

Grand Total of Responses: 6

Consideration of Alternatives

The Commission has determined that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency 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 proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The only alternatives considered by or brought to the attention of the Commission were the comments received during the 45-day comment period and the subsequent 15-day notice comment period. A summary of the comments received and the Commission’s responses are included in this document beginning on page 1.

Mandated Costs

These proposed regulations will not impose a mandate on local agencies or school districts that must be reimbursed in accordance with Part 7 (commencing with section 17500) of the Government Code.