

## FINAL STATEMENT OF REASONS

**Hearing Date: February 16, 2016**

**Subject Matter of Proposed Regulations: English as a Second Language: Additional Examination Time**

**Section(s) Affected:** Add Section 1805.2 to Division 18 of Title 16 of the California Code of Regulations.

### **Updated Information**

A non-substantive, technical amendment was made to the last sentence of Section 1805.2(b) of the text. This change is reflected in the order of adoption:

*“Acceptable documentation includes, but is not limited to, a letter from the chair of the qualifying master’s degree program, or from the educational institution’s chief academic officer.”*

The Initial Statement of Reasons is included in the file (Tab III). As part of the 15-day notice, a supplement to the Initial Statement of Reasons was mailed. That supplement described the additional changes to the regulatory proposal and the rationale for each, as follows:

**1. Additional Amendment #1: “Completing and submitting a request for additional time”**

Proposed Change: The originally proposed language has been amended to state the applicant must “submit a request” for additional time, rather than saying they must “complete and submit” a request for additional time.

Purpose/Rationale: The Board determined that the phrase “complete and submit” a request is repetitive. It is unnecessary to state that a request must be completed, because submission of a request already implies it is completed. Therefore, the amendment was made to make the language more clear and concise.

Anticipated Benefit: Making the language more concise ensures that it is more easily understood by an applicant.

**2. Additional Amendment #2: Remove requirement that request for additional time be signed under penalty of perjury**

Proposed Change: The originally proposed language states that to qualify for consideration for additional exam time, the applicant needs to submit a request stating under penalty of perjury that English is his or her second language.

Purpose/Rationale: The Board has removed the requirement that the statement that English is the second language be made under penalty of perjury, since it has been determined it was not necessary. The Board already has statutory authority to refuse to issue a license or registration, or to suspend or revoke it if the applicant, registrant, or licensee is found to be guilty of unprofessional conduct. Two unprofessional conduct provisions are particularly relevant here:

- a. Misrepresentation as to the type or status of a license or registration held by the person, or otherwise misrepresenting or permitting misrepresentation of his or her education, professional qualifications, or professional affiliations to any person or entity. (Business and Professions Code (BPC) §§4982(f), 4989.54(l), 4992.3(g), and 4999.90(f))
- b. The commission of any dishonest, corrupt, or fraudulent act substantially related to the qualifications, functions, or duties of a licensee or registrant (BPC §§4982(j), 4989.54(g), 4992.3(k), and 4999.90(j))

The Board, therefore, does not believe it would be necessary to require a statement regarding English as a second language to be made under penalty of perjury when it already has appropriate disciplinary tools available to it, in the event the Board discovers that the statement is false.

Anticipated Benefit: The anticipated benefit of this change is increased efficiency in government, because the Board is utilizing the existing disciplinary process already within its authority, instead of pursuing new disciplinary measures.

### **3. Additional Amendment #3: Documentation of Master's program ESL accommodation (16 CCR §1805.2(b))**

Proposed Change: The originally proposed language stated that one way to qualify for an ESL accommodation would be to provide documentation, to the satisfaction of the Board, that the qualifying master's degree program had granted the applicant additional examination time or other accommodation due to speaking English as a second language.

The Office of Administrative Law (OAL) asked the Board to amend the language to provide examples of documentation that would satisfy the Board.

The Board has therefore deleted the requirement that the documentation be "to the satisfaction of the Board." After consulting with stakeholders at universities offering master's degrees intended to lead to Board licensure, the Board has determined that a letter from the degree program's chair or chief academic officer would be examples of credible and acceptable documentation that the school gave this accommodation.

Purpose/Rationale: The addition of examples of acceptable documentation makes it clear to applicants seeking an ESL accommodation via this method what type of documentation the Board will accept.

Anticipated Benefit: Increased clarity benefits applicants for the ESL accommodation because they know what type of documentation the Board is expecting.

**4. Additional Amendment #4: Documentation of Master’s program outside the United States and presented in a language other than English (16 CCR §1805.2(c))**

Proposed Change: The originally proposed language stated that one way to qualify for an ESL accommodation would be to provide documentation, to the satisfaction of the Board, that the qualifying master’s degree program was located outside of the United States and was presented in a language primarily in a language other than English.

The Office of Administrative Law (OAL) asked the Board to amend the language to provide examples of documentation that would satisfy the Board.

The Board has therefore deleted the requirement that the documentation be “to the satisfaction of the Board.” The Board has determined that a letter from the degree program’s chair or chief academic officer would be an example of credible and acceptable documentation of a degree being outside the U.S. and presented in a foreign language.

Purpose/Rationale: The addition of an example of acceptable documentation makes it clear to applicants seeking an ESL accommodation via this method what type of documentation the Board will accept.

Anticipated Benefit: Increased clarity benefits applicants for the ESL accommodation because they know what type of documentation the Board is expecting.

**5. Additional Amendment #5: Master’s program presented primarily in a language other than English (16 CCR §1805.2(c))**

Proposed Change: The originally proposed language stated that one way to qualify for an ESL accommodation would be to provide documentation, to the satisfaction of the Board, that the qualifying master’s degree program was located outside of the United States and was presented primarily in a language other than English.

The Office of Administrative Law (OAL) asked the Board to amend the language to clarify the meaning of “primarily in a language other than English.”

The Board has therefore deleted the word “primarily” and amended the language to state that “at least fifty percent of the coursework was presented in a language other than English.”

Purpose/Rationale: This change makes it clear exactly how much of a degree must be in another language in order to qualify for the ESL accommodation.

Anticipated Benefit: Specifying how much of the degree must be presented in another language promotes clarity, because it establishes a minimum baseline and gives applicants a better idea of whether or not they will qualify under this option.

In addition, the State Business, Consumer Services and Housing Agency has recommended the following two clarifications:

**Clarification #1: Explain the rational for the Board’s determination that a letter from the degree program’s chair or chief academic officer would be examples of credible and acceptable documentation that the school gave an ESL accommodation or presented at least fifty percent of the coursework in a language other than English (Referenced in §1805.2(b) and (c)).**

The Board amended this language response to OAL’s request that the Board provide examples of types of documentation the Board would accept. OAL indicated that it does not to be an all-inclusive list (the Board may accept other types of documentation), but for clarity purposes, the Board needed to provide some examples of documentation that is acceptable.

In order to determine what examples to use, the Board reached out to some educators from two Marriage and Family Therapist Consortium groups, one in Sacramento, and one in Orange County. An MFT Consortium is a group of educations from universities with MFT or LPCC degree programs designed to lead to licensure with the Board. We asked if there are any entities or departments that are fairly standard across universities that we could cite as able to provide a documentation letter. Several possible titles were discussed (titles vary from university to university), but it was thought that the chair of the Master’s degree program, or the university’s chief academic officer would be common position titles across universities that could provide a documentation letter.

**Clarification #2: Explain the rational for the Board’s determination that the qualifying degree program presenting at least fifty percent of the coursework in a language other than English could qualify an applicant for an ESL accommodation (Referenced in §1805.2 (c)).**

Originally the language in §1802(c) stated that to qualify for the ESL accommodation, the individual needed to document that the language in the degree program was presented “primarily” in a language other than English. However, OAL noted that the word “primarily” was too vague. They cited Merriam-Webster’s Collegiate Dictionary (11<sup>th</sup> Ed., 2007), which states “primarily” means “for the most part.” From this, OAL noted that numerically this could range from slightly more than 50% to slightly less than 100%. It was the intent of the Board in choosing the original word “primarily” that a large part (half or more) of the degree program being in a foreign language would be sufficient to indicate a need for an ESL accommodation. Therefore, the Board specified at least 50 percent of the coursework needed to be in a language other than English to qualify for an exemption, because it is reasonable that that amount represented the Board’s original intent.

## **Objections or Recommendations/Responses to Comments:**

The following recommendations/objections were made during the 45-day public comment period or at the public hearing, regarding the proposed action:

### **COMMENT #1 - Email from Keiko Fukue dated January 6, 2016:**

Ms. Fukue is wondering which of the three options she should use to attempt to qualify for additional time. She was wondering if she could qualify by documenting that her master's program had granted her an ESL accommodation, however she notes that she did not have an additional time allowance from her program. In a subsequent phone conversation with Ms. Fukue, staff learned that the master's program allowed her to bring a translation machine to the exam.

**RESPONSE:** The Board rejects making any changes due to this comment. The language in the proposed regulation allows the Board discretion in deciding if the ESL accommodation from the Master's degree program qualifies the applicant for additional examination time from the Board. If the proposed regulations are adopted, Ms. Fukue should submit the documentation of the allowance from the Master's degree program to the Board for consideration.

### **COMMENT #2 - Letter from Laura F. Wilson dated January 29, 2016:**

Ms. Wilson notes that she has had difficulty passing the Board's Standard Written exam due to not having enough time to read the questions. She believes the proposed time extension for ESL applicants would make a positive difference.

**RESPONSE:** No response to this comment is necessary, as it is in support of the proposal.

### **COMMENT #3 - Letter from Maria Cecilia Pinhel received February 12, 2016:**

Ms. Pinhel expresses that she is concerned about the regulation's use of the TOEFL score as the basis for determining English proficiency. She notes the following:

- The TOEFL exam is commonly used to assist universities whether an ESL student has sufficient English skills to comprehend course content;
- The cost of the TOEFL test is expensive, at \$209;
- She is concerned that while TOEFL scores are based on four criteria (reading, listening, speaking and writing), the MFT written exam only measures reading and comprehension, and therefore a TOEFL score may not accurately reflect reading and comprehension ability.
- She notes that TOEFL questions are based on comprehension with no abstract reasoning, while the MFT exam questions incorporate double negatives and are more complex.

She recommends utilizing the criteria for ESL candidates that were in place from 2000 to 2011.

**RESPONSE:** The Board rejects this comment. In its research and consideration of the proposed regulations, the Board recognized that due to cost and other considerations, the TOEFL exam may not be an ideal option for all candidates. Therefore, the Board also established two additional pathways by which an applicant may demonstrate need for an ESL accommodation. Under the regulation proposal, applicant may document that his or her qualifying master's degree program had granted extra exam time or other allowance due to speaking English as a second language, or he or she may show documentation that the degree was obtained from a program outside of the United States and that coursework was presented primarily in a language other than English.

The Board's previous ESL accommodation allowance was a policy based on a case-by-case basis and was not in statute or regulation. The Board asked the applicant to submit verification of initial immigration into the United States, and then the determination was made on a case-by-case basis. However, this method can be problematic, because length of time in the U.S. is not necessarily an indication of English proficiency in every case. For example, a long-time U.S. resident may primarily speak a language other than English, or a recent U.S. immigrant may already speak English as his or her primary language.

The Board believes the proposed regulation best provides a fair and consistent way to measure the need for extra exam time due to limited English proficiency.

### **Comments Received During the 15-Day Period the Modified Text was Available to the Public**

The Board received the following comments during the 15-day comment period regarding the proposed action:

#### **COMMENT #1 - Email from Maria Cecilia Pinhel dated March 8, 2017:**

Ms. Pinhel writes that she agrees with the text modifications and thanks the BBS for working on this proposal. She asks what the next step in the process is and when the proposal might take effect.

**RESPONSE:** No response to this comment is necessary, as it is in support of the proposal. Board staff did respond to Ms. Pinhel to describe the next steps in the regulatory decision making process.

#### **COMMENT #2 - Email from Ellen Lee Zhou dated March 9, 2017:**

Ms. Lee Zhou writes that she is thankful for the extra time being proposed. She asks why the BBS adds extra questions to the exam.

**RESPONSE:** The Board rejects this comment, as it does not pertain to the proposed

rulemaking.

**COMMENT #3 - Email from Daming Mou dated March 13, 2017:**

Ms. Mou writes that she believes the pending regulations to grant additional test time will help her pass the exam, and had questions about when the regulations might pass and how recent the TOEFL test needs to be.

**RESPONSE:** No response to this comment is necessary, as the questions do not pertain to the changes proposed in the 15-day notice. Board staff did respond to Ms. Mou to describe the next steps in the regulatory decision making process.

**Small Business Impact:**

These proposed regulations will not negatively impact a business that is owned by a Board licensee or that employs Board licensees. Allowing extra exam time for ESL applicants may make some of those applicants more likely to pass the exams. If a business has a large client base that speaks a language other than English, and if the proposed ESL extra exam time helps a candidate that speaks this language other than English to pass the exam, the business could benefit from an increased client base if they hire this mental health professional once he or she is licensed.

**Consideration of Alternatives**

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 either be more effective in carrying out the purpose for which the action is proposed or 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 alternatives considered were as follows:

1. Not adopt the regulations. This alternative was rejected because the Board believes that the diverse population in California needs mental health practitioners that speak a wide variety of languages in order to meet the population's mental health needs. The Board believes that offering ESL applicants extra examination time will help some non-English speakers become licensed, while still ensuring that they are qualified practitioners.
2. Adopt the regulations. The Board determined that this alternative is the most feasible. It helps non-English speakers by ensuring they have enough time to interpret the questions on the examination, and it upholds public protection because it ensures their knowledge of the mental health profession is still being tested.

**Local Mandate**

The proposed regulation does not impose any mandate on local agencies or school districts.