



Item: Discussion and Possible Action Regarding Adoption of Proposed Amendments to California Code of Regulations, Title 16, Sections 1399.370 and 1399.372 Relating to Substantial Relationship and Rehabilitation Criteria

Item Summary: At its June 7, 2019 meeting, the Respiratory Care Board (Board) approved regulatory language to implement AB 2138 (Chiu, Chapter 995, Statutes of 2018). The Board initially noticed the regulation proposal on May 29, 2020. Based on feedback from the Office of Administrative Law (OAL) and the Department of Consumer Affairs Legal Office, Modified Text was approved by the Board and was published on October 29, 2020 with no comments received. The final rulemaking package was filed with OAL on March 12, 2021. Additional feedback from OAL resulted in the publication of a Second Modified Text on May 17, 2021 which is being presented to the Board for consideration. There were no comments received in response to the publication of the Second Modified Text. Under normal circumstances, the Board would have been presented with the additional amendments prior to publication. However, due to time constraints the second modified text was published with knowledge that consideration and action by the Board was to follow.

- Board Action:
1. President calls the agenda item and it is presented by or as directed by the President.
  2. If the Board is willing to adopt the modifications to the text, make a motion to:
    - “1) adopt the modifications to sections 1399.370 and 1399.372, and to take such steps necessary to promulgate the regulation in modified form.”
    - 2) - any other appropriate motion.
  3. President may request if there is a second to the motion, if not already made.
  4. Board member discussion/edits (if applicable).
  5. Inquire for public comment / further Board discussion as applicable.
  6. Repeat motion and vote: 1) aye, in favor, 2) no, not in favor, or 3) abstain



## MEMORANDUM

<b>DATE</b>	June 14, 2021
<b>TO</b>	Respiratory Care Board of California Members
<b>FROM</b>	Stephanie Nunez, Executive Director & Alex Millington, Regulatory Counsel, Attorney III, Department of Consumer Affairs
<b>SUBJECT</b>	<b>Second Proposed Modification of Text Regarding Proposed Amendments to Title 16, California Code of Regulations sections 1399.370 and 1399.372 (AB 2138 Implementation)</b>

### **Proposed Changes to Board Approved Language**

The Respiratory Care Board's AB 2138 implementation rulemaking was submitted to the Office of Administrative Law (OAL) in March 2021. During their review, OAL's reviewing attorney noted a number of changes required to the Board's proposed language.

A Second Proposed Modified text was drafted in consultation with OAL, and was published on [the Board's website](#) with a fifteen day comment period as required section 11346.8(c) of the Government Code. The comment period began May 17, 2021 and ended June 1, 2021. The Board received no comments.

The changes to the second proposed modified text include both substantive, and non-substantive changes. Non-substantive changes can be made by the Executive Officer (EO) without a Board vote. This authority is based on the motion made when the Board adopted the regulatory text, which instructed the EO to take such steps "necessary to promulgate the regulation."

Please refer to the Second Proposed Modified Text in Attachment B. The required changes to the regulation text are in italic double underline or italic double strike-through. A brief description of each change follows:

### **§1399.370. Substantial Relationship Criteria**

- 1. Authority Note:** A citation to Business and Professions Code section 481 has been restored, and citations to sections 488 and 492 have been removed. *OAL suggested this change to make the Board's proposed language consistent with other AB 2138 implementation packages. This is a non-substantive change.*

## § 1399.372. Rehabilitation Criteria for Denials, Suspensions, or Revocations

1. **Title:** The section title has been revised to improve clarity to refer to petitions for reinstatement and modification of probation to align with the language in subdivision (c). Proposed text in subdivision (c) refers to “petition for reinstatement, modification of probation, suspension or revocation.” *OAL suggested this change to improve the overall clarity of the title and to ensure the title accurately referred to the circumstances in which it would apply. This is a non-substantive change.*
2. **Subdivision (a):** The term “will” has been replaced with the term “shall.” *OAL noted other DCA programs had consistently used the term ‘shall’ rather than ‘will.’ For purposes of clarity and consistency, this change was requested. This is a non-substantive change.*
3. **Subdivision (a):** The phrase “in evaluating the rehabilitation of such person and his or her fitness for a license” has been deleted. *OAL noted this language differed slightly from the language adopted by other DCA boards, who had not included the phrase “in evaluating the rehabilitation of such person and his or her fitness for a license. For consistency across licensing entities, it was suggested the language be deleted from the Board’s proposed language as well. This is a non-substantive change.*
4. **Subdivision (b):** The word “and” has been changed to “or” in the phrase “the denial is based in one or more rounds specified in Section 3750, 3750.5, and 3755 of the B&P.” The language now reads “Section 3750, 3750.5, or 3755”. *This change is made at the election of the Board to correctly reflect the bases upon which the regulation applies. The list is intended to reflect circumstances where any of the listed grounds are applicable, not situations where all are applicable. The word “or” correctly connotes this by allowing any ground to form a sufficient base independent of the others. This is a substantive revision.*
5. **Subdivision (b):** The sentence reading “The board shall find that the applicant has made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated” has been deleted. The previous sentence ending in “applicant’s termination” has had its period replaced with a colon. *OAL noted other DCA boards had deleted the sentence and instead had placed a colon at the end of the preceding sentence. Doing so allows for sufficient indication that the following list of criteria is to be applied by the Board. This is a non-substantive change.*
6. **Subdivision (b)(1):** The term “severity” has been revised to “gravity.” *OAL noted this change was consistent with the verbiage used by other DCA programs. This is a non-substantive change for consistency and clarity.*
7. **Subdivision (b)(2):** The term “professional misconduct” has been inserted. *OAL noted other DCA boards included two references to “professional misconduct” rather than the lone reference included in the proposed modified text. This is a non-substantive change.*

8. **Subdivision (b)(4):** Correct inconsistent capitalization of “Applicant.” OAL suggested this change for grammatical clarity. This is a non-substantive change.
9. **Subdivision (b)(6):** Correct inconsistent capitalization of “Applicant.” OAL suggested this change for grammatical clarity. This is a non-substantive change.
10. **Subdivision (c)(4):** Changed use of the term “applicant” to “licensee.” OAL suggested this change to correctly identify the class of party subject to the regulation. Because subdivision (c)(4) applies to petitions for reinstatement, modification of probation, suspension or revocation of existing licenses, the correct term is ‘licensee.’ This is a non-substantive change.
11. **Subdivision (d):** Changed use of the term “applicant” to “licensee.” OAL suggested this change to correctly identify the class of party subject to the regulation. Because subdivision (c)(4) applies to petitions for reinstatement, modification of probation, suspension or revocation of existing licenses, the correct term is ‘licensee.’ This is a non-substantive change.
12. **Subdivision (d):** Remove two references to the term ‘denial’ and one instance of the term ‘professional misconduct’ and replace them with the phrase “petition for reinstatement, modification of probation, suspension, or revocation of a respiratory care practitioner license is based on disciplinary action as described in Section 141 of the Business and Professions Code, or the petition for reinstatement, modification of probation, suspension, or revocation of a respiratory care license...” OAL noted two references to “denial” are incorrect as subdivision (d) is intended to apply to the above-listed actions and not to denials. Separately, the term ‘professional misconduct’ is deleted and corrected to refer to actions as described in BPC section 141 to accurately cover disciplinary bases upon which subdivision (d) would apply. This is a substantive revision.
13. **Subdivision (d):** The word “and” has been changed to “or” in the phrase “the denial is based in one or more rounds specified in Section 3750, 3750.5, and 3755 of the B&P.” The language now reads “Section 3750, 3750.5, or 3755”. This change is made at the election of the Board to correctly reflect the bases upon which the regulation applies. The list is intended to reflect circumstances where any of the listed grounds are applicable, not situations where all are applicable. The word “or” correctly connotes this by allowing any ground to form a sufficient base independent of the others. This is a substantive revision.
14. **Subdivision (d):** The sentence reading “The board shall find that the licensee has made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated” has been deleted. The previous sentence ending in “applicant’s termination” has had its period replaced with a colon. OAL noted other DCA boards had deleted the sentence and instead had placed a colon at the end of the preceding sentence. Doing so allows for sufficient indication that the following list of criteria is to be applied by the Board. This is a non-substantive change.

- 15. Subdivision (d)(1):** The term “severity” has been changed to “gravity.” *OAL noted this change was consistent with the verbiage used by other DCA programs. This is a non-substantive change for consistency and clarity.*
- 16. Subdivision (d)(1):** The term “professional misconduct” has been deleted and the term “unprofessional conduct” has been added. *OAL noted Business and Professions Code section 3755 refers to “unprofessional conduct” and that several other DCA programs had added “unprofessional conduct” in the text to account for the difference in comparable statutory language. This is a substantive change.*
- 17. Subdivision (d)(3):** The term “professional misconduct” has been deleted and the term “unprofessional conduct” has been added. *OAL noted Business and Professions Code section 3755 refers to “unprofessional conduct” and that several other DCA programs had added “unprofessional conduct” in the text to account for the difference in comparable statutory language. This is a substantive change.*
- 18. Subdivision (d)(4):** The term “compliance” has been replaced with the phrase “Whether the licensee has complied”. *OAL noted the proposed language differed from that used by other DCA boards, who had used “whether the licensee has complied.” The phrase “whether the licensee has complied”. The longer phrase is more exact in that it articulates the nature of the inquiry – whether compliance has occurred – rather than leaving the nature of the inquiry limited to “compliance.” This is a non-substantive clarification.*
- 19. Subdivision (d)(4):** The phrase “such person” has been replaced with the phrase “the licensee.” *OAL noted “the licensee” was a clearer identification of the subject of the regulation. This is also consistent with the terminology used in the remainder of the regulation. This is a non-substantive change.*
- 20. Authority Note:** Citations to Business and Professions Code sections 481 and 482 have been added. *OAL noted these changes were needed to maintain consistency with other DCA programs and to correctly articulate the Board’s statutory authority over licensing decision making processes. This is a non-substantive change.*
- 21. Reference Note:** A reference to Business and Professions Code section 141 has been added. *This addition is made at the Board’s election to accurately articulate the statutes implemented through this regulation. Section 141 allows for the use of out-of-state licensing actions and records in certain Board determinations. This is a non-substantive addition.*
- 22. Reference Note:** Citations to Business and Professions Code sections 3750.5 and 3755 have been added and grammatical changes made to accommodate the insertion of the new items. *OAL noted these additions were needed to correctly articulate all the statutory sections implemented by this rulemaking. Section 3750.5 relates to specific grounds for*

*disciplinary and denial actions, and section 3755 relates to the Board's authority to take action in cases of unprofessional conduct. These are non-substantive changes.*

**Action Requested**

Review the proposed changes set out in the Second Modified regulatory text in Attachment B. If the Board is willing to adopt the second modifications to the text that was noticed on [May 29, 2020](#), make a motion to adopt the second modifications to sections 1399.370 and 1399.372, and if no comments are received, to take such steps necessary to promulgate the regulation in modified form.

**California Code of Regulations  
Title 16. Professional and Vocational Regulations  
Division 13.6. Respiratory Care Board**

**SECOND MODIFIED TEXT**

**Legend:**

Changes addressed in Notice of Proposed Regulatory Action (45-day comment period):

- Deleted text is indicated by ~~strikethrough~~
- Added text is indicated with an underline

Modified Text (15-day comment period):

- Deleted text is indicated by ~~double strikethrough~~
- Added text is indicated by double underline

Second Modified Text (15-day comment period):

- Deleted text is indicated by ~~*italic double strikethrough*~~
- Added text is indicated by *italic double underline*

Amend section 1399.370 to read:

**§ 1399.370. Substantial Relationship Criteria.**

(a) For the purposes of denial, suspension, or revocation of a license pursuant to Section 141 or Division 1.5 (commencing with section 475) of the B&P, Sections 3750, 3750.5, and 3755 of the B&P, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions, or duties of a respiratory care practitioner, if it evidences present or potential unfitness of a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following:

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:

(1) The nature and gravity of the offense;

(2) The number of years elapsed since the date of the offense; and

(3) The nature and duties of a respiratory care practitioner person, the profession in which the applicant seeks licensure, or in which the licensee is licensed, holding the license.

(c) For purposes of subdivision (a), Such substantially related crimes, professional misconduct or acts include but are not limited to those involving the following:

(a1) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any provision or term of the B&P.

(b2) Commission of an act or conviction of a crime involving fraud, fiscal dishonesty theft, or larceny.

(~~e~~3) Commission of an act or conviction of a crime involving driving under the influence or reckless driving while under the influence.

(~~d~~4) Commission of an act or conviction of a crime involving harassment or stalking ~~as defined by the Penal Code and/or Civil Code.~~

(~~e~~5) Commission of an act or conviction of a crime involving lewd conduct, prostitution or solicitation thereof, or pandering and/or indecent exposure, ~~as defined by the Penal Code.~~

(~~f~~6) Commission of an act or conviction of a crime involving human trafficking, ~~as defined by the Penal Code.~~

(~~g~~7) Commission of an act or conviction of a crime involving gross negligence in the care of an animal or any form of animal cruelty ~~as defined by the B&P or Penal Code.~~

(~~h~~8) Failure to comply with a court order.

(~~i~~9) Commission of an act or conviction of a crime, involving verbally abusive conduct or unlawful possession of a firearm or weapon.

(10) Commission of an act or conviction of a crime, of neglect, endangerment, or abuse involving a person under 18 years of age or over 65 years of age, or a dependent adult, without regard to whether the person was a patient.

Note: Authority cited: Sections ~~481 and 481~~ and 3722, Business and Professions Code. Reference: Sections 141, 480, 481, ~~488, 490, 492, 493,~~ 3750, 3750.5, 3752, 3752.5, 3752.6, 3752.7, 3754.5, and 3755, Business and Professions Code; and Sections ~~266, 288, 314, 646.9, 647, 1203.097, 11414, 13519.6 and 13519.7,~~ Penal Code.

Amend section 1399.372 to read:

**§ 1399.372. Rehabilitation Criteria for ~~Denials, Suspensions, or Revocations,~~ Petitions for Reinstatement, or Probation Modification**

~~(a) When considering the denial, petition for reinstatement, modification of probation, suspension or revocation of an RCP license, the board will consider the following criteria in evaluating the rehabilitation of such person and his or her eligibility for a license:~~

~~(a) The nature and severity of the act(s) or offense(s).~~

~~(b) The total criminal record.~~

~~(c) The time that has elapsed since the commission of the act(s) or offense(s).~~

~~(d) Compliance with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against such person.~~

~~(e) Evidence of any subsequent act(s) or crime(s) committed.~~

~~(f) Any other evidence of rehabilitation submitted that is acceptable to the board, including:~~



(1) Successful completion of respiratory care courses with a "C" or better, as determined by the institution;

(2) Active continued attendance or successful completion or rehabilitative programs such as 12-step recovery programs or psychotherapy counseling;

(3) Letters relating to the quality of practice signed under penalty of perjury from licensed health care providers responsible for the supervision of his/her work.

(g) Statements, letters, attestations of good moral character, or references relating to character, reputation, personality, marital/family status, or habits shall not be considered rehabilitation unless they relate to quality of practice as listed in section (f).

(a) When considering the denial of an RCP respiratory care practitioner license pursuant to section 480 of the B&P on the grounds that the applicant ~~was~~ has been convicted of a crime, the board shall consider whether the applicant made a showing of rehabilitation ~~and is presently fit for a license~~, if the applicant completed the criminal sentence at issue without a violation of parole or probation.- In making this determination, the board ~~will~~shall consider the following criteria ~~in evaluating the rehabilitation of such person and his or her fitness for a license~~:

(1) The nature and gravity of the crime(s).

(2) The length(s) of the applicable parole or probation period(s).

(3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

(4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation.

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

~~(b) If subdivision (a) is inapplicable~~ If the applicant has not completed the criminal sentence at issue without a violation of parole or probation, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), the denial is based on professional misconduct, or the denial is based on one or more grounds specified in Sections 3750, 3750.5, ~~and~~ 3755 of the B&P, the board shall apply the following criteria in evaluating an applicant's rehabilitation. ~~The board shall find that the applicant made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated:~~

(1) The nature and ~~severity~~gravity of the act(s), professional misconduct, or crimes(s) under consideration as grounds for denial.

(2) Evidence of any act(s), ~~professional misconduct~~, or crime(s) committed subsequent to the act(s), professional misconduct, or crime(s) under consideration as grounds for denial under Section 480 of the B&P.

(3) The time that has elapsed since commission of the act(s), professional misconduct, or crime(s) referred to in paragraph (1) or (2).

(4) Whether the ~~a~~Applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the ~~a~~Applicant.

(5) The criteria in subdivision (a)(1)-(5), as applicable.

(6) Evidence, if any, of rehabilitation submitted by the ~~a~~Applicant.

(c) When considering the petition for reinstatement, modification of probation, suspension or revocation of an ~~RC~~Respiratory care practitioner license on the ground that the licensee ~~has been was~~ convicted of a crime, the board shall consider whether the licensee made a showing of rehabilitation ~~and is presently fit for a license~~, if the licensee completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the board shall consider the following criteria:

(1) The nature and gravity of the crime(s).

(2) The length(s) of the applicable parole or probation period(s).

(3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

(4) The terms or conditions of parole or probation and the extent to which they bear on the ~~applicant's~~licensee's rehabilitation.

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

~~(d) If subdivision (a) is inapplicable—If the applicant~~licensee has not completed the criminal sentence at issue without a violation of parole or probation, or the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (c), ~~the denial~~petition for reinstatement, modification of probation, suspension, or revocation of a respiratory care practitioner license is based on disciplinary action as described in Section 141 of the Business and Professions Code professional misconduct, or the petition for reinstatement, modification of probation, suspension, or revocation of a respiratory care practitioner license denial is based on one or more of the grounds specified in Sections 3750, 3750.5, and/or 3755, the board shall apply the following criteria in evaluating a licensee's rehabilitation. ~~The board shall find that the licensee made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the licensee is rehabilitated:~~

(1) The nature and ~~severity~~gravity of the act(s), ~~unprofessional conduct~~professional misconduct, or crimes(s).

(2) The total criminal record.

(3) The time that has elapsed since commission of the act(s), ~~unprofessional conduct~~professional misconduct, or crime(s).

(4) ~~Compliance~~Whether the licensee has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against ~~such person~~the licensee.

(5) The criteria in subdivision (c)(1)-(5), as applicable.

(6) If applicable, evidence of dismissal proceedings pursuant to section 1203.4 of the Penal Code.

(7) Evidence of any subsequent act(s) or crime(s) committed.

(8) Any other evidence of rehabilitation submitted that is acceptable to the board, including:

(i) Successful completion of respiratory care courses with a "C" or better, as determined by the institution;

(ii) Active continued attendance or successful completion or rehabilitative programs such as 12-step recovery programs or psychotherapy counseling;

(iii) Letters relating to the quality of practice signed under penalty of perjury from licensed health care providers responsible for the supervision of his/her work.

(9) Statements, letters, attestations of good moral character, or references relating to character, reputation, personality, marital/family status, or habits shall not be considered rehabilitation unless they relate to quality of practice as listed in section (d)(8)(iii).

Note: Authority cited: Sections ~~482 and~~ 481, 482, and 3722, Business and Professions Code.

Reference: Sections 141, 475, 480, 481, 482, 488, 490, 493, 3750, 3750.5, 3751, and 3753, and 3755, Business and Professions Code.