



CALIFORNIA PSYCHIATRIC ASSOCIATION
921 11th Street, Suite 502; Sacramento, CA 95814
916-442-5196 ♦ calpsych@calpsych.org

October 1, 2018

Denise Pines, President
Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento CA 95815

Dear Ms Pines,

On behalf of the California Psychiatric Association, a State Association of the American Psychiatric Association (APA) and a medical specialty society representing 3,500 physicians in the State, to encourage you to ensure that any questions implicating mental health and/or substance use disorders in the California medical licensing applications are compliant with Title II of the Americans with Disabilities Act (ADA). Specifically, we have concerns about the following questions in the California medical licensing applications:

Initial Physician Licensing Application¹:

1. Have you ever been enrolled in, required to enter into, or participated in any drug, alcohol, or substance abuse recovery program or impaired practitioner program?
2. Have you ever been treated for or had a recurrence of a diagnosed addictive disorder?
3. Have you ever been diagnosed with an emotional, mental, or behavioral disorder that may impair your ability to practice medicine safely?
4. Have you ever been diagnosed with a neurological or other physical condition that may impair your ability to practice medicine safely?

Specifically, our concern is that these questions regarding the mental health status of applicants, as currently phrased, are overbroad and discriminatory in that they are intended to reveal diagnosis and treatment of a mental disorder which is not relevant to the question of current impairment. Oversight entities should not include questions about past diagnosis and treatment of a mental disorder as a component of a general screening inquiry. Instead, application questions should inquire only about the conditions that currently impair an applicant's ability to function as a licensee and therefore are relevant to the physician's ability to practice medicine now. Indeed, confining application questions to those that relate to current impairment is consistent with the dictates of the ADA.

Under Title II of the ADA, qualified individuals shall not be "...subjected to discrimination by any such [public] entity", including unnecessarily subjecting disabled applicants to increased levels of scrutiny.² Significant case law identifies state medical licensing boards as public entities that must abide by Title II.³

¹ http://www.mbc.ca.gov/Applicants/Physicians_and_Surgeons/

² 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(6) & (8).

³ See *Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002); *Medical Society of New Jersey v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, (D of N.J., Oct 5, 1993); *ACLU of Indiana v. Individual Members of the State Bd. of Law Examiners*, 1:09-cv-842-TWP-MJD, WL 4387470, (S.D. Indiana, Sept. 20, 2011).

The U.S. Department of Justice's (DOJ) 2014 Consent Decree for the Louisiana Supreme Court offers guidance about the acceptable standard under the ADA for mental health inquiries with in licensing applications. That Consent Decree specifically required the Louisiana Bar Examiners to remove the following from their application:

1. "Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?"⁴
2. "Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or mental, emotional, or nervous disorder or condition) which in any way currently affects, or *if untreated could affect*, your ability to practice...in a competent and professional manner?"⁵ (emphasis added).

The first question was determined to be noncompliant with the ADA because "a history of mental health diagnosis or treatment does not provide an accurate basis for predicting future misconduct."⁶ The second question was found to violate the ADA because the italicized clause, by inquiring about the effect of a disability when untreated, reduced the question to one about diagnosis, rather than the effect of that diagnosis on an applicant's current fitness to practice. As the DOJ noted, the "question considers an applicant's disability in a hypothetical future untreated form, which does not inform an assessment of how the disability affects an applicant's current fitness to practice law."⁷ To comply with the ADA, the clause was removed, shifting the focus to current fitness to practice rather than the existence of a disability.

The standard for ADA compliance offered in the Consent Decree applies equally to medical licensing applications as it does to bar licensing applications. For example, in 1993 a set of similar questions about mental health on the New Jersey medical licensing application was challenged.⁸ The Court found that these questions violated the ADA because, "they substitute an impermissible inquiry into status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior."⁹ The Court continued,

[T]he Board can formulate a set of questions [or inquiries] that screen out applicants based on their behavior and capabilities. For example...based on whether applicants can perform certain tasks or deal with certain emotionally...demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up to responsibilities.¹⁰

We recognize the importance of the Board's responsibility to license doctors capable of meeting the high standards necessary to practice medicine in the State of California. However, the mental health questions within your application must not impermissibly screen applicants for mental health disabilities rather than current ability to practice. There is no evidence of any correlation between having a mental health diagnosis and ability to responsibly fulfill the essential functions of the practice of medicine. Therefore, other mechanisms to determine competence should be employed.¹¹ Unnecessarily probing into mental health status coupled with the onerous additional requirements imposed upon disclosers of mental health disabilities is a discriminatory and ineffective practice and in violation of the ADA.¹² Including such questions in a licensing application may also have the unintended consequence of deterring medical students and professionals from seeking treatment

⁴ 2014 DOJ Letter Reporting the Findings of its Investigation into the Louisiana Supreme Court, at 5.

⁵ *Id.* at 22.

⁶ *Id.* at 23.

⁷ *Id.* at 22.

⁸ *Medical Society of New Jersey v. Jacobs*, No. 93-3670 (WGB), 1993 WL 413016, at *8 (D of N.J., Oct. 5, 1993)

⁹ *Id.* at *8.

¹⁰ *Id.* at *7.

¹¹ 2014 DOJ Letter Reporting the Findings of its Investigation into the Louisiana Supreme Court, at 23. (noting that "[r]esearch has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace")

¹² 28 C.F.R. § 35.130(b)(6) & (8).

because they fear that disclosure could endanger their license eligibility, unnecessarily harming these individuals and potentially diminishing the quality of medical care provided.

We suggest replacing the aforementioned questions with ones that focus on behaviors indicating a necessity for further screening. Provided below are some examples that adequately assess an applicant's ability to practice medicine and maintain compliance with the ADA standard:

1. Are you currently using narcotics, drugs or intoxicating liquors to such an extent that your ability to practice medicine in a competent, ethical and professional manner would be impaired? (Yes/No)
2. Are you currently suffering from any condition for which you are not being appropriately treated that impairs your judgment or that would otherwise adversely affect your ability to practice medicine in a competent, ethical and professional manner? (Yes/No)

We encourage you to reference the APA's Position Statement on Inquiries about Diagnosis and Treatment of Mental Disorders in Connection with Professional Credentialing and Licensing, available at:

<https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Inquiries-about-Diagnosis-and-Treatment-of-Mental-Disorders-in-Connection-with-Professional-Credentialing-and-Licensing.pdf> and to revise the questions contained within the California medical licensing applications and to end discriminatory practices against physicians with mental illnesses.

We look forward to hearing back from you. Please do not hesitate to direct questions you may have about this matter to Randall Hagar, CPA Director of Government Relations (randall-hagar@calpsych.org).

Best wishes.



Robert McCarron, DO
California Psychiatric Association, President