

# Regulatory Analysis Form

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COMMONWEALTH OF PENNSYLVANIA  
REGULATORY  
REVIEW COMMISSION

(1) Agency

Department of State, Bureau of Professional and  
Occupational Affairs, State Board of Optometry

(2) I.D. Number (Governor's Office Use)

16A-5210

IRRC Number: 2271

(3) Short Title

Therapeutic Certification

(4) PA Code Cite

49 Pa. Code §§ 23.201 and 23.202

(5) Agency Contacts & Telephone Numbers

Primary Contact: Teresa Lazo-Miller, Counsel

State Board of Optometry (717) 783-7200

Secondary Contact: Joyce McKeever, Deputy Chief

Counsel, Department of State (717) 783-7200

(6) Type of Rulemaking (check one)

☐ Proposed Rulemaking

☐ Final Order Adopting Regulation

☐ Policy Statement

☒ Final Proposed Omitted Rulemaking

(7) Is a 120-Day Emergency Certification  
Attached?

No ☒ X

Yes: By the Attorney General

Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation deletes section 23.201 based on the Commonwealth Court of Pennsylvania ruling in Rand v. Pennsylvania State Board of Optometry, 762 A.2d 392 (Pa. Commw. Ct. 2000). The regulation amends section 23.202 to conform to section 4.1 of the Optometric Practice and Licensure Act, Act of June 6, 1980, P.L. 197, as amended by Act 130 of 1996, 63 P.S. §244.4a. A copy of the court's decision in Rand is attached as Appendix A.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

In Rand, the Commonwealth Court held that "the Board's insertion of the April 1, 1993 test date requirement in 49 Pa. Code § 23.201 exceeds the grant of legislative power in sections 3 and 4.1 of the Act...." and instructed the Board to determine whether Rand "meets the statutory requirements for certification contained in 63 P.S. § 244.4a." The Board is deleting section 23.201, which set forth requirements for certification at the court's direction to apply the statutory requirements. The Board is amending section 23.202 to conform to the statutory requirements. The Board's authority to promulgate regulations is contained in 63 P.S. § 244.3(b)(14).

### Regulatory Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

**Yes, the regulatory amendment is required by the Commonwealth Court's decision in Rand.**

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

**The public has a compelling interest in having the Board's regulations conform to the statute.**

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

**Public confusion would result from having an invalid and unenforceable regulation in the Pennsylvania Code.**

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

**Optometrists and the general public will benefit from having the regulation conform to the statute.**

### Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

**The Board has not identified any person who will be adversely affected by the regulation.**

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

**All optometrists seeking certification will be required to comply with the statutory requirements to obtain certification and will be required to comply with the application procedures of section 23.202.**

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

**Because the regulation is mandated by the Commonwealth Court's decision in Rand, the Board did not seek input from the public in the development and drafting of the regulation.**

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

**There are no costs or savings to the regulated community associated with compliance.**

## **Regulatory Analysis Form**

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

**There are no costs or savings to local governments associated with compliance.**

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

**The applications for certification have already been amended to conform to the statutory requirements. The cost for this amendment was minimal.**

**The state government may realize savings from eliminating any confusion about whether the statutory or current regulatory requirements for certification are applied.**

### Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>	\$NA	\$NA	\$NA	\$NA	\$NA	\$NA
Regulated Community						
Local Government						
State Government						
<b>Total Savings</b>						
<b>COSTS:</b>	NA	NA	NA	NA	NA	NA
Regulated Community						
Local Government						
State Government						
<b>Total Costs</b>						
<b>REVENUE LOSSES:</b>	NA	NA	NA	NA	NA	NA
Regulated Community						
Local Government						
State Government						
<b>Total Revenue Losses</b>						

(20a) Explain how the cost estimates listed above were derived.

There are no costs associated with implementation and compliance.

For optometrists applying for therapeutic certification under section 4.1(a)(1) of the Act, 63 P.S. § 244.4a(a)(1), the cost associated with taking the licensure examination to practice optometry which examination included the prescription and administration of pharmaceutical agents for therapeutic purposes is associated with the statutory requirement, not the regulatory requirement. For optometrists applying for therapeutic certification under section 4.1(a)(2) of the Act, 63 P.S. § 244a(a)(2), the National Board of Examiners in Optometry has waived the fee normally charged for the TMOD examination for optometrists who must take this examination to meet state certification requirements.

### Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -98-99	FY -99-00	FY -00-01	Budgeted FY 01-02
State Board	\$128,946.11	\$139,491.37	\$150,396.01	\$142,000.00

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

**Cost-benefit analysis is inapplicable to this regulation.**

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

**No non-regulatory alternatives were considered**

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

**No alternative regulatory schemes were considered because the amendments are mandated by the ruling in Rand.**

### Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

**There is no federal regulation in this area.**

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

**About half of the states have no regulation addressing requirements for certification because those requirements are set by statute. Pennsylvania will join those states in which certification requirements are set by statute.**

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

**No existing or proposed regulations will be affected.**

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

**No public hearings or informational meetings will be scheduled.**

### **Regulatory Analysis Form**

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

**The regulation will not affect existing reporting, record keeping or other paperwork requirements.**

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

**No particular affected groups have been identified.**

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

**The regulation will become effective upon publication in the Pennsylvania Bulletin.**

(31) Provide the schedule for continual review of the regulation.

**The Board continuously monitors its regulations. The Board meeting dates for 2002 are: January 9, March 14, May 8, July 11, September 11 and November 14.**



CDL-1

FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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LEGISLATIVE COUNCIL  
REVIEW COMMISSION

# 2271

DO NOT WRITE IN THIS SPACE

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form and legality. Attorney General

Copy below is hereby certified to be a true and correct  
copy of a document issued, prescribed or promulgated by:

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Executive or Independent  
Agencies.

BY: \_\_\_\_\_  
(DEPUTY ATTORNEY GENERAL)

State Board of Optometry  
(AGENCY)

*John V. Curran*

DOCUMENT/FISCAL NOTE NO. 16A-5210

DATE OF APPROVAL

DATE OF ADOPTION: \_\_\_\_\_  
BY: *Steven Reto*  
Steven Reto, O.D.

DATE OF APPROVAL

*4/19/02*  
(Deputy General Counsel  
(~~Chief Counsel~~,  
~~Independent Agency~~  
Strike inapplicable  
title)

TITLE: Chairperson  
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

- [ ] Check if applicable  
Copy not approved.  
Objections attached.
- [ ] Check if applicable. No Attorney  
General approval or  
objection within 30 day  
after submission.

FINAL RULEMAKING, PROPOSED OMITTED  
COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
STATE BOARD OF OPTOMETRY  
49 PA. CODE, §§ 23.201 and 23.202  
THERAPEUTIC CERTIFICATION

By this Order, the State Board of Optometry ("Board") amends 49 Pa. Code §§ 23.201 and 23.202 (relating to certification to prescribe and administer pharmaceutical agents for therapeutic purposes), to conform to the ruling by the Commonwealth Court of Pennsylvania in Rand v. Pennsylvania State Board of Optometry, 762 A.2d 392 (Pa. Commw. Ct. 2000).

### **Statutory Authority**

Section 3(b)(14) of the Optometric Practice and Licensure Act ("Act") (63 P.S. § 244.3(b)(14)) authorizes the Board to promulgate all rules and regulations necessary to carry out the purposes of the Act.

### **Background and Need for Amendment**

These amendments are required by section 4.1 of the act of October 30, 1996 (P.L. 721, No. 130) (63 P.S. § 244.4a), as interpreted by the Commonwealth Court of Pennsylvania in Rand. In Rand, the Court determined that the Board's regulation at 49 Pa. Code § 23.201 was "invalid and unenforceable." The Court remanded, instructing the Board to apply the criteria in section 4.1 of the Act, 63 P.S. § 244.4a, to determine whether Dr. Rand met the qualifications to become certified to prescribe and administer pharmaceutical agents for therapeutic purposes. Because the Court has determined that the Board's regulation is invalid and that the Board should apply the criteria in section 4.1 of the statute, the Board must delete its regulation at 49 Pa. Code § 23.201.

The Board's regulation at 49 Pa. Code § 23.202, which makes reference to § 23.201, must also be amended. The Board will simply replace the portions of § 23.202 that refer to optometrists meeting provisions of § 23.201 with references to the requirements in section 4.1 of the Act.

Section 204 of the Commonwealth Documents Law, 45 P.S. § 1204, permits state administrative agencies to promulgate regulations with proposed rulemaking omitted when the agency finds that the procedures for proposed rulemaking are, in the circumstances, "impracticable, unnecessary, or contrary to the public interest." The amendments make changes to conform to the decision of the Commonwealth Court interpreting the Optometric Practice and Licensure Act and the S 23.201 of the Board's regulations. The Court held that § 23.201 of the Board's regulations was invalid and the Court instructed the Board to apply the criteria in section 4.1 of the Act, 63 P.S. § 244.4a, to determine an optometrist's eligibility for certification to prescribe and administer pharmaceutical agents. The Board finds that it is unnecessary to publish proposed rulemaking in this case because, given the Court's finding that § 23.201 is invalid, it must be stricken and given the Court's directive to apply the statutory criteria, it would

be duplicative to amend the regulation to simply repeat the statutory language. In addition, the continued presence of § 23.201 in the Pennsylvania Code has created public confusion. Finally, § 23.202 must be amended to replace references to the qualifications in § 23.201 with references to the qualifications in section 4.1 of the Act.

### **Compliance with Executive Order 1996-1**

The Board reviewed this rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final/proposed omitted regulation addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

### **Fiscal Impact and Paperwork Requirements**

The proposed amendments will have no fiscal impact on the Commonwealth or its political subdivisions. Candidates for certification to administer and prescribe pharmaceutical agents for therapeutic purposes must meet the requirements set forth in the statute and in § 23.202 of the Board's regulations.

### **Regulatory Review**

Pursuant to section 5.1(c) of the Regulatory Review Act (71 P.S. § 745.5a(c)), the Board submitted a copy of the regulation with proposed rulemaking omitted on May 1, 2002, to the Independent Regulatory Review Commission (IRRC), the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) and the House Professional Licensure Committee (HPLC). On the same date, the regulation was submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101 – 732-506).

In accordance with Section 5.1(d) and (e) of the Act (71 P.S. § 745.5a(d) and (e)), the regulation was (deemed) approved by HPLC on \_\_\_\_\_, 200\_\_, and (deemed) approved by SCP/PLC \_\_\_\_\_, 200\_\_. IRRC met on \_\_\_\_\_, 200\_\_, and (deemed) the regulation approved.

### **Additional Information**

Individuals who desire information are invited to submit inquiries to Deborah Smith, Board Administrator, State Board of Optometry, P.O. Box 2649, Harrisburg, PA 17105-2649, [www.dos.state.pa.us](http://www.dos.state.pa.us)

### *Findings*

The State Board of Optometry finds that:

(1) Public notice of the Board's intention to amend its regulations as adopted by this Order, under the procedures specified in sections 201 and 202 of the Commonwealth Documents Law (CDL) (45 P.S. §§ 1201 and 1202), has been omitted under the authority contained in Section 204(3) of the CDL (45 P.S. § 1204(3)), because the Board has, for good cause, found that the procedures specified in Sections 201 and 202 of the CDL are in this circumstance, unnecessary because the regulation conflicts with section 4.1 of the Act, 63 P.S. §244.4a, as interpreted by the Commonwealth Court of Pennsylvania.

(2) The amendment of the regulations of the Board in the manner provided in this Order is necessary and appropriate for administering the Board's authorizing statute.

### *Order*

The State Board of Optometry, acting under its authorizing statute, orders that:

(a) Regulations of the Board are hereby amended at 49 Pa. Code §§ 23.201 and 23.202 as set forth in Annex A.

(b) The Board shall submit this Order and attached Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Board shall certify this Order and the attached Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This Order shall become effective immediately upon publication in the Pennsylvania Bulletin.

STEVEN RETO, O.D., CHAIRMAN

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS  
PART I. DEPARTMENT OF STATE  
SUBPART A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
CHAPTER 23. STATE BOARD OF OPTOMETRY

CERTIFICATION IN PHARMACEUTICAL AGENTS FOR  
THERAPEUTIC PURPOSES

§ 23.201. [Qualifications for certification.

(a) *Category I.* To obtain certification to prescribe and administer pharmaceutical agents for therapeutic purposes, an applicant licensed by examination to practice optometry in this Commonwealth or another jurisdiction on or after April 1, 1993, shall meet the following requirements:

- (1) Graduation from an accredited optometric educational institution in the United States or Canada where a condition for graduation at the time the applicant graduated was the successful completion of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes.
- (2) A passing score on one of the following examinations taken on or after April 1, 1993:
  - i. The TMOD portion of Part II (Clinical Sciences) of the National Board Examination.
  - ii. The TMOD.
  - iii. An examination for licensure in another jurisdiction which required passing scores on the prescription and administration of pharmaceutical agents for therapeutic purposes.

(b) *Category II.* To obtain certification to prescribe and administer pharmaceutical agents for therapeutic purposes, an applicant licensed by examination to practice optometry in this Commonwealth or another jurisdiction before April 1, 1993, shall meet the following requirements:

- (1) Successful completion of a course offered on or after April 1, 1993, consisting of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes offered by an accredited optometric educational institution in the United States or Canada.

- (2) A passing score as determined by the NBEO on the TMOD taken on or after April 1, 1993]. Reserved.

**§23.202. Application procedure.**

(a) An applicant for certification under [Category 1] section 4.1(a)(1) of the Act, 63 P.S. §244.4a(a)(1), shall submit the following to the Board:

- (1) A completed application obtained from the Board together with the certification fee required by §23.91 (relating to fees).
- (2) Certification on a form provided by the Board from an accredited optometric educational institution in the United States or Canada that the applicant graduated from the institution and that a condition for the applicant's graduation was the successful completion of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes.
- (3) Certification from the NBEO that the applicant obtained a passing score on the [TMOD portion of Part II (Clinical Sciences) of the National Board Examination taken on or after April 1, 1993, or a passing score on the TMOD taken on or after April 1, 1993, or certification on a form provided by the Board from the appropriate licensing authority of another jurisdiction that the applicant obtained a passing score on a licensing examination in that jurisdiction taken on or after April 1, 1993, which required a passing score on the prescription and administration of pharmaceutical agents for therapeutic purposes at the time the applicant passed the examination] licensure examination to practice optometry which examination included the prescription and administration of pharmaceutical agents for therapeutic purposes.

(b) An applicant for certification under [Category 2] section 4.1(a)(2) of the Act, 63 P.S. §244.4a(a)(2), shall submit the following to the Board:

- (1) A completed application obtained from the Board together with the certification fee required by § 23.91.
- (2) Certification on a form provided by the Board from an accredited optometric educational institution in the United States or Canada that the applicant has successfully completed its course [offered on or after April 1, 1993,] consisting of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes.

- (3) Certification from the NBEO that the applicant has obtained a passing score on [the TMOD taken on or after April 1, 1993.] an examination on the prescription and administration of pharmaceutical agents for therapeutic purposes, which examination was prepared and administered by a qualified and approved testing organization.

(c) On and after June 6, 1998, applicants for licensure as optometrists by examination who meet the qualifications [, including a passing score on the TMOD portion of Part II (Clinical Sciences of the National Board Examination and graduation from an accredited optometric educational institution in the United States or Canada] set forth in the Act shall be certified to prescribe and administer pharmaceutical agents for therapeutic purposes without further application.

**LAWRENCE A. RAND, O.D., M.S., Petitioner v. PENNSYLVANIA STATE  
BOARD OF OPTOMETRY, Respondent**

**No. 260 C.D. 2000**

**COMMONWEALTH COURT OF PENNSYLVANIA**

*762 A.2d 392; 2000 Pa. Commw. LEXIS 604*

**September 12, 2000, Argued**

**November 13, 2000, Decided**

**November 13, 2000, Filed**

**SUBSEQUENT HISTORY:**

**[\*\*1]** Petition for Allowance of Appeal Denied August 7, 2001, Reported at: *2001 Pa. LEXIS 1701*.

**PRIOR HISTORY:**

Appealed From No. 0061-Misc-99. State Agency: State Board of Optometry.

**DISPOSITION:**

Reversed and Remanded.

**COUNSEL:**

Debra K. Wallet, Camp Hill, for petitioner.

Teresa A. Lazo-Miller, Harrisburg, for respondent.

**JUDGES:**

BEFORE: HONORABLE DAN PELLEGRINI, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Judge, HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge. President Judge DOYLE did not participate in the decision in this case.

**OPINIONBY:**

ROCHELLE S. FRIEDMAN

**OPINION:**

**[\*393]**

**OPINION BY JUDGE FRIEDMAN**

Lawrence A. Rand (Rand) appeals from the January 18, 2000 order of the State Board of Optometry (Board), which denied Rand's November 23, 1998 application to obtain certification to administer therapeutic agents. We reverse and remand.

Rand is an optometrist who has a solo part-time practice in an office in Lemoyne, Pennsylvania. He graduated from the Pennsylvania College of Optometry in May 1987 and obtained his license to practice optometry in Pennsylvania on July 23, 1987. During optometry school, Rand passed a course in the prescription of therapeutic agents, and, before his May 1987 graduation, he passed the therapeutics examination for the Treatment and Management of Ocular Diseases (TMOD).

When Rand subsequently **[\*\*2]** applied to the Board for certification to administer therapeutic agents, the Board denied the application because Rand did not meet the regulatory requirements. Rand requested a review of the decision, and the Board held a hearing on the matter on May 12, 1999. The Board denied his request for certification in a January 18, 2000 memorandum opinion, stating that Rand had failed to fulfill the regulatory requirements for certification set forth in 49 Pa. Code § 23.201. n1 **[\*394]** Specifically, the Board determined that Rand failed to obtain his optometry license by examination on or after April 1, 1993 and failed to pass the TMOD on or after April 1, 1993.

n1 The regulation at 49 Pa. Code § 23.201 (emphasis added) provides:

(a) *Category 1.* To obtain certification to prescribe and administer pharmaceutical agents for therapeutic purposes, an applicant licensed by examination to practice optometry in this Commonwealth or another jurisdiction on or after April 1, 1993, shall meet the following requirements:

(1) Graduation from an accredited optometric educational institution in the United



States or Canada where a condition for graduation at the time the applicant graduated was the successful completion of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes.

(2) A passing score on one of the following examinations taken on or after April 1, 1993:

(i) The TMOD portion of Part II (Clinical Sciences) of the National Board Examination.

(ii) The TMOD...

(b) *Category 2.* To obtain certification to prescribe and administer pharmaceutical agents for therapeutic purposes, an applicant licensed by examination to practice optometry in this Commonwealth or another jurisdiction before April 1, 1993, shall meet the following requirements:

(1) Successful completion of a course offered on or after April 1, 1993, consisting of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes offered by an accredited optometric educational institution in the United States or Canada.

(2) A passing score as determined by the NBEO on the TMOD taken on or after April 1, 1993.

Rand applied for certification under 49 Pa. Code § 23.201(a), Category 1, which applies only to those who were licensed on or after April 1, 1993. We note that because he obtained his optometry license in 1987, he should have applied under Category 2. However, even if Rand chose the wrong category for his application, it will have no impact on this case.

[\*\*3]

On appeal to this court, n2 Rand contends he should not be denied certification based on the fact that he obtained his license and took the TMOD before April 1, 1993. He argues that the April 1, 1993 date inserted by the Board in 49 Pa. Code § 23.201 should be stricken as void because it is not contained in section 4.1 of the Optometric Practice and Licensure Act (Act). n3 We agree.

n2 Our scope of review of appeals from adjudications by the Board is limited to

determining whether constitutional rights were violated, whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence. See *White v. State Board of Optometry*, 682 A.2d 404 (Pa. Cmwlth. 1996).

n3 Act of June 6, 1980, P.L. 197, added by section 4 of the Act of October 30, 1996, P.L. 721, as amended, 63 P.S. § 244.4a.

The regulation at 49 Pa. Code § 23.201 is a legislative regulation enacted pursuant to section 3 of the Act, 63 P.S. § 244.3. n4 Thus, to determine its validity, [\*\*4] we must analyze whether it is (a) within the legislative grant of power under the Act, (b) issued pursuant to proper procedure, and (c) reasonable. See *Pennsylvania Human Relations Commission v. Uniontown Area School District*, 455 Pa. 52, 313 A.2d 156 (1973). The regulation fails under the first prong of the test because it exceeds the legislatively granted power, so it will not be necessary to examine the second and third prongs.

n4 We recognize that there is a distinction between legislative and interpretive regulations. See *Pennsylvania Human Relations Commission v. Uniontown Area School District*, 455 Pa. 52, 313 A.2d 156 (1973). However, in this case, 49 Pa. Code § 23.201 is a legislative regulation because it was properly enacted pursuant to the Commonwealth Documents Law and because it establishes a binding standard of conduct pursuant to a grant of legislative power by the General Assembly. See *id.*; *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 551 Pa. 605, 712 A.2d 741 (1998).

[\*\*5]

In section 3 of the Act, 63 P.S. § 244.3(14), the legislature granted the Board power "to promulgate all rules and regulations necessary to carry out the purposes of this act." The purpose of section 4.1 of the Act n5 is to ensure that certified optometrists possess up-to-date knowledge with respect to the prescription and administration [\*\*395] of pharmaceutical agents for therapeutic purposes. Thus, section 4.1(a)(1) of the Act requires: (1) graduating from an accredited school of optometry; (2) completing at least 100 hours of study in the prescription and administration of pharmaceutical agents for therapeutic purposes; and (3) passing a licensing exam that included questions about the prescription and administration of pharmaceutical agents

for therapeutic purposes. In addition, to maintain their authority to prescribe and administer therapeutic agents, subsection 4.1(b) requires optometrists to take continuing education courses in this area.

n5 Section 4.1 of the Act, 63 P.S. § 244.4a, (emphasis added) provides:

(a) In addition to its other powers and duties under this act, the board shall have the power and the duty to certify qualified licensees to prescribe and administer pharmaceutical agents for therapeutic purposes as defined in the amendatory act. To obtain such certification, a licensee shall submit an application to the board on a form provided by the board showing to the satisfaction of the board that the licensee has either:

(1) graduated from an accredited school of optometry and as a condition for graduation has successfully completed a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes and has passed a licensure examination to practice optometry which examination included the prescription and administration of pharmaceutical agents for therapeutic purposes; or

(2) completed a board-approved course of a minimum of 100 hours in the prescription and administration of pharmaceutical agents for therapeutic purposes and has passed an examination on the prescription and administration of pharmaceutical agents for therapeutic purposes...

(b) In order to maintain such authority, the licensee shall, as part of the continuing education required for renewal of a license under this act, complete such additional study in the prescription and administration of pharmaceutical agents for therapeutic purposes.

[\*\*6]

Here, the Board contends the April 1, 1993 testing date required in 49 Pa. Code § 23.201 is necessary to ensure that certified optometrists possess up-to-date knowledge about the prescription and administration of pharmaceutical agents for therapeutic purposes. However, we disagree with this reasoning. We note that April 1, 1993 is a date frozen in time. In fact, those certified optometrists who passed the test on April 1,

1993, would be seven years behind the current knowledge, unless they have fulfilled their continuing education requirements since then. Therefore, the Board's insertion of this date into the regulation does nothing to advance the intent of the Act, which is to ensure the optometrists' knowledge regarding pharmaceutical agents is current. Indeed, the date is totally unnecessary because the continuing education requirements serve to ensure that the optometrists' knowledge is up-to-date. n6

n6 Pursuant to 49 Pa. Code § 23.82(a), optometrists are required to renew their licenses every two years. Optometrists who are licensed to prescribe and administer pharmaceutical agents for therapeutic purposes must fulfill six hours of continuing education coursework in that area. If optometrists fail to comply with this regulation, they may have their license placed in an inactive status and be prohibited from practicing until they meet the license renewal criteria.

[\*\*7]

Based on the foregoing, this court concludes that the Board's insertion of the April 1, 1993 test date requirement in 49 Pa. Code § 23.201 exceeds the grant of legislative power in sections 3 and 4.1 of the Act and is, therefore, invalid and unenforceable. Accordingly, because the hearing examiner erroneously concluded that the regulation was properly within the grant of authority established by the legislature in the Act, we reverse and remand the case to the Board for further consideration of Rand's application for certification. The Board is hereby ordered to examine Rand's application within the next twenty days to determine whether he meets the statutory requirements for certification contained in 63 P.S. § 244.4a.

ROCHELLE S. FRIEDMAN, Judge

President Judge Doyle did not participate in the decision in this case.

ORDER

AND NOW, this 13th day of November, 2000, the order of the Pennsylvania State Board of Optometry (Board) dated January 18, 2000 is hereby reversed, and this case is remanded to the Board for further proceedings in accordance with this opinion.

Jurisdiction relinquished.  
ROCHELLE S. FRIEDMAN, Judge



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
STATE BOARD OF OPTOMETRY

Post Office Box 2649  
Harrisburg, Pennsylvania 17105-2649  
(717) 783-7155

May 1, 2002

The Honorable John R. McGinley, Jr., Chairman  
INDEPENDENT REGULATORY REVIEW COMMISSION  
14<sup>th</sup> Floor, Harristown 2, 333 Market Street  
Harrisburg, Pennsylvania 17101

Re: Final Regulation with Notice of Proposed Rulemaking Omitted  
State Board of Optometry  
16A-5210: Therapeutic Certification

Dear Chairman McGinley:

Enclosed is a copy of a final regulation with notice of proposed rulemaking omitted of the State Board of Optometry pertaining to therapeutic certification.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Reto".

Steven Reto, O.D., Chairperson  
State Board of Optometry

SR/TLM:kmh

Enclosure

cc: John T. Henderson, Jr., Chief Counsel  
Department of State  
David M. Williams, Acting Commissioner  
Bureau of Professional and Occupational Affairs  
Joyce McKeever, Deputy Chief Counsel  
Department of State  
Philip Zarone, Regulatory Counsel  
Department of State  
Herbert Abramson, Senior Counsel in Charge  
Department of State  
Teresa Lazo-Miller, Counsel  
State Board of Optometry  
State Board of Optometry

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT**

<b>I.D. NUMBER:</b>	16A-5210
<b>SUBJECT:</b>	State Board of Optometry - Therapeutic Certification
<b>AGENCY:</b>	DEPARTMENT OF STATE
<b>TYPE OF REGULATION</b>	
<input type="checkbox"/> Proposed Regulation	
<input type="checkbox"/> Final Regulation	
<input checked="" type="checkbox"/>	Final Regulation with Notice of Proposed Rulemaking Omitted
<input type="checkbox"/> 120-day Emergency Certification of the Attorney General	
<input type="checkbox"/> 120-day Emergency Certification of the Governor	
<input type="checkbox"/> Delivery of Tolled Regulation	
a.	With Revisions
b.	Without Revisions

RECEIVED  
2002 MAY -1 AM 11:52  
REGULATORY REVIEW COMMISSION

FILING OF REGULATION		
DATE	SIGNATURE	DESIGNATION
5-1-02	<i>Lori A. Clark</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
5/1/02	<i>Sammy Weaver</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
5/1/02	<i>E. Regan</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
5-1-02	<i>Mary Mummert</i>	ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU

April 11, 2002