

THOMAS P. GANNON, MEMBER
MAIN CAPITOL BUILDING
HOUSE BOX 202020
HARRISBURG, PENNSYLVANIA 17120-2020
PHONE: (717) 783-6430
FAX: (717) 783-0083

DISTRICT OFFICE:
219 MORTON AVENUE
FOLSOM, PENNSYLVANIA 19033
PHONE: (610) 461-5543



House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

CHAIRMAN
PROFESSIONAL LICENSURE COMMITTEE

RECEIVED

2005 JAN -5 PM 3:08

OFFICE OF LEGISLATIVE
REVIEW COMMISSION

Original: 2323

January 5, 2004

Steven J. Reto, O.D.
Chairperson
State Board of Optometry
Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649

Re: Regulation 16A-528, final rulemaking of the State Board of Optometry relating to general revisions -- comments with respect to the board's December 14, 2004, revision

Dear Dr. Reto:

We are submitting this letter in response to the board's proposed re-draft of Regulation 16A-528 received by our respective executive directors, Ms. Harr and Ms. Dalton, on December 14, 2004. Please note that our comments have to do with drafting issues.

We respectfully request that the board consider our comments about drafting. Our only motivation is to ensure that the words on the page effectuate the intent of the board with respect to policy.

Comments:

1. Section 23.3(10), treatment of the lacrimal system:
There is a drafting error with respect to the word "prove." It should read "probe."
2. Section 23.3(12), ultrasound examination of the eye and orbit.
The text of the re-draft reads:
"Ultrasound examination of the eye and orbit. An optometrist may perform intraocular lens calculations when the optometrist is acting with physician involvement in accordance with Section 21 of the Medical Practice Act, 63 P.S. 422.21. An optometrist may not make final selection of lens implant power."

This language is different from that which the House Professional Licensure Committee received from the board in its final rulemaking package dated October 1, 2004. In the October 1st package, the portion on ultrasound examinations stated:

“Ultrasound examination of the eye and orbit including A-scans, with or without intraocular lens calculations, and B-scans.”

There are a number of unanswered questions in Section 23.3(12) found in the December 14, 2004 revision. For example, are A-scans and B-scans included in “ultrasound examination of the eye and orbit” as set forth in Section 23.3(12)? What is the board’s policy with respect to A-scans and B-scans, i.e., can an optometrist perform A-scans and B-scans on his own or is physician involvement a condition precedent to performance of these scans?

Further, physician involvement only applies to “intraocular lens calculations” and not “ultrasound examinations of the eye and orbit.” If the board intends to provide that an optometrist may not perform an ultrasound examination without physician involvement, then this language does not effectuate the board’s intent. If it is the board’s intent to condition ultrasound examinations on physician involvement, then we suggest that this paragraph be rewritten so that it states something like, “Ultrasound examinations of the eye and orbit, including intraocular lens calculations, if the optometrist...”

With respect to the language about physician involvement, (“An optometrist may perform intraocular lens calculations when the optometrist is acting with physician involvement in accordance with Section 21 of the Medical Practice Act, 63 P.S. 422.21”), we submit that this reference will not effectuate the board’s intent because this language applies to allopathic physicians only. The language of Section 21 does not apply to osteopathic physicians. Indeed, Section 21 states, “In the event the law, including this act, conditions a person’s authorization to perform one or more medical services upon medical doctor involvement...” The definition of “medical doctor” in Section 2 of the Medical Practice Act limits that term to allopathic physicians.

There is no similar provision with respect to physician involvement found in the Osteopathic Medical Practice Act. In fact, Section 17 of the Osteopathic Medical Practice Act states, “The provisions of this act shall not apply either directly or indirectly, by intent or purpose, to affect the practice of optometry...” If there were, such a reference could simply be added and both allopathic and osteopathic physicians would be covered.

Consequently, we recommend that the language of Section 23.3(12) be re-drafted to: (1) clearly and affirmatively state the acts that an optometrist may perform only after consultation with and at the direction of a physician, and (2) include a definition of “physician,” with that definition meaning both an allopathic physician and an osteopathic physician.

Finally, just as Section 21 of the Medical Practice Act of 1985 states, Section 23.3(12) should also state that failure to act without physician involvement with respect to those acts enumerated by the board is unprofessional conduct and shall subject the optometrist to disciplinary action.

3. Section 23.3(15), interpreting and reporting of angiographic studies.

The text of the re-draft reads:

“Interpreting and reporting of angiographic studies of ocular vasculature and blood flow. An optometrist may not administer or order the administration of intravenous materials.”

The board’s comment to this paragraph states, **“Under the currently-proposed language, an optometrist could only interpret or report an angiographic study of ocular vasculature at the request of the ordering physician.”**

Since there is no language in Section 23.3(15) requiring physician involvement with respect to interpreting or reporting an angiographic study, we respectfully disagree with the board’s position about the legal effect of this language. Because the board has stated its position in the comment that an optometrist may not order an angiographic study and may only interpret or report such a study at the request of the ordering physician, it makes sense that the language in Section 23.3(15) clearly reflect that policy.

Consequently, we recommend that Section 23.3(15) state that an optometrist may not order an angiographic study of ocular vasculature or blood flow and may only interpret or report such a study at the request of the ordering physician. Finally, as with Section 23.3(12) of the board’s December 14th revision and in conformity with Section 21 of the Medical Practice Act of 1985, Section 23.3(15) should state that failure to act without physician involvement is unprofessional conduct and will subject the optometrist to disciplinary action.

4. Section 23.64(c)(1), withdrawal of service.

The text of the re-draft reads:

“The optometrist shall notify the patient, in writing, that the optometrist is terminating the professional relationship and the reasons for the termination, and provide the patient with at least two months time and reasonable assistance to allow the patient to obtain necessary replacement care.”

There are problems with this language from a drafting perspective. The intent of the board, as we understand it, is to place a duty on the optometrist who has terminated the professional relationship to: (1) continue care of a patient for at least 60 days, and (2) provide assistance in obtaining alternate care.

We believe the December 14th revision will not effectuate the board’s intent of placing an affirmative duty on an optometrist to continue care for at least 60 days and to assist the patient in obtaining care from another optometrist. At best, the duty of continued care is implied. At worst, an optometrist will read that verbiage and be confused about the duty he owes to the patient after termination and which acts will subject him to disciplinary action.

In addition, the phrase “at least two months time” is confusing. As some months are comprised of 28 days, 30 days, and 31 days, (not to mention a leap year when the month of February is comprised of 29 days), this language will lead to different time periods in

different cases, making it difficult for the board, members of the profession, not to mention the public, to determine if the necessary time period has elapsed.

Consequently, we recommend that this paragraph be drafted so that a duty of continued care is clearly imposed on the optometrist who terminates the professional relationship. Further, we recommend that this paragraph use days, instead of months, as its unit of measurement. Hence, we respectfully suggest that this paragraph be re-written so that it says something like, "The optometrist shall provide the patient with at least 60 days of continued care after notice of termination and shall assist the patient in finding alternative care."

5. Section 23.64(c)(2), reference to statutory limit fees for medical records.

The text of the re-draft reads:

"In addition, the optometrist shall make a copy of the patient's medical record available to the patient or successor eye care provider designated by the patient, and may charge a reasonable fee consistent with the fees set forth in the Pennsylvania Rules of Evidence, 42 PaCS 6152(a)(2)(i), for copying the record."

The reference to the Pennsylvania Rules of Evidence should be stricken. Although the board is correct that Chapter 61 of Title 42 of the Pennsylvania Consolidated Statutes is entitled, "Rules of Evidence," the Pennsylvania Rules of Evidence are rules promulgated by the Pennsylvania Supreme Court. We therefore recommend that the paragraph cite 42 PaCS 6152(a)(2)(i), without reference to court rules.

Please feel free to call upon us with any questions.

Very truly yours,



Thomas P. Gannon
Majority Chairman



William W. Reiger
Minority Chairman

Cc: Honorable Basil L. Merenda
Commissioner, Bureau of Professional and Occupational Affairs

Eric P. Battisti, Director of Legislative Affairs
Department of State

Cynthia K. Montgomery, Regulatory Counsel
Department of State