

MEMORANDUM

State of Alaska Department of Law

TO:	File	DATE:	September 22, 2023
		FILE NO.:	2023200067
FROM:	Brad Sharp Assistant Attorney General Legislation and Regulations Section	TEL. NO.:	(907) 269-5100
		SUBJECT:	Board of Examiners in Optometry proposed regulation amendment concerning the practice of optometry through telehealth

Background.

The Board of Examiners in Optometry (the board) has proposed an amendment to Title 12, Chapter 48 of the Alaska Administrative Code to set requirements for an optometrist conducting a patient eye exam through telehealth.¹ Certain provisions of the regulation require that the optometrist, who is at a different location than the patient, must conduct the exam by using telehealth technology to guide and communicate with a “telehealth facilitator,” an unlicensed person conducting the exam at the patient site.² As part of our review, we looked into the legality of the proposed “telehealth facilitator” requirements.

Question Presented.

Whether the board has the statutory authority to adopt a regulation that requires a remote optometrist to direct a non-optometrist “telehealth facilitator” to conduct a patient eye exam through telehealth technology.

Brief Answer.

No, state law does not grant the board legal authority to adopt regulations concerning delegation of optometry tasks to a non-optometrist. Additionally, the practice of optometry by an unlicensed

¹ See Department of Law Matter No. 2023200067.

² The proposed regulation defines a “telehealth facilitator” as “a person at the patient site trained in the use of telehealth technology and trained to assist a client in understanding and using the technology at the direction of the licensee.” 12 AAC 48.370(d) (note that while this definition does not facially describe a *non-optometrist’s* conduct of an exam at the direction of a remote optometrist, The discussions with the board chair and agency staff during review has confirmed this as the intent).

person is prohibited by law. Therefore, the “telehealth facilitator” provisions of the proposed regulation must either be withdrawn by the board or disapproved by the Department of Law.

Discussion.

Regulations adopted by the board must comply with the state’s Administrative Procedure Act (APA).³ The APA requires that for a regulation to be effective, it must be adopted “within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”⁴ The scope of authority to adopt a regulation may be provided by the express or implied terms of a statute, so long as the regulation is consistent with the statute it interprets, implements, or makes specific.⁵ If a regulation is not compliant with the standards set by the APA, the Department of Law must disapprove that regulation.⁶ When only certain provisions of a proposed regulation are noncompliant, only those provisions require disapproval.⁷

Our review was unable to identify any statutory authority that would allow the board to adopt a regulation providing for the delegation of optometry tasks. Further, we found no statutory exception to overcome the statutory prohibition against the practice of optometry by an unlicensed person. Accordingly, the provisions of the proposed regulation that concern an optometrist’s remote direction of a non-optometrist “telehealth facilitator” are not compliant with the APA and must be disapproved by the Department of Law or withdrawn by the board. This conclusion is consistent with relevant legislative history and past guidance on the subject provided by the Department of Law.

A. The board lacks the legal authority to regulate an optometrist’s delegation of practice tasks to a non-optometrist “telehealth facilitator,” as the state requires that a person be licensed as an optometrist to practice optometry.

The APA requires that from the outset, a regulation must be adopted under a valid “scope of authority conferred [by the legislature].”⁸ For the board to meet this requirement, it must be able to point to an express or implied grant of authority that allows it to set standards for an optometrist’s delegation to an unlicensed person able to act in the capacity of the proposed

³ The Board of Examiners in Optometry is required to comply with the APA under AS 08.01.010(32) (Applicability of chapter) and AS 08.01.090 (Applicability of the Administrative Procedure Act).

⁴ AS 44.62.020.

⁵ AS 44.62.030.

⁶ See AS 44.62.060(b)(2) (requiring the Department of Law Regulations Attorney to review each proposed regulation for legal compliance); see also AS 44.62.100(a)(3) (requiring that a regulation filed with the lieutenant governor complies with the APA).

⁷ See *Drafting Manual of Administrative Regulations*, 109 (23rd Ed., 2022) (“the regulations attorney... may disapprove the regulation, in whole or in part”).

⁸ AS 44.62.020 (“Authority to adopt, administer, or enforce regulations.”).

“telehealth facilitator.”⁹ Here, the authority relied upon must be specific, as the state requires under AS 08.72.110 that “[a] person may not practice, attempt to practice, or offer to practice optometry without first obtaining a license from the board.”¹⁰ After a review of state law, our assessment is that the proposed “telehealth facilitator” provisions lack the requisite statutory authority and are therefore invalid under the APA.

A review of the relevant law begins at AS 08.02.130, which provides that “[a] health care provider licensed in this state may provide health care services within the health care provider’s authorized scope of practice... through telehealth.” This language grants state health care boards with general authority to adopt regulations concerning telehealth, but does not confer authority to a health care provider to delegate practice to a non-practitioner or to the boards to regulate the same.¹¹

We next turn to AS 08.72 to identify a statute that either places delegation of professional tasks within an optometrist’s “authorized scope of practice” or that authorizes the board to regulate delegation by an optometrist generally. No statute was identified for either case.¹² In fact, only two statutes in the whole of Title 8 contemplate any form of delegation by an optometrist: one authorizing an optometrist to delegate “dispensing optician tasks” to a person who is not a licensed dispensing optician or registered apprentice,¹³ and another authorizing an optometrist to “delegate dispensing optician tasks to an apprentice or assistant”.¹⁴ However, the language in both statutes concerns only “dispensing optician tasks,” and is inapplicable to the delegation of optometry tasks.

⁹ AS 44.62.030.

¹⁰ See *Frank v. State*, 97 P.3d 86, 91 (Alaska App. 2004) (if a regulation conflicts with a statute, the regulation must yield).

¹¹ Note, a “health care provider” includes an optometrist under AS 08.02.130(j)(1)(A).

¹² Note, the absence of statutory authority for the board to regulate an optometrist’s delegation of practice tasks is atypical. Virtually all comparable professions organized under Title 8 of the Alaska Statutes are subject to either an express grant of delegation authority (see AS 08.36.346 (dentistry); AS 08.54.635 (big game guides and transporters); AS 08.64.106 (physicians, podiatrists, osteopaths, and physician assistants); AS 08.68.805 (nursing)) or an implied grant of authority for the respective board to regulate delegation (see AS 08.98.050(a)(9) (directing the Board of Veterinary Examiners to “establish, by regulation, educational and training requirements for the delegation of duties by veterinarians licensed under this chapter to veterinary technicians”; AS 08.63.050(a)(7) (directing the Board of Marital and Family Therapy to “establish standards for supervisors and supervision under this chapter”); AS 08.65.030(a)(7) (directing the Board of Certified Direct-Entry Midwives to “adopt standards for... apprentice programs”); and AS 08.95.030(2)(D) (directing the Board of Social Workers to “adopt regulations “establishing standards for supervisors and for supervision”)).

¹³ AS 08.71.163.

¹⁴ AS 08.71.165.

Absent a grant of authority by the legislature providing for the delegation of optometry tasks, the board's "telehealth facilitator" provisions fail to satisfy the statutory authority requirement set by the APA.¹⁵ Moreover, because AS 08.72.110 expressly prohibits the practice of optometry in the state without a license, the "telehealth facilitator" provisions of the proposed regulation propose an impermissible conflict with state law. Accordingly, the "telehealth facilitator" provisions do not meet the legal standard for the adoption of regulations set by the APA and if the board does not withdraw the proposed provisions, we are required to disapprove them. Note that those provisions of the board's regulation that do not concern the "telehealth facilitator" may still be approved.

B. The conclusion that the board lacks statutory authority to regulate delegation is supported by the legislative history for AS 08.72.

The legislative history for AS 08.72 provides insight into how the board ended up as the only professional licensing board without statutory authority to regulate the delegation of practice tasks within its profession. Committee testimony and the history of amendments to AS 08.72 suggest that the board's lack of authority is the result of efforts by the Legislature to address industry contentions focused on a 1988 change in the law to require that dispensing optician apprentices be licensed by the state.¹⁶ Because this shift in the law triggered industry concerns that focused on an optometrist's or dispensing optician's delegation of *dispensing optician tasks*

¹⁵ AS 44.62.020; 44.62.030.

¹⁶ See § 4 ch 51 SLA 1988 (introducing the requirement that optician apprentices must register with the state as a condition of employment); see also House State Affairs Committee, Hearing on HB 405, 1831 (Jan. 30, 1996) ("CATHERINE REARDON, Director, Central Office, Division of Occupational Licensing, Department of Commerce and Economic Development, said she did not want to overemphasize the conflict between the optometrists and the dispensing opticians, but over the years there had been the discussion if optometrists had to employ opticians or apprentices in their office if they wanted staff to dispense glasses and contacts... She said there were two bills that exempted the employees of optometrists from the requirement in previous sessions. The bills did not pass, however.") available at <https://www.akleg.gov/basis/Meeting/Detail?Meeting=HSTA%201996-01-30%2008:00:00>; see also House Labor and Commerce Committee, Hearing on SB 270, 1137 (Apr. 12, 2002) (Pat Davidson, a state legislative auditor, asked the committee, "because [the assistants are] the apprentices, it's the dispensing-opticians statutes and regulations that define how these people are to be supervised. When you move them out of being apprentices of the Dispensing Optician Board, does that mean the direct supervision needs to be defined in the statutes for... the optometrists..?" Roberta Rawcliffe, the publicly appointed member of the Board of Dispensing Opticians, addressed inherent limitations to dispensing optician apprentices, noting "[t]he issue comes down to what you call [the apprentices] and what are their duties... if all they want to do is clerical work or help customers choose frames, or hand over lenses which have already been checked out by the optician or the licensed apprentice I have, personally, no problem with that.") available at <https://www.akleg.gov/PDF/22/Bills/SB0270F>.

to dispensing optician apprentices (and later, unlicensed persons), legislative policy evolved on only that subject.¹⁷

This leaves optometry today as an outlier- the state's other board-regulated professions have legal authority to delegate *within* those professions, whereas optometry's authority exclusively concerns the delegation of tasks *outside* of the profession (*i.e.*, delegation of dispensing optician tasks under AS 08.71).¹⁸ The result is that the Legislature has not expanded the board's authority to regulate delegation by an optometrist to a non-optometrist outside of "dispensing optician tasks" alone.

C. Past Department of Law guidance supports the conclusion that, absent a specific statutory exemption, the "telehealth facilitator" provisions are prohibited by law.

The conclusion of this memorandum is consistent with our past guidance on the subject. In 1991, we provided a memorandum in response to a letter from the director of the Division of Occupational Licensing that requested legal advice on various questions concerning delegation by an optometrist.¹⁹ The division's letter asked whether an employee of an optometrist may perform dispensing optician tasks "under the supervisory and liability umbrella of a doctor of optometry," and whether the board has the authority under AS 08.72 to delegate "certain health care procedures to ancillary personnel in the absence of any specific statutory acknowledgement of optometric assistants."²⁰ To both inquiries, our response was "no."²¹

Our 1991 advice explained that because the Legislature has defined each licensed profession and its exemptions under Title 8 of the Alaska Statutes, a board cannot create a new class of licenses within a profession "in the absence of a specific statute creating that class of licenses."²² The 1991 memorandum uses physician assistants as a comparative example- a specific statute authorizes the profession of physician assistants, creating exceptions to the state's physician licensing requirements, whereas no statute recognizes an optometrist's assistant.²³ But the absence of a statute recognizing the optometrist's assistant occupation is a limitation, not an authorization.^{24, 25} Because a license is required to perform dispensing optician tasks, we advised

¹⁷ *Id.*

¹⁸ *See* fn. 15, *supra*.

¹⁹ *Letter to Ann Boudreaux*, 1991 Alaska Attorney General Reports and Opinions 357 (1991).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

the 1991 board that it could not regulate an optometrist's delegation of dispensing optician tasks to an optometrist's assistant without a specific statute exempting optometrist's assistants from the dispensing optician licensing requirements.

Our 1991 memorandum to the board is squarely applicable to today's question regarding the delegation of optometry tasks to a "telehealth facilitator." Like with the dispensing optician practice, to practice as an optometrist requires a license.²⁶ And just like with the "optometrist's assistants" and "ancillary personnel" inquired after by the board in 1991, the Legislature has not provided a specific statutory exception to authorize a "telehealth facilitator" or other analogous class of unlicensed persons to practice optometry without a license.²⁷ Accordingly, the board's proposed regulatory provisions for a non-optometrist "telehealth facilitator" to perform optometry tasks at the direction of an optometrist would effectively mean the board has impermissibly created a new class of license under Title 8 of the Alaska Statutes.

Conclusion.

For the forgoing reasons, the provisions of the board's proposed regulation that concern an optometrist delegating practice tasks to a non-optometrist "telehealth facilitator" via telehealth technology must be withdrawn by the board or be disapproved as required under the APA. Other provisions of the regulation that do not concern a "telehealth facilitator" and are compliant with the APA may proceed in accordance with our ongoing review.

²⁵ See generally, 1962 Op. Att'y Gen. No. 17 (Sep. 24) (once the state has legislated the practice of a profession, a person's right to practice that profession is no longer "unfettered" and must meet the limitations set in state law).

²⁶ AS 08.72.110.

²⁷ See, e.g., AS 08.71.163; 08.71.165.