



Meeting Minutes
Regulatory Advisory Panel –
Scope Expansion
August 5, 2022

Call to Order

The August 5, 2022, Board of Optometry RAP-Scope Expansion Meeting was called to order at 12:01 p.m. at the Department of Health Professions (DHP), Perimeter Center, 9960 Mayland Drive, 2nd Floor, Board Room 3, Henrico, Virginia 23233.

Chair for the RAP

Devon Cabot, Citizen Member of the Board of Optometry

Members Present

Jeffrey Michaels, OD, Virginia Optometric Association Representative
Lisa Wallace-Davis, OD, President, Board of Optometry
Harold Bernstein, MD, Medical Society of Virginia Representative
Jonathan Noble, OD
Jen Weigel, OD

Staff Present

Leslie Knachel, Executive Director
Erin Barrett, Senior Policy Analyst
Laura Jackson, Board Administrator
Laura Paasch, Licensing & Operations Specialist

Public Present

Bo Keeney, Keeney Group
Lisa Gontarek, Virginia Optometric Association
Amanda Umlandt
Cal Whitehead
Trevor Mancuse

Establishment of Quorum

With six RAP members present, a quorum was established.

Mission Statement

Ms. Cabot read the mission statement and thanked the RAP members for participating.

Ordering of Agenda

Ms. Cabot opened the floor to any edits or corrections regarding the agenda. Hearing none, the agenda was accepted as presented.

Public Comment

Bo Keeney, Amanda Umlandt and Lisa Gontarek provided public comment about the draft regulations included in the agenda package related to the laser surgery certification process. Written comments submitted by the VOA are attached to the minutes.

Discussion Items

Devon Cabot stated that the RAP's task is to assist the Board of Optometry in meeting the legislative mandate to promulgate regulations establishing criteria for certification of an optometrist to perform certain laser surgery procedures.

Ms. Knachel and Ms. Barret provided a review of the legislation expanding the scope of practice for TPA-certified optometrists and the regulatory promulgation process.

Ms. Barrett reviewed the draft regulations. The following changes were adopted:

- Dr. Noble made a motion under *18VAC105-20-90 Requirements for proctoring, A. 1, 2, and 3* to not specify the number of required proctored sessions. Dr. Wallace-Davis seconded the motion. The motion carried with 5 aye and 1 abstention from Dr. Bernstein.
- Dr. Michaels made a motion under *18VAC105-20-80 Requirements for laser surgery certification, A. 3.* to add that proctored sessions may be obtained during educational training. Dr. Noble seconded the motion. Dr. Michaels requested the motion be withdrawn.

Dr. Noble moved to add a new section under *18VAC105-20-80. Requirements for laser surgery certification, A. 4. b.,* stating proctored sessions may be obtained during education training. Dr. Wallace-Davis seconded the motion. The motion carried with 5 aye and 1 abstention from Dr. Bernstein.

- Dr. Michaels made a motion to strike *B* under *18VAC105-20-80. Requirements for laser surgery certification.* Dr. Noble seconded the motion. The motion carried with 5 aye and 1 abstention from Dr. Bernstein.
- Dr. Michaels made a motion to strike out paragraph *B. 2.* under *18VAC105-20-90 Requirements for proctoring.* The motion was seconded by Dr. Wallace-Davis. The motion carried with 5 aye and 1 abstention from Dr. Bernstein.

- Dr. Michaels made a motion to add new paragraph *B. 2.* under *18VAC105-20-90 Requirements for proctoring*, that a laser surgery certified optometrist may proctor sessions within the Commonwealth when a model eye is used. Dr. Noble seconded the motion. The motion carried with 5 aye and 1 abstention from Dr. Bernstein.
- Dr. Michaels made a motion to strike *1 and 2* under *18VAC105-20-110 Quality assurance review process* and to include a random yearly audit after July 1, 2025. The motion was seconded by Dr. Noble.

Dr. Noble made an amended motion to strike only *2* under *18VAC105-20-110 Quality assurance review process*, and conduct random audits. The motion was seconded by Dr. Wallace-Davis. The motion carried with 5 aye and 1 nay from Dr. Michaels.

A vote on the main motion with the amendment was taken. The motion carried with 5 aye and 1 nay from Dr. Michaels.

A comment was made that the definition of "proctored session" would require a change to the regulatory reference, which was noted by staff.

- Dr. Noble made a motion to forward the recommended draft regulations to the full board. Dr. Wallace-Davis seconded the motion. The motion carried with 5 aye and 1 abstention from Dr. Bernstein.

Ms. Knachel stated that the recommended changes to the draft regulations would be forwarded to the RAP for review to ensure all changes were made.

Adjournment

Hearing no objections, Ms. Cabot adjourned the meeting at 3:01 p.m.



August 5, 2022

Lisa Wallace-Davis, O.D.
President, Board of Optometry
9960 Mayland Drive, Suite 300
Henrico, VA 23233

Re: Board of Optometry Regulatory Advisory Panel

Dear Dr. Wallace-Davis,

These comments are submitted on behalf of the Virginia Optometric Association (the “VOA”).

Background

Chapters 16 and 17 of the 2022 Regular Session passed the General Assembly with an overwhelming vote in the House and Senate. The legislation was well-lobbied by the VOA, and passionately opposed by Medical Society of Virginia (“MSV”) and the Virginia Society of Eye Physicians and Surgeons (VSEPS). Consequently, the legislature was well-aware of the respective positions of the interested parties when it adopted the legislation.

In addition to reorganizing the scope of practice section in § 54.1-3201, the legislation expands the scope of practice for doctors of optometry to perform a three specific laser surgery procedures upon certification by the Board of Optometry (the “Board”).

The Requirements of the Statute

Section 54.1-3225 obligates the Board to certify an optometrist to perform certain laser surgery procedures “upon submission by the optometrist of evidence satisfactory to the Board that he” has (i) the requisite certification pursuant to § 54.1-3222, and (ii) “satisfactorily completed such didactic and clinical training programs provided by an accredited school or college of optometry that includes training in the use of lasers for the medically appropriate and recognized treatment of the human eye as the Board may require.”

The statute clearly limits who may provide an acceptable training program and further requires the program to include training in the use of lasers for the appropriate treatment of the human eye. The Board’s role in this process is to verify that a) such a program contains the curriculum that meets the requirement of the statute (i.e. the appropriate use of lasers to treat the eye and a clinical component to the training program), and b) the course is provided (or proctored) by an accredited school or college of optometry.

It is this statutory underpinning that the Board is then granted the authority and direction to promulgate regulations, pursuant to the second enactment clause, to implement this statutory charge and to develop and oversee the application and certification process. The legislation contains three enactment clauses that should be read together to inform the Board as to the topics to address in its regulations. However, the grant of authority in the second, third and fourth enactment clauses is not a license for the Board to accomplish through the regulatory process that which was not accomplished by certain advocates through the legislative process.

All three enactment clauses work together to ensure that Board clearly states the procedural requirements that must be met to successfully process an application to perform these procedures and the reporting requirements that must be met by an optometrist upon obtaining certification to perform laser surgery.

The Appropriateness of the Draft Regulations

Section 18 VAC 105-20-80(1)-(3) of the proposed draft regulations is consistent with the direction given to the Board by the statute and enactment clause two. However, the proposals to require the passing of a national exam (18 VAC 105-20-80(A)(4)), or in the alternative, the requirement to perform a set number of procedures to be supervised by a Virginia a licensed ophthalmologist (18 VAC 105-20-90) exceeds the authority granted to the Board

The grant of authority to the Board to develop regulations is not broader than the confines of the statute. To the extent the proposals to require passage of a national exam or the supervision of a certain number of procedures by a Virginia licensed ophthalmologist rely upon on perceived authority from the charge given to the Board in the second enactment clause, such reliance is misplaced.

First, neither the plain language of the statute nor the second enactment clause clearly state such requirements. When the General Assembly intends to require an examination or a specific examination in the context of a health profession, it knows how to clearly state such a requirement. *See* § 54.1-3211 (“The Board shall set the necessary standards to be attained in the *examinations* to entitle the candidate to receive a license to practice optometry.... The Board may determine a score that it considers satisfactory on any written *examination of the National Board of Examiners in Optometry.* ”); § 54.1-2709(B)(“*(iii) has passed all parts of the examination given by the Joint Commission on National Dental Examinations; (iv) has successfully completed a clinical examination acceptable to the Board*”); § 54.1-2931(A)(“ *The examinations of candidates for licensure to practice medicine and osteopathy shall be those of the National Board of Medical Examiners, the Federation of State Medical Boards, the National Board of Osteopathic Medical Examiners, or such other examinations as determined by the Board. The minimum passing score shall be determined by the Board prior to administration of the examination.*”); § 54.1-2931(B)(“*The examination of candidates for licensure to practice chiropractic shall include the National Board of Chiropractic Examiners Examinations and such other examinations as determined by the Board. The minimum passing score shall be determined by the Board prior to administration of the examination.*”); and § 54.12931(C)(“*The examination of candidates for licensure to practice podiatry shall be the National Board of Podiatric Medical Examiners examinations and such other examinations as determined by the Board. The minimum passing score shall be determined by the Board prior to administration of the examination.*”) Emphasis added.

Second, such authority cannot be inferred or implied by the direction given to the Board in the second enactment clause. The second enactment clause of the legislation directs the Board to adopt regulations “establishing criteria for certification of an optometrist to perform certain” laser eye surgery procedures. The second enactment clause then outlines what the content of those regulations should address. The regulations that the Board is authorized to promulgate cannot override the provisions of § 54.1-3225.

Had the General Assembly desired to require the passing of an exam as proposed in the draft regulations, it could have explicitly made that requirement part of the legislation as it has done in other contexts. Instead, the General Assembly vested the Board with the obligation to verify that an applicant satisfactorily completed a training program from an accredited school or college of optometry “as the Board may require.” The Board is authorized to require sufficient evidence that an applicant has “satisfactorily completed” a training program offered by an appropriate institution.

The authority to promulgate regulations as provided in the second enactment clause does not expand the Board’s authority to issue regulations beyond what is necessary to determine that an appropriate course (from an accredited institution) was completed by the applicant.

Sections (iv) and (v) of the second enactment clause relate specifically to the requirement imposed by § 54.1-3225(A)(2). The curriculum and application criteria proposed in 18 VAC 105-20-80(A)(1)-(3) is consistent with section (iv) of the second enactment clause. However, the reference to “proctoring” in section (v) of the enactment clause is not referring to the proctoring of procedures by a Virginia licensed ophthalmologist. This section concerns the proctoring of the examination associated with completion of the training program required by 3225(A)(2).

Moreover, the language does not require the proctoring of any exam or procedure by an ophthalmologist. As such, such a requirement in the draft regulations (18 VAC 105-20-90(B)) goes beyond what the Board is authorized to promulgate.

Optometrists are independently licensed professionals. Had the General Assembly intended to require supervision of an ophthalmologist as a path to obtain certification, it would have clearly stated that requirement in the legislation. This is particularly true given the historical conflict concerning scope of practice between the two health professions.

The general charge of the quality assurance provision in section (vi) cannot be used as an end run around the requirements of the statute and the intent of the legislation. The quality assurance provision in section (vi) of the second enactment clause is fulfilled by the reporting requirements of the third and fourth enactment clauses, which require an optometrist certified to perform laser surgery to report various aspects of his performance of the allowed procedures.

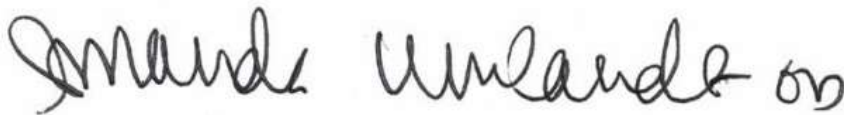
When the General Assembly intends to require supervision of optometrists by an ophthalmologist, it knows how to do clearly state that condition. *See* § 54.1-3223(A)(“In establishing standards of instruction and training, the Board shall consult with a school or college of optometry and a school or college of medicine and shall set a minimum number of hours of clinical training *to be supervised by an ophthalmologist.*”) Emphasis added. There is no similar requirement for supervision by an ophthalmologist of an optometrist for the didactic and clinical training programs for laser surgery.

In adopting this legislation, the General Assembly is presumed to have knowledge of its prior enactments, particularly when they appear within the same structure of regulation of a specific

health profession. See *Gillespie v. Commonwealth*, 272 Va. 753, 785-759, 636 S.E.2d 430, 432 (2006) (“In ascertaining legislative intent, we presume that the General Assembly, when enacting new laws, is fully aware of the state of existing law relating to the same general subject matter.” *United Masonry, Inc. v. Riggs National Bank*, 233 Va. 476, 480, 357 S.E.2d 509, 512, 3 Va. Law Rep. 2739 (1987); *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985).).

In the absence of statutory language similar to that in the TPA certification process, it is clear there is no authority for the Board to require consultation, collaboration, supervision or similar oversight of a physician over an optometrist in the context of laser surgery. The Board is not specifically authorized to require a minimum number of procedures or hours of training supervised by an ophthalmologist for laser surgery. ([Va. Code 54.1-3225\(2\)](#)). Therefore, the Board has no authority to require a minimum number of proctored sessions by an ophthalmologist.

Finally, to the extent the Board chooses to adopt regulations concerning the reporting provision in the fourth enactment clause,¹ the regulations should, like the legislation, contain an automatic expiration date. Had the General Assembly intended this reporting requirement to be of a permanent nature, it would have not set a date certain for its expiration or it would have placed the requirement in the statute. Given that the General Assembly has spoken specifically on this reporting requirement in fourth enactment clause and provided a date certain by which the requirement will expire, the Board does not have the authority to permanently impose a reporting requirement through regulation on a topic that an Act of Assembly specifically sunsets on a date certain.



Amanda Umlandt, OD, President
Virginia Optometric Association

¹ 4. That an optometrist certified to perform laser surgery pursuant to § [54.1-3225](#) of the Code of Virginia, as created by this act, shall report quarterly to the Board of Optometry (the Board) the following information: (i) the number and type of laser surgeries performed by the optometrist, (ii) the conditions treated for each laser surgery performed, and (iii) any adverse treatment outcomes associated with such procedures that required a referral to an ophthalmologist for treatment. The Board shall report annually to the Governor and the Secretary of Health and Human Resources regarding the performance of laser surgery by optometrists during the previous 12-month period and shall make such report available on the Board's website. The provisions of this enactment shall expire on July 1, 2025.