MEMORANDUM

To: Regulatory Compliance Division Director
From: Janice McCoy, Executive Director
Date: July 3, 2023
RE: 22 TAC 279.1 & 22 TAC 279.3

The rules in the Chapter 279 were reviewed as a result of the Board’s general rule review under Texas Government Code §2001.039. Notice of the review was published in the June 10, 2022, issue of the Texas Register (47 TexReg 3487). No comments were received regarding the Board’s notice of review.

The Board has determined that there continues to be a need for the rules in Chapter 279. The Board has also determined that changes to §279.1 and §279.3 as currently in effect are necessary.

The Board initially proposed amendments in the November 25, 2022, issue of the Texas Register (47 TexReg 7843), but officially withdrew those rules on April 28, 2023 (published in the May 12, 2023, issue of the Texas Register). At the April 28, 2023, Board meeting the Board adopted a new proposal for the rules outlined below (published in the May 26, 2023, issue of the Texas Register (48 TexReg 2654-2657).

Please note the Board intends to meet to discuss adoption of this rule on Friday, August 4, 2023.

To facilitate the Regulatory Compliance Division’s review of the proposed rule, the Texas Optometry Board respectfully provides answers to the following questions:

1. Briefly describe the proposed rule.
   For both rules, the Board proposes to require the optometrist or therapeutic optometrist to “examine in-person” instead of “personally make” certain findings during an initial visit. The Board proposes that the findings must be made unless prohibited by the patient’s unique condition instead of “if possible.” For contact lens examinations, the Board proposes to require the optometrist or therapeutic optometrist to personally notate why it is not possible to record the required findings. For discipline purposes, the Board proposes that charges must state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule.

2. What is the purpose of the proposed rule?
   The Board would like to better clarify what is required by Optometrists under Section 351.353 and 351.453 of the Texas Optometry Act.
3. Describe any relevant factual background to the proposed rule and the impetus for the state agency to consider rulemaking.
As mentioned above, the Board considered updating the rules after its quadrennial rule review. Additionally, in the course of inspections and complaint review, the Board has noticed that many optometrists are not comply with Section 351.353 of the Texas Optometry Act, for both in-person and telehealth exams.

4. Describe the legal authority for the proposed rule.
The amendments to 22 TAC 279.1 and TAC 279.3 are proposed under the Texas Occupations Code, §351.151, §351.353 and §351.453. The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession.

5. Describe the process that the state agency followed in developing the proposed rule, including any public hearings held, public comments invited, studies conducted, and data collected or analyzed.
The Texas Optometry Board delegated the development of the amendments to the Rules Committee. The Rules Committee has met several times to consider information and proposed amendments to this rule. The Rules Committee has consulted with legal counsel from the Office of the Attorney General’s Office regarding authority and interpretation. The agency has held two stakeholder meetings (2022 and 2023) regarding changes to Chapter 279. Finally, the agency has received public comment on the November 2022 rule publication and again on the May 2023 rule publication.

6. Describe the harm that the proposed rule is intended to address and how the proposed rule will address the harm.
Patients shall be able to receive care from a licensed optometrist at all times. In-person, comprehensive eye exams will continue to be the gold standard for patient care. However, the Board did adopt a rule (22 TAC §279.16) to allow optometrists and optometry practices may embrace the use of telehealth services in order to ensure continuity of care and access to care for all patients.

In the course of inspections and complaint review, the Board has noticed that many optometrists are not comply with §§351.353 and 351.453 of the Texas Optometry Act, for both in-person and telehealth exams. The Board is attempting to ensure that Texas patients receive high quality care from licensed Texas optometrists in compliance with the Texas Optometry Act.

7. Do any less restrictive alternatives to the proposed rule exist for addressing the same harm? If so, include a comparison of the proposed rule to the alternatives and a justification for not pursuing a less restrictive alternative. If no less restrictive alternatives exist, explain why.
The Board does not feel like the current statute provides for less restrictive alternatives given the language of §351.453 which reads: “An optometrist or therapeutic optometrist may not sign, or cause to be signed, an ophthalmic lens prescription without first personally examining the eyes of the person for whom the prescription is made.”

However, some providers may argue that the proposed language limits synchronous telehealth visits between a provider and a patient.
8. Indicate how the proposed rule affects market competition (See Section 57.105(d), Texas Occupations Code).
The Board does not feel that the proposal creates a barrier to market competition. However, many comments from telehealth providers would argue that it limits their ability to compete against traditional face to face providers.

9. Describe the specific impact that the proposed rule will have on market competition and how that effect is consistent with state policy as established by the Legislature in state statute.
See Response 8.

10. Did the state agency self-determine that the proposed rule affects market competition or did the Regulatory Compliance Division identify the proposed rule as possibly affecting market competition?
The Board does not think the rule affects market competition, but is seeking the Division’s advice.

11. Does the proposed rule relate to a question that is the subject of an opinion request pending before the Office of the Attorney General? Does the proposed rule relate to an opinion previously issued by the Office of the Attorney General?
Partially – see KP-047

12. Does the proposed rule relate to a matter on which there is pending litigation or a final court order?
Partially – the Board has several cases pending at SOAH regarding §351.353, but those deal more with the optometrist not complying with statute as a direct result of working for an ophthalmologist.

13. Is there anything else that the state agency would like the Regulatory Compliance Division to know about the proposed rule?
This rule only applies to Texas licensed optometrists and is not intended to limit or restrict services.

The rules in the Chapter 271 were reviewed by the Board's Administration and Licensing Committee in January 2023 to ensure the licensing and renewal process was efficient and effective. At the January 19, 2023, committee meeting, members voted to move forward with changes to update and modernize...
the process and to refer the proposal to the Rules Committee. At the April 27, 2023, Rules Committee meeting, the members concurred with the recommendations of the Administration and Licensing Committee and proposed the following amendments to the licensing and renewal process.

During the April 28, 2023, meeting the Board determined that there continues to be a need for the rules in Chapter 271. The Board has also determined that changes to certain rules as currently in effect are necessary. The specific rules being amended include: §271.2 Applications; §271.3 Jurisprudence Examination Administration; §271.5 Licensure without Examination; and §271.6 National Board Examination.

The amendments outlined in this proposal include non-substantive changes to all references from "board" to "Board" and from "executive director" to "Executive Director."

In §271.2 Applications, the Board proposes to amend the title of the rule to read "Applications for Licensure as Therapeutic Optometrist"; to update the documents required for licensure; to update the statutory reference to Texas Occupations Code Chapter 53 as it relates to convictions that must be reported upon application; to state that applications must be approved within one year of application submission or applicants will have to reapply; to set out requirements for applicants who are licensed in other states; and to remove arcane language related to scheduling the jurisprudence exam as the Board will allow an applicant to take the exam at any point.

In §271.3 Jurisprudence Examination Administration, the Board proposes to amend the title of the rule to read "Jurisprudence Examination"; to clarify the jurisprudence exam is an "open book" exam; to remove arcane language related to scheduling the jurisprudence exam as the Board will allow an applicant to take the exam at any point; to state that jurisprudence exam scores are only valid for one year and if an applicant fails to get licensed in that year, applicants will have to retake the exam; and to remove language related to the administration of the exam as the Board has outsourced the exam administration to another entity.

In §271.5 Licensure without Examination, the Board proposes to clarify that the rule only applies to those applicants who have not taken Part III of the National Board of Examiners in Optometry and to make other non-substantive grammatical changes and references to statute.

In §271.6 National Board Examination, the Board proposes to remove language regarding the jurisprudence exam as it is referenced in a separate rule; and to make other non-substantive grammatical changes and references to statute.

Janice McCoy, Executive Director, has determined that for the first five-year period the amended rules are in effect, there will not be fiscal implications for state and local governments as a result of amending these existing rules.

Janice McCoy, Executive Director, has determined that for each of the first five years the amendments are in effect, the public benefit is a more effective and efficient licensing and renewal system for both licensees and Board staff.

Legal counsel for the Board has reviewed the amended rules and has found them to be within the Board's authority to propose.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS ON SMALL BUSINESSES AND RURAL COMMUNITIES: There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the amendments. Since the agency has determined that the amendments to the rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT: The agency has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

GOVERNMENT GROWTH STATEMENT: During the first five years that the amended rules will be in effect, it is anticipated that the amendments will not create or eliminate a government program as no program changes are proposed. Further, implementation of the amended rules will not increase the creation of a new employee position or the elimination of an existing employee position; will not increase or decrease future legislative appropriations to the agency; will not increase or decrease fees paid to the agency; does not impact the number of individuals subject to the rule's applicability; does not positively or adversely impact the state's economy. The amendment does not create a new regulation nor does it expand, limit, or repeal an existing regulation.

PUBLIC COMMENTS: Comments on the amended rules may be submitted electronically to: janice.mccoy@tob.texas.gov or in writing to Janice McCoy, Executive Director, Texas Optometry Board, 1801 N. Congress, Suite 9.300, Austin, Texas 78701. The deadline for furnishing comments is thirty days after publication in the Texas Register.

Amendments to §271.2 Applications; §271.3 Jurisprudence Examination Administration; §271.5 Licensure without Examination; and §271.6 National Board Examination are being proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and Texas Occupations Code Chapter 351, Subchapter F - License Requirements.

No other sections are affected by the amendments.

§271.2. Applications for Licensure as Therapeutic Optometrist.

(a) The applicant shall make application furnishing to the Executive Director [executive director], on forms to be furnished by the Board [board], satisfactory evidence that the applicant [has attained the age of 21 years, and has a preliminary education equivalent to permit matriculation in the University of Texas, and that the applicant] has attended and graduated from a reputable university or college of optometry which meets with the requirements of the Board [board, or in the alternative, submit a written statement from the dean of a reputable college of optometry that the applicant is enrolled in good standing in the college and is in the final semester before graduation,] and such other information as the Board [board] may deem necessary for the enforcement of the Act.

(b) The applicant shall report all felony and misdemeanor criminal convictions as outlined under Texas Occupations Code Chapter 53 [including deferred adjudication or court ordered community or mandatory supervision, with or without an adjudication of guilt or revocation of parole, probation or court ordered supervision on the application]. Failure of an applicant to report every criminal conviction
is deceit, dishonesty and misrepresentation in seeking admission to
practice and authorizes the Board [board] to take disciplinary action
under §351.501 of the Act. An applicant is not required to report a
Class C Misdemeanor traffic violation. The applicant shall furnish
any document relating to the criminal conviction as requested by the
Board. The applicant shall also provide a complete criminal history by
submitting fingerprints to the authority authorized by the Department
of Public Safety to take the fingerprints in the form required by that
authority.

(c) In such application, the applicant shall state that the applicant
will abide by the laws of this state regulating the practice of optom-
etry and that all facts, statements and answers contained in the appli-
cation are true and correct. Such application shall be signed (manually
or digitally) and dated.

(d) [Applicants shall submit proof that the applicant is legally
entitled to the issuance of a license under federal law.] Applicants shall
submit a report of out-of-state disciplinary action prepared by an
approved national databank.

(e) Any person furnishing false information in such application
shall be denied the issuance of a license [right to take the examina-
tion], or if the applicant has been licensed before it is made known to the
Board [board] of the falseness of such information, such license shall
be subject to suspension, revocation, or cancellation in accordance with
[the Act,] §351.501 of the Act.

(f) Applications [submitted by graduates of an approved col-
lege of optometry] must contain a certified [copy of the] optometry
school transcript, which shall show the total number of hours of atten-
dance, the subjects studied, the grades or marks given, and the date of
graduation of the applicant. Applicants must also submit a copy of the
transcript from any undergraduate school attended which [A license
will not be issued until the applicant has submitted certified copies of
the transcript of record from preoptometry and optometry colleges
attended by the applicant, which certified transcript of record] shall show
the total number of hours of attendance, the subjects studied, the grades
or marks given, and the date of graduation of the applicant.

(g) The Board may require other documentation not specified
by this section be submitted with the application. All required docu-
ments [, including transcripts, license verifications, birth certifica-
tes, and criminal histories] must be received [by the executive director prior
to the date which is] within one year of application [after successful
passage of the board’s jurisprudence examination]; otherwise, the
applicant must reapply and pay the application fee [and take and pass the
board’s jurisprudence examination]. A person may apply for licensure
prior to graduation from a reputable university or college of optometry.

[(g) The completed application and examination fee must be
filed with the executive director by the first day of the month prior to
the exam. ]

(h) The application must be accompanied by a fee set by the
Board.

[(h) The fee for taking the examination shall be $150. The fee
is non-refundable and non-transferable.]

(i) If applicable, the application must furnish a certificate of
good standing from any jurisdiction where licensed or previously li-
censed. The certificate must establish that:

(1) the applicant's license has never been suspended or re-
voked;

(2) there are no pending disciplinary actions against the appli-
cant; and

(3) the applicant is presently authorized to practice therapeu-
tic optometry without restrictions.

[(i) Any applicant who is refused a license because of failure
to pass the examination shall be permitted to take a second examination
without resubmitting an application, provided:]

[(1) the applicant submits a payment of $150;]

[(2) the second examination is taken within a period of one
year from the date the examination was first taken; and ]

[(3) a written request to take the second examination and
the required fee is received by the executive director at least 30 days
prior to the date of the examination requested.]

(j) If the certificate of good standing does not establish the
items in subsection (i) of this section, the applicant will be required
to submit additional information for further Board review.

[(j) If an applicant is refused a license because of failure to
pass the second examination, the applicant must reapply and take and pass
the board’s jurisprudence examination.]

[(k) No application fee for examination will be returned to any
applicant after the application has been accepted by the board, because
of the decision of the applicant not to stand for the scheduled exami-
nation or failure for any reason to take the examination.]

§271.3. Jurisprudence Examination Administration.

(a) Every applicant [Examination] for a license to practice
therapeutic optometry in this state must take and pass a jurisprudence
exam covering the laws and rules of the Board. The laws and rules of
the Board may be referenced while taking the exam (that is, the exam
shall be considered "open book").

(b) The jurisprudence exam shall be conducted in the Eng-
lish language in writing and by such other means as the Board [board]
shall determine adequate to ascertain the qualifications of the applicant.
[Each applicant shall be given due notice of the date and place of ex-
amination. The board shall administer the jurisprudence examination
at least on a quarterly schedule.]

[(b) Prior to an examination, the executive director or a mem-
ber of the board designated by the chair shall prepare a tentative sche-
dule showing the time allotted to each examination.]

(c) [The examination shall be a written jurisprudence exami-
nation.] The passing grade on the jurisprudence written test shall be 70.
[In addition, passing scores from the National Board of Examiners in
Optometry (NBEO) Examination will be required for licensure under
§271.6 of this title (relating to National Board Examinations).]

(d) [Applicants shall not communicate any words or signs, in
person, in writing, or electronically, with another applicant while the
applicant's examination is in progress.] Applicants shall not collaborate
in any manner with any other person [, including another applicant, a
licensee, or a staff member of the board,] on examination matters while
the applicant's examination is in progress. Violations of this rule shall
subject the offender to disciplinary action.

(e) If an applicant fails to be licensed within one-year of taking
and passing the jurisprudence exam, the applicant must retake and pass
the exam in order to be licensed.

[(e) Examination materials are the property of the board and
shall not be returned to the applicant. An unsuccessful candidate may
request an analysis of such person's performance, which request must
be made in writing within 30 days after final grading.]

[(f) The board will provide reasonable examination accommo-
dations to an examinee diagnosed as having dyslexia for all examina-
tions administered by the board. Applications requesting reasonable examination accommodations shall be submitted to the board at least 30 days before the start date of the examination. Applications for accommodations shall include a diagnosis of dyslexia by a health professional licensed to diagnose the condition, documentation establishing that accommodations are necessary, and the specific accommodation requested.

§271.5. Licensure Without Examination.

(a) Upon payment of a fee in an amount set by the board, the Board may license applicants who have not taken Part III of the National Board of Examiners in Optometry (NBEO) and [without examination] who:

1. have no pending disciplinary actions in the state, district, or territory in which the applicant is licensed;
2. have never had their license suspended or revoked;
3. meet all requirements of the Act;
4. are currently licensed as a therapeutic optometrist in good standing in another state, the District of Columbia, or territory of the United States;
5. have passed an examination that is equivalent or superior to the examination required by §351.253 [and §351.256] of the Act; and
6. have, for at least five of the seven years preceding the application date, been: [been]
   A. actively engaged in the practice of therapeutic optometry; or
   B. engaged in full-time teaching at an accredited college of optometry or medicine.

(b) The applicant must furnish a certificate of good standing from the jurisdictions where licensed. The certificate must establish that:

1. the applicant’s license has never been suspended or revoked;
2. there are no pending disciplinary actions against the applicant; and
3. the applicant is presently authorized to practice therapeutic optometry without restrictions.

(c) An examination is deemed equivalent or superior to the examination required by §351.253 [and §351.256] of the Act if at the time the applicant took the examination, the examination met the requirements of §351.253 of the Act.

(d) The applicant shall take and pass the jurisprudence examination administered by the board.

(e) The applicant must have complied with §271.2 of this chapter (relating to Applications for Licensure as Therapeutic Optometrist). The completed application with all supporting documents must be received by the board not later than 30 days before the date of the meeting at which the application is to be considered.


(a) The Board determines that the written examination by the National Board of Examiners in Optometry (NBEO) known as Part I and Part II complies in all material respects with the examination requirements of §351.253 of the Act. The passing score on each Part of the National Board written examination is determined by the criterion-referenced standard setting approach, in which the passing score is set at the scaled score of 300. The Texas Optometry Board will accept scores from an NBEO written examination if Part I or II was satisfactorily completed on or after January 1, 1984.

(b) The Board determines that the practical examination known as Part III by the National Board of Examiners in Optometry (NBEO) complies in all material respects with the practical examination requirements of §351.254 of the Act. The passing scores on Part III shall be determined by the NBEO. The Board will accept scores from an NBEO Part III examination if Part III was satisfactorily completed on or after June of 1994.

(c) All applicants must comply with the application process and qualification criteria of §351.254 of the Act, as well as all applicable Board rules.

(d) All applicants must pay an examination fee of $150 to the Texas Optometry Board. No fee for examination will be returned to any applicant if the application has been approved by the board.

(e) In addition to the NBEO examinations referenced in subsections (a) and (b) of this section, all applicants shall take and pass a written jurisprudence examination given by the Texas Optometry Board in order to be eligible for licensure. The board shall administer the jurisprudence written examination at least on a quarterly schedule. The jurisprudence examination can be administered in conjunction with Part III of the NBEO, provided the candidate has graduated from an approved college of optometry and has completed application with the board. However, an applicant who meets the requirements of this section and §351.254 of the Act may take the examination without having graduated, if the dean of a college of optometry that meets the requirements of the board notifies the board in writing that the applicant is enrolled in good standing in the college and is in the final semester before graduation.

(f) [¶] Each applicant shall submit a true and correct copy of the applicant’s score report to the executive director, and such other evidence of having achieved a passing grade on each part of the NBEO examination as outlined in subsections (a) and (b) of this section as the executive director may determine. Such satisfactory evidence of passage of the NBEO examination must be submitted to the executive director within 12 months of successful passage of the board’s jurisprudence examination; otherwise, the applicant must reapply and take and pass the board’s jurisprudence examination. No license will be issued to an applicant until evidence of passage of the NBEO examination is received.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency’s legal authority to adopt.

Filed with the Office of the Secretary of State on May 15, 2023.
TRD-202301776
Janice McCoy
Executive Director
Texas Optometry Board

Earliest possible date of adoption: June 25, 2023
For further information, please call: (512) 305-8500

CHAPTER 279. INTERPRETATIONS

22 TAC §279.1

The Texas Optometry Board proposes amendments to 22 TAC Chapter 279, §279.1 - Contact Lens Examination.
The rules in the Chapter 279 were reviewed as a result of the Board's general rule review under Texas Government Code §2001.039. Notice of the review was published in the June 10, 2022, issue of the Texas Register (47 TexReg 3487). No comments were received regarding the Board's notice of review.

The Board has determined that there continues to be a need for the rules in Chapter 279. The Board has also determined that changes to §279.1 as currently in effect are necessary.

The Board initially proposed amendments in the November 25, 2022, issue of the Texas Register (47 TexReg 7843), but officially withdrew those rules on April 28, 2023 (published in the May 12, 2023, issue of the Texas Register). At the April 28, 2023, Board meeting the Board adopted a new proposal as follows.

The amendment requires the optometrist or therapeutic optometrist to "examine in-person" instead of "personally make" certain findings during an initial visit. It states that the findings must be made unless prohibited by the patient's unique condition instead of "if possible." It requires the optometrist or therapeutic optometrist to personally note why it is not possible to record the required findings.

It clarifies that for discipline purposes, the charges must state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule.

Finally, the amendment makes non-substantive capitalization changes to ensure consistency across the Board's rules.

Janice McCoy, Executive Director, has determined that for the first five-year period the amended rule is in effect, there will not be fiscal implications for state and local governments as a result of amending this existing rule.

Janice McCoy, Executive Director, has determined that for each of the first five years the amendment is in effect, the public benefit is patient protection to ensure the examination is done accurately and completely.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS ON SMALL BUSINESSES AND RURAL COMMUNITIES: The agency does not find that there will be an adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the amendment. Since the agency has determined that the amendment to the rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT: The agency has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT: During the first five years that the amended rule will be in effect, it is anticipated that the amendment will not create or eliminate a government program as no program changes are proposed. Further, implementation of the amended rule will not require the creation of a new employee position or the elimination of an existing employee position; will not increase or decrease future legislative appropriations to the agency; will not increase or decrease fees paid to the agency; does not impact the number of individuals subject to the rule's applicability; does not positively or adversely impact the state's economy. The amendment does not create a new regulation nor does it expand, limit, or repeal an existing regulation.

PUBLIC COMMENTS: Comments on the amended rule may be submitted electronically to: Janice.mccoy@toh.texas.gov or in writing to Janice McCoy, Executive Director, Texas Optometry Board, 1801 N. Congress, Suite 9.300, Austin, Texas 78701. The deadline for furnishing comments is thirty days after publication in the Texas Register.

Amendments to §279.1 - Contact Lens Examination are being proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and 351.353.

No other sections are affected by the amendments.

§279.1 Contact Lens Examination.

(a) The optometrist or therapeutic optometrist shall, in the initial examination of the patient for whom contact lenses are prescribed:

(1) Examine in-person [Personally make] and record, unless prohibited by the patient's unique condition [if possible], the following findings of the conditions of the patient as required by §351.353 of the Act:

(A) biomicroscopy examination (lids, cornea, sclera, etc.), using a binocular microscope;

(B) internal ophthalmoscopic examination (media, fundus, etc.), using an ophthalmoscope or biomicroscope with fundus condensing lenses; videos and photographs may be used only for documentation and consultation purposes but do not fulfill the internal ophthalmoscopic examination requirement; and

(C) subjective findings: [ ] far point and near point;

(2) Either personally make and record or authorize an assistant present in the same office with the optometrist or therapeutic optometrist to make and record the following findings required by §351.353 of the Act. The authorization for assistants to make and record the following findings does not relieve the optometrist or therapeutic optometrist of professional responsibility for the proper examination and recording of each finding required by §351.353 of the Act:

(A) case history (ocular, physical, occupational, and other pertinent information);

(B) visual acuity;

(C) static retinoscopy O.D., O.S., or autorefractor;

(D) assessment of binocular function;

(E) amplitude or range of accommodation;

(F) tonometry; and

(G) angle of vision; [ ] to right and to left; [ ]

(3) The optometrist or therapeutic optometrist shall personally [Personally] note in the patient's record the reasons why it is not possible to make and record the findings required in subsection (a) of this section;

(4) When a follow-up visit is medically indicated, schedule the follow-up visit within 30 days of the contact lens fitting, and inform
the patient on the initial visit regarding the necessity for the follow-up care; and

(5) Personally or authorize an assistant to instruct the patient in the proper care of lenses.

(b) The optometrist or therapeutic optometrist and assistants shall observe proper hygiene in the handling and dispensing of the contact lenses and in the conduct of the examination. Proper hygiene includes sanitary office conditions, running water in the office where contact lenses are dispensed, and proper sterilization of diagnostic lenses and instruments.

(c) The fitting of contact lenses may be performed only by a licensed physician, optometrist, or therapeutic optometrist. Ophthalmic dispensers may make mechanical adjustments to contact lenses and dispense contact lenses only after receipt of a fully written contact lens prescription from a licensed optometrist, therapeutic optometrist, or a licensed physician. An ophthalmic dispenser shall make no measurement of the eye or the cornea or evaluate the physical fit of the contact lenses, by any means whatever, subject solely and only to the exception contained in the §351.005 of the Act.

(d) The willful or repeated failure or refusal of an optometrist or therapeutic optometrist to comply with any of the requirements in the Act, §351.353 and §351.359, shall be considered by the Board [board] to constitute prima facie evidence that the licensee is unfit or incompetent by reason of negligence within the meaning of the Act, §351.501(a)(2), and shall be sufficient ground for the filing of charges to cancel, revoke, or suspend the license. The charges shall state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule [was not complied with]. After the Board [board] has produced evidence of the omission of a finding required by §351.353, the burden shifts to the licensee to establish that the making and recording of the findings was not possible.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 15, 2023.
TRD-202301778
Janice McCoy
Executive Director
Texas Optometry Board
Earliest possible date of adoption: June 25, 2023
For further information, please call: (512) 305-8500

22 TAC §279.3

The Texas Optometry Board proposes amendments to 22 TAC Chapter 279, §279.3 - Spectacle Examination.

The rules in Chapter 279 were reviewed as a result of the Board's general rule review under Texas Government Code §2001.039. Notice of the review was published in the June 10, 2022, issue of the Texas Register (47 TexReg 3487). No comments were received regarding the Board's notice of review.

The Board has determined that there continues to be a need for the rules in Chapter 279. The Board has also determined that changes to §279.3 as currently in effect are necessary.

The Board initially proposed amendments in the November 25, 2022, issue of the Texas Register (47 TexReg 7847), but officially withdrew those rules on April 28, 2023 (published in the May 12, 2023, issue of the Texas Register). At the April 28, 2023, Board meeting the Board adopted a new proposal as follows.

The amendment requires the optometrist or therapeutic optometrist to "Examine In-Person" instead of personally make certain findings during an initial visit. It states that the findings must be made unless prohibited by the patient's unique condition instead of "if possible." It requires the optometrist or therapeutic optometrist to personally note why it is not possible to record the required findings.

It clarifies that for discipline purposes, the charges must state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule.

Finally, the amendment makes non-substantive capitalization changes to ensure consistency across the Board's rules.

Janice McCoy, Executive Director, has determined that for the first five-year period the amended rule is in effect, there will not be fiscal implications for state and local governments as a result of amending this existing rule.

Janice McCoy, Executive Director, has determined that for each of the first five years the amendment is in effect, the public benefit is patient protection to ensure the examination is done accurately and completely.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS ON SMALL BUSINESSES AND RURAL COMMUNITIES: The agency does not find that there will be an adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the amendment. Since the agency has determined that the amendment to the rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT: The agency has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT: During the first five years that the amended rule will be in effect, it is anticipated that the amendment will not create or eliminate a government program as no program changes are proposed. Further, implementation of the amended rule will not require the creation of a new employee position or the elimination of an existing employee position; will not increase or decrease future legislative appropriations to the agency; will not increase or decrease fees paid to the agency; does not impact the number of individuals subject to the rule's applicability; does not positively or adversely impact the state's economy. The amendment does not create a new regulation nor does it expand, limit, or repeal an existing regulation.

PUBLIC COMMENTS: Comments on the amended rule may be submitted electronically to: janice.mccoy@tob.texas.gov or in writing to Janice McCoy, Executive Director, Texas Optometry Board, 1801 N. Congress, Suite 9.300, Austin, Texas 78701.
The deadline for furnishing comments is thirty days after publication in the Texas Register. Amendments to §279.3 - Spectacle Examination are being proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.353. No other sections are affected by the amendments. §279.3. Spectacle Examination.

(a) The optometrist or therapeutic optometrist shall, in the initial examination of the patient for whom ophthalmic lenses are prescribed:

1. Examine in-person [Personally make] and record, unless prohibited by the patient's unique condition [if possible], the following findings of the conditions of the patient as required by §351.353 of the Act:

   A) biomicroscopy examination (lids, cornea, sclera, etc.), using a binocular microscope;
   B) internal ophthalmoscopic examination (media, fundus, etc.), using an ophthalmoscope or biomicroscope with fundus condensing lenses; videos and photographs may be used only for documentation and consultation purposes but do not fulfill the internal ophthalmoscopic examination requirement; and
   C) subjective findings: far point and near point;

2. Either personally make and record or authorize an assistant present in the same office with the optometrist or therapeutic optometrist to make and record the following findings required by §351.353 of the Act. The authorization for assistants to make and record the following findings does not relieve the optometrist or therapeutic optometrist of professional responsibility for the proper examination and recording of each finding required by §351.353 of the Act:

   A) case history (ocular, physical, occupational, and other pertinent information);
   B) visual acuity;
   C) static retinoscopy O.D., O.S., or autorefractor;
   D) assessment of binocular function;
   E) amplitude or range of accommodation;
   F) tonometry; and
   G) angle of vision to right and to left.

3. Personally note in the patient's record the reasons why it is not possible to make and record the findings required in this section.

(b) The willful or repeated failure or refusal of an optometrist or therapeutic optometrist to comply with any of the requirements in the Act, §351.353 and §351.359, shall be considered by the Board to constitute prima facie evidence that the licensee is unfit or incompetent by reason of negligence within the meaning of the Act, §351.501(a)(2), and shall be sufficient ground for the filing of charges to cancel, revoke, or suspend the license. The charges shall state the specific instances in which it is alleged that optometrist or therapeutic optometrist did not comply with the rule. After the Board has produced evidence of the omission of a finding required by §351.353, the burden shifts to the licensee to establish that the making and recording of the findings was not possible.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.