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BEFORE THE DEPARTMENT OF CONSUMER AFFAIRS OF THE STATE OF CALIFORNIA

California Academy of Eye Physicians & Surgeons

California Medical Association

American Glaucoma Society

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DOCKET NO.

PETITIONERS.

***REVISED ADMINISTRATIVE PETITION***  
**REQUESTING AN INVESTIGATION AND WITHDRAWAL OF THE DEPARTMENT'S**  
**SB 1406 FINDINGS AND RECOMMENDATIONS**  
**(GOVERNMENT CODE SECTION 11340.6, BUSINESS & PROFESSIONS CODE**  
**SECTIONS 3041.10, 155(a), 100, et. al., 109)**

1 **PURPOSE OF THE PETITION**

2 We urge the Department of Consumer Affairs to convene a joint investigation into whether any  
3 state licensing laws have been violated in the blinding of eight glaucoma cases by optometrists at  
4 the Veterans Affairs Palo Alto Health Care System (VAPAHCS). This investigaton should  
5 utilize the resources and expertise of the State Board of Optometry and the Medical Board of  
6 California in consultation with the California Department of Veterans Affairs. In addition, we  
7 urge that the Department withdraw its Findings and Recommendations to the Board of Optometry  
8 mandated by SB 1406 of 2008 pending a full investigation into the blinding of eight veterans by  
9 uncertified optometrists in violation of VAPAHCS policy. At the conclusion of this investigation,  
10 the records obtained and any recommendations or conclusions derived there from should be made  
11 available to the State Board of Optometry and incorporated in the regulatory record for any future  
12 implementation of SB 1406.

13  
14 **INTRODUCTION**

15 Glaucoma is a vision threatening disease. (See [www.nei.nih.gov/health/glaucoma/glaucoma](http://www.nei.nih.gov/health/glaucoma/glaucoma)  
16 [\\_facts.asp](#).) A lack of early diagnosis and proper treatment can result in blindness. (*Id.*) In  
17 January of this year, officials at the US Department of Veterans Affairs Hospital in Palo Alto  
18 discovered that eight patients suffering from glaucoma had apparently been blinded by  
19 mismanagement of their disease at the hands of two optometrists who had violated the Veteran’s  
20 Affairs’ policies. The Veterans Affairs (VA) hospital policies prohibit optometrists from  
21 treating glaucoma patients without consulting with a medical doctor/ophthalmologist. And  
22 Neither of these California licensed optometrists were certified under California law to  
23 independently treat glaucoma. This tragic incident occurred at the very time California was in the  
24 final stage of deciding whether to eliminate its stringent clinical training requirements and allow  
25 the state’s 6,000 optometrists to treat glaucoma patients with only four years of optometry school  
26 and **no** actual “hands-on” clinical training. The issue the Department of Consumer Affairs  
27 grappled with was whether optometrists would be required to have any supervised experience  
28

1 with glaucoma patients under their own management prior to certification. These reduced clinical  
2 training requirements contrast with the eight years required for a licensed medical  
3 doctor/ophthalmologist. In short, even as the role of uncertified optometrists in the VA blindness  
4 cases was being uncovered, California was in the process of scrapping the very certification  
5 safeguards that, had they been followed, might have protected the VA patients. The regulatory  
6 process authorized under SB 1406 of 2008 proceeded without knowledge of the VA Hospital  
7 scandal, which has only recently been made public in a series of published reports.

8  
9 The Legislature's clear SB 1406 mandate to the Department to employ a neutral consensus  
10 building approach to establishing clinical training requirements for optometrists to treat glaucoma  
11 patients without going to medical school was violated by the Department of Consumer Affairs'  
12 former Director. (For details see pages 11-12.) When the glaucoma advisory committee created  
13 by the Legislature deadlocked, the Department's former Director, in the absence of any legislative  
14 authority, hired a Special Consultant to in effect break the deadlock. The Department's former  
15 Director set in motion a tainted regulatory scheme with the intent to implement a predetermined  
16 conclusion:

17  
18       Optometrists were to be allowed to treat glaucoma patients with minimal clinical  
19       training.

20  
21 The state's Political Reform Act states:

22  
23       "Public officials, whether elected or appointed, should perform  
24       their duties in an impartial manner, **free from bias caused by their**  
25       **own financial interests or the financial interests of persons who**  
26       **have supported them;**"[Emphasis added.]<sup>1</sup>

27  
28 <sup>1</sup> Government Code Section 81001 (b)

1 Instead of hiring a consultant “free from bias,” the Department hired the President of the litigation  
2 arm of the California Optometric Association -- the Public Vision League – who has freely  
3 admitted his bias:

4  
5 “... I have been and continue to be an active member of the California Optometric  
6 Association -- a past president and member of the COA Board of Trustees and deeply  
7 passionate and committed to the evolution of the profession of optometry in California  
8 and on the national scene. That is who I am; therefore, **I am not certain that I can**  
9 **completely divorce myself from this bias ...nonetheless I have tried.**” [Emphasis  
10 added.]<sup>2</sup>

11  
12 The Department’s former director waived or simply ignored the Department’s Conflict of Interest  
13 Code, which required the consultant to file a Form 700 Statement of Economic Interests.

14  
15 The consultant, as expected, recommended scrapping clinical requirements that have protected  
16 glaucoma patients for almost a decade and replacing them with minimal clinical standards. This  
17 recommendation set in motion a regulatory process that would permit an optometrist who seeks  
18 certification to complete the process *without having managed an actual glaucoma patient*. The  
19 Department of Consumer Affairs signed off on those recommendations with only minor revisions  
20 and regulations finalizing those decisions are imminent. **After** the consultant’s recommendations  
21 were received and used to shape the Department’s final decision, the Department required the  
22 consultant to file a Form 700 Statement of Economic Interests pursuant to the Department’s  
23 Conflict of Interest Code.<sup>3</sup>

24  
25 The vision of California consumers will be placed at risk if optometrists are allowed to, in

26 \_\_\_\_\_  
27 <sup>2</sup> Tony Carnevali, O.D., F.A.A.O. Special Consultant, Office of Professional Examination Services, Department of  
28 Consumer Affairs, letter to Sonja Merold, Chief, Office of Professional Examination Services, Department of  
Consumer Affairs, June 25, 2009, p. 2

<sup>3</sup> See Department of Consumer Affairs Conflict of Interest Code

1 essence, expand further into the practice of medicine without having to go to medical school.  
2 These decisions were made without public knowledge of the blinding of eight veterans and harm  
3 to dozens of others, These events demand proper investigation prior to any final decision on  
4 reducing existing clinical training requirements for optometrists who wish to treat glaucoma  
5 patients.

6  
7 The California Academy of Eye Physicians & Surgeons, the California Medical Association and  
8 the American Glaucoma Society are filing this formal Administrative Petition under California  
9 Government Code Section 11340.6 to protect the vision of California consumers.

10  
11 Petitioners urge investigation of the Department of Consumer Affairs licensees to determine  
12 whether any state licensing laws have been violated and suspension of current regulatory efforts  
13 to further reduce the clinical training requirements for optometrists who seek to treat patients with  
14 glaucoma without consulting medical doctors/ophthalmologists.

## 15 16 **STATEMENT OF FACTS**

17 1. According to published reports, while under the care of two California-licensed optometrists,  
18 eight veterans at the Palo Alto Veterans Affairs Hospital were blinded.<sup>4</sup> Another 16 veterans  
19 experienced “progressive visual loss” and a total of 87 others were determined to be at high risk  
20 of losing their sight. What all of these veterans had in common, besides their record of service to  
21 their country, was that they were suffering from glaucoma, and that they were being treated – not  
22 by medical doctors whose consultation was required by VA policy – but by less trained  
23 optometrists whose standard of care is overseen by the State Board of Optometry within the  
24 Department of Consumer Affairs.

25  
26 \_\_\_\_\_  
27 <sup>4</sup> Jessica Bernstein-Wax, “VA Says Glaucoma Patients at Palo Alto Facility Suffered Severe Vision Loss Due to  
28 Mistreatment, San Jose Mercury News, July 22, 2009. Jessica Bernstein-Wax, “Physicians demand investigation of  
Palo Alto VA optometry department,” Daily News, September 24, 2009; Juliana Barbassa, “Groups want review  
after vets lose vision,” Associated Press, September 23, 2009

1 2. What makes this tragedy more painfully significant is that even as the US Department of  
2 Veterans Affairs was learning of the scope of injury to the veterans under its care, the California  
3 State Board of Optometry was deliberating on how much more to relax the clinical training  
4 required of the state's 6,000 optometrists before they can treat glaucoma patients without  
5 consulting a physician.

6  
7 3. The Department of Consumer Affairs maintains that this relaxation of glaucoma standards was  
8 authorized by SB 1406, passed in 200 at the behest of the California Optometric Association.  
9 The Optometric Association believes that reduced minimum clinical standards for the  
10 management and treatment of glaucoma will provide "access to cost effective and quality eye  
11 care for all Californians."<sup>5</sup> That claim is now called into tragic question by the events in Palo  
12 Alto.

13  
14 **I. Veterans Affairs Policy Violated: Possible Violations of State Law**

15 4. In January of 2009, doctors at the Veterans Affairs Palo Alto Health Care System (VAPAHCS)  
16 discovered that a 62-year-old male veteran had significant visual loss in one eye as a result of  
17 poorly controlled glaucoma. What triggered particular alarm was the fact that the man had been  
18 managed *solely* in the hospital's optometry unit since at least June of 2005, despite the fact clinic  
19 notes showed optometrists suspected he had glaucoma.<sup>6</sup>

20  
21 5. "Ophthalmology Service became concerned that optic nerve damage and visual loss might  
22 have been avoided if the patient had been referred to ophthalmology sooner," a VA statement  
23 said.<sup>7</sup>

24  
25  
26 \_\_\_\_\_  
27 <sup>5</sup> "State Board Approves Standards for Optometrists to Become Glaucoma Practitioners," California Optometric  
28 Association, July 16, 2009

<sup>6</sup> Op. Cit. "VA Says Glaucoma Patients at Palo Alto Facility Suffered Vision Loss..."

<sup>7</sup> Ibid

1 6. That discovery triggered a review of 381 medical charts and resulted in the finding that eight  
2 veterans with glaucoma suffered blindness, 16 more had experienced “progressive visual loss”  
3 short of blindness and 87 others were at high risk of losing their sight.

4  
5 7. Especially disturbing was the fact that while VA policy requires optometrists to consult with  
6 medical doctors on glaucoma cases, the policy had apparently been ignored by the optometry  
7 service. As a result of the probe, the chief of optometry was removed from his clinical and  
8 administrative duties and has since retired;<sup>8</sup> A second optometrist was reassigned.

9  
10 8. Dr. Stephen Ezeji-Okoye, deputy chief of staff at the facility, said: “It was identified that there  
11 were treatment options available that potentially could have prevented their loss. We felt that they  
12 didn’t get optimal treatment.”<sup>9</sup>

13  
14 9. The VA hospital moved all glaucoma cases to the care of the ophthalmology department,  
15 which will now supervise the optometry department.

## 16 17 **II. Optometry vs Ophthalmology**

18 10. Ophthalmologists must have eight years of training: four years of medical school, a one-year  
19 internship and a three-year residency before they are permitted to practice independently.

20  
21 11. Optometrists, on the other hand, complete only four years of optometry school.

22  
23 12. Nonetheless, for the past 30 years, the California Optometric Association has been on a quest  
24 to gain for its members the right to operate as eye physicians and surgeons without having to go  
25

26  
27 <sup>8</sup> Juliana Barbassa, “Groups want review after vets lose vision,” Associated Press, September 23, 2009

28 <sup>9</sup> Jessica Bernstein-Wax, “Optometrists Association Defends Palo Alto VA Optometry Chief”, San Jose Mercury News, July 23, 2009

1 to medical school.<sup>10</sup> Included in that quest has been the goal to gain licensure to treat glaucoma  
2 with minimal or no supervision from licensed ophthalmologists.

3  
4 **III. State Law: On a Collision Course With Blindness**

5 13. Optometrists have had a steady string of political victories in the California legislature, which  
6 has tended to view the important distinction between medical doctors and optometrists as nothing  
7 more than a ‘turf war.’ But as the eight cases of blindness at the Palo Alto Veterans Hospital  
8 clearly demonstrate that the so-called ‘turf’ is much more than a mere political prize. *Patient*  
9 *safety is at stake.*

10  
11 14. Glaucoma is a group of diseases that can damage the eye's optic nerve and result in permanent  
12 vision loss and blindness. It is one of the main causes of blindness in the United States, according  
13 to the National Eye Institute of the National Institutes of Health.

14  
15 15. Until 2000, optometrists were not authorized to treat glaucoma, and therefore had to refer  
16 those who they suspected had the disease to medical doctors/ophthalmologists. (In that respect,  
17 until 2000, state law closely resembled the Veterans Affairs policy that appears to have been  
18 ignored in the case of the blinded veterans at Palo Alto.)

19  
20 16. However, in 2000, SB 929 (Polanco), sponsored by the California Optometric Association,  
21 authorized optometrists to independently treat certain glaucoma patients over 18 years of age  
22 provided the optometrist underwent a special certification process. An optometrist was required  
23 to treat a total of 50 glaucoma patients for two years each under the supervision of an  
24 ophthalmologist before being authorized to treat a patient. After almost a decade, only about 110  
25 optometrists of California’s 6,000 licensed optometrists had completed the certification by  
26

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27 <sup>10</sup> Last year the California Optometric Association sought legislative approval to perform undefined “minor surgery”.  
28 The bill was re-written when the analysis noted that the bill would have authorized brain surgery. See Senate  
Committee on Business, Professions, and Economic Development Analysis of SB 1406, April 14, 2008.

1 November 2007.<sup>11</sup>

2  
3 17. The California Optometric Association then sponsored SB 1406 (Correa) in 2008, which  
4 eliminated the previous stringent certification requirements, and in their place established what  
5 came to be known as the “Glaucoma Diagnosis and Treatment Advisory Committee.” This  
6 committee, composed of three ophthalmologists and three optometrists, was to work out a final  
7 compromise on the required clinical training for glaucoma certification.

8  
9 18. SB 1406 (2008) delegated unprecedented authority to the Department of Consumer Affairs to  
10 make key Findings and Recommendations as to the regulatory requirements for optometrists who  
11 seek certification to independently treat glaucoma patients without having to go to medical  
12 school. One of the last amendments to the bill removed the Board of Optometry’s authority to  
13 make the key Findings and Recommendations about the adequate level of clinical training  
14 required for patient safety and placed that responsibility squarely with the Department of  
15 Consumer Affairs to protect patient safety. As the plain language of the SB 1406 reveals the  
16 ability for optometrists to treat and manage glaucoma patients was expressly conditioned on  
17 Section 2 of the bill, adding Business & Professions Code §3041.10. This Section requires the  
18 Board of Optometry to appoint a committee that was balanced between the professions, with an  
19 equal number of physicians and optometrists, so that the public would be assured that whatever  
20 curricula and certification requirements were adopted, patients were adequately protected. The  
21 neutrality of process laid out by this bill was key to the parties’ agreement to the bill’s passage.  
22 Further, the law only authorized the committee to submit and the Department of Consumer  
23 Affairs to receive **a single** recommendation. (See Business & Professions Code §3041.10(f).)

24  
25 19. SB 1406 required the newly formed committee to “presume” that all optometrists who had  
26 graduated from optometry school after May 1, 2008 had received the necessary glaucoma training

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28 \_\_\_\_\_  
<sup>11</sup> Analysis of SB 1406, Assembly Committee on Business and Professions, June 24, 2008

1 in school and would therefore be eligible for certification. But the law left open the door for the  
2 committee to impose additional requirements on thousands of other practicing optometrists  
3 should a review of the training given in California's two optometry schools warrant it.  
4

5 20. Following that premise, the three ophthalmologists on the panel sought information from the  
6 optometrist members regarding how many glaucoma patients the average student at the UC  
7 Berkeley School of Optometry and the Southern California College of Optometry managed under  
8 supervision, and for how long. At first, the three optometrists on the panel agreed to provide the  
9 information, but later changed their minds and refused to make the data public. The very  
10 necessity of clinical optometry training is illustrated by the facts of the Palo Alto VA case. It is  
11 extremely significant that the VA hospital's chief of optometry involved in the cases of blindness  
12 also supervises the training of optometry students at the UC Berkeley School of Optometry. A  
13 proper investigation of the details of the Palo Alto VA cases of blindness may call into question  
14 the quality of the optometry school training and necessitate additional requirements as provided  
15 by SB 1406. UC Berkeley's School of Optometry is one of the state's two teaching schools of  
16 optometry. It is also worth noting that neither optometrist involved in the Palo Alto VA hospital  
17 scandal appears to have been certified under California law to treat glaucoma patients.  
18

#### 19 **IV. A Clinical Deadlock and a Tainted Compromise**

20 21. The advisory committee deadlocked on all of the clinical training issues by a vote of 3-3.  
21 Instead of forwarding a **single** unified report to the Department of Consumer Affairs as required  
22 by the Legislature, **two** competing reports were submitted. Among the differences, the three  
23 optometrists in their report argued that previous strict glaucoma certification requirements should  
24 be eliminated and replaced with a 16-hour lecture course and **no** supervised treatment of patients  
25 at all. Imagine licensing an airline pilot to fly 200 passengers from Sacramento to Los Angeles  
26 who had only passed a written exam, but never flown an airliner before?  
27  
28

1 22. To reconcile the competing reports and make recommendations on certification requirements  
2 for glaucoma, contrary to the clear intent of the Legislature, the Department of Consumer Affairs  
3 hired a consultant who was:

- 4       ▪ An optometrist who was **not** certified to treat glaucoma.
- 5       ▪ An employee of the Southern California College of Optometry, one of two  
6       optometry schools in California that would be an **economic beneficiary**<sup>12</sup> of the  
7       effort to reduce clinical training requirements;
- 8       ▪ The President of the litigation arm of the California Optometric Association---the  
9       Public Vision League<sup>13</sup> and
- 10      ▪ A past President and long-time member of the Board of Trustees of the California  
11      Optometric Association, which sponsored SB 1406.

12  
13 Although the published job description for the position claimed to be willing to consider either an  
14 optometrist or an ophthalmologist, other listed requirements could **only** be filled by an  
15 optometrist.

16  
17 23. Once the appointment had been made, the Department ignored correspondence from the  
18 California Academy of Eye Physicians and Surgeons (supported by correspondence from the  
19 California Medical Association)<sup>14</sup> expressing concern about the statutory authority for the  
20 consultant, but requesting that if one were used the Department instead employ a qualified  
21 educator (neither an optometrist or a physician) or other more neutral party to address this  
22 obvious procedural flaw.

23 \_\_\_\_\_  
24 <sup>12</sup> In retaining Tony Carnevali, OD as a consultant the Department of Consumer Affairs failed to follow its own  
25 Conflict of Interest Code that requires consultants to file a Statement of Economic Interest. The director could have  
26 waived the requirement. However, the Conflict of Interest Code requires the director to make a finding as the  
27 reasons for the waiver and place the findings in the public review file. The department now says it will require Dr.  
28 Cornevali to file a Form 700 Statement of Economic Interest weeks after he was retained and his recommendations  
were made a part of the regulatory record. See Fax Message Mike Newbert, Office of Professional Services, August  
18, 2009

<sup>13</sup> See Form 700, Tony Carnevali, OD and Form 990, Tax Return for Exempt Organization for Public Vision League  
(Provided upon request).

<sup>14</sup> CAEPS letter to Sonja Merold, Chief, Office of Professional Examination Services, Department of Consumer  
Affairs, May 28, 2009, and CMA letter to Ms. Merold, May 29, 2009.

1 24. The consultant supported the position of the California Optometric Association in his SB  
2 1406 Findings and Recommendations that directly involved decisions affecting his major  
3 employer, the Southern California College of Optometry. He recommended scrapping clinical  
4 requirements that have protected glaucoma patients for almost a decade and replacing them with  
5 minimal clinical standards. These recommendations set in motion a regulatory process that  
6 would permit an optometrist who seeks certification to complete the process *without having*  
7 *managed an actual glaucoma patient*. The Department of Consumer Affairs signed off on those  
8 recommendations with only minor revisions and regulations finalizing those decisions are  
9 imminent.

10  
11 25. After the consultant's recommendations were received and used to shape the Department's  
12 final decision, the Department discovered it had failed to require the consultant to file a Form 700  
13 Statement of Economic Interests pursuant to the Department's Conflict of Interest Code. So after  
14 the fact the Department required the consultant to file the required disclosure.

15  
16 26. As noted earlier, the consultant optometrist is **not** certified to treat glaucoma. This is  
17 particularly significant because the Department's own *published requirement for the position*,  
18 required that the consultant have "personal experience in treating more than 50 cases (patients)  
19 diagnosed with glaucoma."(Emphasis added).<sup>15</sup> (The 50-glaucoma case standard was one of the  
20 key requirements for glaucoma certification prior to the passage of SB 1406. The consultant  
21 couldn't have *treated* glaucoma patients prior to performing his duties as the consultant because it  
22 was illegal.)

23  
24 27. It was not surprising; therefore, that the Department of Consumer Affairs' consultant  
25 recommended watering down the requirements to allow optometrists to be certified to treat  
26 glaucoma patients. The final recommendation was to authorize glaucoma certification after

27 \_\_\_\_\_  
28 <sup>15</sup> Item H, "Special Consultant Tasks and Responsibilities," (Tab 1, Appendix), Office of Professional Examination  
Services Report from Special Consultant, June 25, 2009.

1 simply completing a lecture requirement and “interacting” in a group with **as few as 10 glaucoma**  
2 **patients** over a single year or less. Incredibly, under this new California Optometric Association-  
3 Department of Consumer Affairs recommended process, an optometrist *could actually become*  
4 *certified to independently treat glaucoma without having ever treated a single glaucoma*  
5 *patient.*<sup>16</sup> Furthermore, all optometrists who graduated after May 2008 were “presumed” to have  
6 sufficient training under SB 1406. Not surprising, the consultant agreed with the position of the  
7 optometry school where he is employed – namely that current graduates are well qualified to  
8 independently treat glaucoma -- and decided that optometrists who graduated after 2008 would  
9 *not* be required to have any additional clinical training.

10  
11 28. The California State Board of Optometry accepted the recommendations and will enact  
12 regulations in January of 2010.

13  
14 29. At no time did the Legislature provide the Department of Consumer Affairs with authority to  
15 hire an outside consultant to reconcile any potential competing reports that were generated by the  
16 committee. Had the Legislature wanted to do so, it clearly could have. See *People v. Cole* (2006)  
17 38 Cal.4th 964.

18  
19 30. Further, serious Constitutional implications are raised. Unlike the Legislature's direction with  
20 respect to the composition and duties of the committee, the Legislature was silent on the issue of  
21

22 <sup>16</sup> The complicated three-option certification process endorsed by the Department of Consumer Affairs claims to  
23 require each applicant to follow 25 “patients” over a year. However, it allows an applicant to obtain:

- 24 1. 15 “patient credits” for a lecture course involving no patients.
- 25 2. 15 “patient credits” from a course where live patients are “seen” in a large group setting where they are  
26 discussed with faculty.

26 However, options 1 and 2 can completely satisfy the “25 patients over a year” requirement *without ever treating*  
27 *a patient with glaucoma*. And then there is option 3 that no one expects applicants to voluntarily choose.

- 28 3. This option provides a "preceptorship" where the applicant actively manages glaucoma patients with a  
supervisor authorized to treat glaucoma.

1 hiring of an outside consultant, and therefore provided no safeguards to guide such an individual's  
2 discretion. In the absence of such legislative direction, serious questions are raised as to whether  
3 the hiring of the consultant to reconcile the reports, or otherwise make independent  
4 recommendations, constitutes an unlawful delegation of legislative power. See, for example,  
5 *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228 (a statute, which conferred  
6 upon licensed dispensing opticians unlimited power to exclude optician applicants was an invalid  
7 delegation of legislative discretion); see also *State Board of Drycleaners v. Thrift-D-Lux Cleaners*  
8 (1953) 40 Cal.2d 436 (statute which authorized State Board of Dry Cleaners to establish just and  
9 reasonable minimum prices for services of drycleaners was unconstitutional where Board  
10 included active members of the industry and the Legislature failed to establish an ascertainable  
11 standard to guide the administrative body).

12  
13 31. This unauthorized activity nullifies the recommendations made to the Department of  
14 Consumer Affairs and subsequently adopted by the Board of Optometry. As a result, any  
15 regulation adopted authorizing optometrists to treat and diagnose glaucoma is void as being in  
16 excess of statutory authority and in violation of the criminal provisions prohibiting the unlicensed  
17 practice of medicine. See Business & Professions Code §2052.

## 18 19 **PARTIES**

### 20 **Petitioners**

21 1. Petitioner, California Academy of Eye Physicians & Surgeons, is a leading physician-based  
22 organization committed to serving the total visual health care needs of the people of California  
23 through public and professional education, membership services, and legislative advocacy.

24  
25 2. Petitioner, California Medical Association, is the state's leading physician organization  
26 representing more than 35,000 members in all modes of practice and specialties representing the  
27 patients of California.

1 3. Petitioner, American Glaucoma Society is a national organization of glaucoma specialists and  
2 related scientists. Its mission is to promote excellence in the care of patients with glaucoma and  
3 preserve or enhance vision by supporting the advancement of education and research in the field.  
4

### 5 **JURISDICTION**

6 This Administrative Petition<sup>17</sup> is filed pursuant to California Government Code Section 11340.6,  
7 which provides that “[A]ny interested person may petition a state agency requesting the adoption,  
8 amendment, or repeal of a regulation as provided in Article 5 (commencing with Section  
9 11346)....” Government Code section 11340.7 further provides:  
10

11 (a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a  
12 regulation pursuant to Article 5 (commencing with Section 11346), a state agency  
13 shall notify the petitioner in writing of the receipt and shall within 30 days deny  
14 the petition indicating why the agency has reached its decision on the merits of the  
15 petition in writing or schedule the matter for public hearing in accordance with the  
16 notice and hearing requirements of that article.  
17

18 (b) A state agency may grant or deny the petition in part, and may grant any  
19 other relief or take any other action as it may determine to be warranted by the  
20 petition and shall notify the petitioner in writing of this action.  
21

22 (c) Any interested person may request a reconsideration of any part or all of a  
23 decision of any agency on any petition submitted. The request shall be submitted  
24 in accordance with Section 11340.6 and include the reason or reasons why an  
25

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26 <sup>17</sup> This code section originated from the advocacy of Consumers Union USA. For a discussion of its use in consumer  
27 advocacy see: Harry Snyder, Consumers Union West Coast Regional Office, with Carl Oshiro and Ruth Holton,  
28 Getting Action How to Petition Government and Get Results, Updated and Expanded - 2nd Edition  
2002, <http://www.consumersunion.org/other/g-action1.htm>

1 agency should reconsider its previous decision no later than 60 days after the date  
2 of the decision involved. The agency's reconsideration of any matter relating to a  
3 petition shall be subject to subdivision (a).

4  
5 (d) Any decision of a state agency denying in whole or in part or granting in  
6 whole or in part a petition requesting the adoption, amendment, or repeal of a  
7 regulation pursuant to Article 5 (commencing with Section 11346) shall be in  
8 writing and shall be transmitted to the Office of Administrative Law for  
9 publication in the California Regulatory Notice Register at the earliest practicable  
10 date. The decision shall identify the agency, the party submitting the petition, the  
11 provisions of the California Code of Regulations requested to be affected,  
12 reference to authority to take the action requested, the reasons supporting the  
13 agency determination, an agency contact person, and the right of interested persons  
14 to obtain a copy of the petition from the agency.

15  
16 The authority and responsibility of the Department of Consumer Affairs to investigate its  
17 licensees is unquestioned. Business and Professions Section 155 (a), states:

18  
19 “In accordance with Section 159.5, the director may employ such investigators,  
20 inspectors, and deputies as are necessary properly to investigate and prosecute all  
21 violations of any law, the enforcement of which is charged to the department or to any  
22 board, agency, or commission in the department.”

23  
24 Furthermore, Business and Professions Code Section 100. et. al. authorizes the Department of  
25 Consumers Affairs to oversee and evaluate the 39 licensing boards and bureaus for the protection  
26 of the public. Business and Professions Code Section 109 limits the power of the Department of  
27 Consumer Affairs Director over decisions of the licensing boards “comprising the department  
28

1 with respect to setting standards, conducting examinations, passing candidates, and revoking  
2 licenses, are not subject to review by the director, but are final within the limits provided by this  
3 code...” However, *this limitation is silent with respect to intervening in regulatory matters.*

4 Further, Subsection (c) provides the following exception:

5  
6 *(c) The director may intervene in any matter of any board where an*  
7 *investigation by the Division of Investigation discloses probable cause to*  
8 *believe that the conduct or activity of a board, or its members or employees*  
9 *constitutes a violation of criminal law.* [Emphasis added.]

10  
11 The term "intervene," as used in paragraph (c) of this section may  
12 include, but is not limited to, an application for a restraining order or injunctive  
13 relief as specified in Section 123.5, or a referral or request for criminal  
14 prosecution. For purposes of this section, the director shall be deemed to have  
15 standing under Section 123.5 and shall seek representation of the Attorney  
16 General, or other appropriate counsel in the event of a conflict in pursuing that  
17 action.

18  
19 However, the Legislature in SB 1406 of 2008 granted the Department of Consumer Affairs  
20 additional unprecedented responsibilities for establishing clinical training requirements for  
21 glaucoma certification:

22  
23 Section 3041.10. (a) The Legislature hereby finds and declares that it is necessary to  
24 ensure that the public is adequately protected during the transition to full certification for  
25 all licensed optometrists who desire to treat and manage glaucoma patients.

1 SB 1406 Business and Professions Code 3041.10 (f) grants the Department of Consumer Affairs  
2 unique regulatory authority over the issue of setting clinical requirements for certifying  
3 optometrists to treat glaucoma patients. The Department of Consumer Affairs is mandated to,  
4 among other things, examine the committee's recommendation to determine whether it will (a)  
5 adequately protect patients, and (b) ensure that optometrists are able to treat glaucoma on an  
6 appropriate and timely basis. Clearly, the Legislature intended that Department of Consumer  
7 Affairs utilize the resources of the State Board of Optometry and the ophthalmologists, licensees  
8 of the Medical Board of California for the protection of the public to prevent the unlicensed  
9 practice of medicine and protect patients. The Petition's requested withdrawal of the  
10 Department's SB 1406 Findings and Recommendations and a defacto suspension of the clinical  
11 training requirements regulatory process pending completion of the requested investigation are  
12 consistent with the Legislature's mandate to the Department to "to ensure that the public is  
13 adequately protected during the transition to full certification for all licensed optometrists who  
14 desire to treat and manage glaucoma patients."

15 .  
16 Neither of the two optometrists involved in the VA hospital tragedy appears to have been certified  
17 to treat glaucoma patients under California law.

18  
19 "Department of Consumer Affairs is a regulator. DCA consists of more than 40 bureaus, pro-  
20 grams, boards, committees, commission, and other entities that license more than 2.4 million  
21 practitioners in more than 255 professions. **DCA works with professions throughout the State**  
22 **to protect licensees from unfair competition and to protect consumers from unlicensed**  
23 **practitioners.**"<sup>18</sup> [Emphasis added.]

24  
25  
26  
27 \_\_\_\_\_  
28 <sup>18</sup> Department of Consumer Affairs, "What We Do and How We Do it", p. 4  
[http://www.dca.ca.gov/about\\_dca/index.shtml](http://www.dca.ca.gov/about_dca/index.shtml)

1 **RELIEF REQUESTED**

2 Petitioners request that the Department of Consumer Affairs:

- 3
- 4 1) Investigate the blinding of eight veterans and the harm to others at the Veterans  
5 Affairs Palo Alto Health Care System (VAPAHCS) to determine whether state  
6 laws governing the California-licensed optometrists have been violated.
- 7
- 8 2) Withdraw the Department’s Findings and Recommendations on clinical training  
9 requirements for glaucoma certification required by SB 1406 pending the results of  
10 the requested investigation of the blinding of the veterans.
- 11
- 12 3) Suspend any further watering down or elimination of clinical training requirements  
13 until a thorough investigation of the Palo Alto VA scandal is complete and its  
14 findings and recommendations can be included in the implementation of SB 1406.
- 15

16 **CONCLUSION**

17 The mission statement of the California Department of Consumer Affairs says, “We are the  
18 primary consumer protection resource for California residents.”

19

20 Speaking to the issue of health care professionals shortly after the new Director of the Department  
21 of Consumer Affairs Brian J. Stiger was appointed, he stated:

22

23 “The existing model protects licensees. The new model makes the protection of  
24 consumers paramount.”

25

26 The California consumers treated at the Palo Alto Veterans Hospital who are now blind or  
27 suffering from failing eye sight might legitimately question how much protection they received

28

1 from our state's licensing process.

2  
3 At the very least, their cases deserve investigation of the kind we have outlined in this Petition. At  
4 the very least, further attempts to water down clinical training requirements should be placed on  
5 hold pending that investigation. At the very least, our state should be aware of the admonishment  
6 from the American Glaucoma Society that: "Vision lost to glaucoma is lost forever."<sup>19</sup>

7  
8 The California Optometric Association's political might does not make it right. Increased risk of  
9 blindness to the public is simply unacceptable.

10  
11 For the reasons set forth above, Petitioners request that this Administrative Petition be  
12 granted and this matter be scheduled the matter for public hearing in accordance with the  
13 rulemaking provisions of the California Administrative Code. Petitioners further request the  
14 withdrawal of the Department's Finding and Recommendations required by SB 1406 pending the  
15 results of the investigation of the blinding of 8 veterans. Petitioners request that the Department  
16 and the Board of Optometry stay any further proceedings on SB 1406 implementation pending  
17 final resolutions of the requested investigation.

18  
19 Respectfully submitted,



20  
21 Dated: October 12, 2009

22 James B. Ruben, MD  
23 President  
24 California Academy of Eye Physicians & Surgeons  
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28 <sup>19</sup> Theodore Krupin, M.D., President, American Glaucoma Association letter to Sonja Merold, Chief, Office of Professional Examination Services, July 15, 2009

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- The Honorable Barbara Yaroslavsky, President, Medical Board of California, 2005 Evergreen Street, Suite 1200, Sacramento, CA 95815
- Acting Secretary Roger Brautigan, California Department of Veterans Affairs, 1227 O Street, Sacramento, California, 95814
- The Honorable Jerry Brown, Attorney General, California Department of Justice P.O. Box 944255 Sacramento, CA 94244-2550
- The Honorable Arnold Schwarzenegger, Governor, State Capitol, Sacramento, 95814