
**Response to the Kentucky Board of Optometric Examiners’
Emergency Regulation 201 KAR 5:020E.**

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Last month, the National Board of Examiners in Optometry® (NBEO®)¹ released a [statement](#) in response to a news article reporting that the Kentucky Board of Optometric Examiners (KBOE) had voted on at least six dates during the period 2020-2023 to provide waivers of the examination requirements in its own initial licensure regulations (at 201 KAR 5:010) to at least 21 optometry graduates who had not passed one or more parts of the three-part state-required licensing exam that the NBEO administers.² In that statement, NBEO expressed that it “continues to be very concerned about the serious weakening of public protection in Kentucky and irregularities in the KBOE’s regulation and licensing of Kentucky optometrists.”

NBEO has carefully reviewed the emergency regulation, [201 KAR 5:020E](#), that the KBOE filed on December 31, 2025. Unfortunately, NBEO’s concerns about the weakening of public protection in Kentucky and irregularities in the KBOE’s actions are now even more grave. When the Administrative Regulation Review Subcommittee of the Kentucky Legislature meets in connection with its review of the KBOE’s emergency regulation, the NBEO will be asking the Subcommittee to find the emergency regulation deficient. If the KBOE does not withdraw the emergency regulation and instead proceeds with holding a public hearing as scheduled on February 27, NBEO will participate. Because of its public protection mission, NBEO has an obligation to share publicly the reasons that it opposes the KBOE’s emergency regulation. As set forth more fully below,

- **the adoption of the emergency regulation lacked any transparency and violated the Open Meetings Act,**
- **the emergency regulation does not meet the requirements for the KBOE to avoid the ordinary notice and comment process,**
- **the emergency regulation enables continued threats to public health safety by permitting invalidly licensed and potentially unqualified optometrists to continue to practice, and**
- **the emergency regulation’s compliance requirements are illusory.**

¹ NBEO was founded in 1951 to establish the legitimacy and credibility of the optometry profession. The NBEO is an independent, 501(c)(3) tax-exempt nonprofit organization. The mission of the NBEO is to protect the public through competence assessment.

² See <https://kentuckylantern.com/2025/12/11/questionable-testing-waivers-put-kys-licensing-of-optometrists-under-scrutiny/>.

For these reasons, NBEO will be asking the Subcommittee to determine that the emergency regulation is deficient under the Kentucky Administrative Procedure Act, KRS 13A.030, and will request that the KBOE withdraw the emergency regulation.

Background

The three-part licensure examination that NBEO develops and administers has been required in all 50 states and assesses whether a candidate has demonstrated the baseline qualifications of training, knowledge, and competencies to enter into independent practice as an optometrist, as in accordance with national professional education accreditation and certification standards. During the period that the KBOE granted at least 21 waivers of its examination requirements for initial licensure, the KBOE's regulations required that candidates pass all three parts of the NBEO examination series. Under NBEO's policies, candidates who do not pass an exam part may attempt it again for up to five more times, for a total of six attempts per each exam part.

The KBOE's waivers were granted both during and after the expiration of the COVID-19 pandemic state of emergency. Many of the waivers granted optometry licenses to individuals who had not passed Part III of the licensing exam: the in-person examination that addresses case analysis, critical thinking, and essential skills evaluation in a simulated, live-patient encounter.³ This part of the exam was developed to measure a candidate's ability to apply evidence-based knowledge to patient care. The KBOE's minutes from its December 13, 2023, meeting – after the end of the state of emergency – reflect that the KBOE also voted to waive Part I of the NBEO exam for some candidates. The Part I Applied Basic Science (ABS®) examination is a multiple-choice, computer-based exam that assesses candidates' mastery of the underlying foundational biomedical science concepts necessary for entry into independent optometric practice.

The KBOE has not provided any transparency as to which licensed optometrists in Kentucky have not passed all parts of the competency exams, and NBEO's policies do not permit it to release that information without permission of an individual candidate.⁴ As a result, **no member of the public seeking optometric care from an optometrist who received an initial license in Kentucky during the 2020-2023 time period has any way to determine whether that optometrist may have bypassed or repeatedly failed one or more parts of the NBEO competency examinations.**

³ Currently, the NBEO Part III exam is called the Patient Encounters and Performance Skills (PEPS®) Examination. It replaced the Part III Clinical Skills Examination (CSE®) when the CSE exam was retired at the end of the 2023-2024 exam administration year.

⁴ As reported in the *Kentucky Lantern* article breaking this story, NBEO had sent a confidential letter on May 23, 2025, to the KBOE requesting information about its apparent decision to license 21 candidates who had not at that point passed one or more parts of NBEO's examination; the *Kentucky Lantern* reporter obtained this letter through an Open Records Act request. The KBOE never responded to NBEO's letter.

In response to a request from Senator Stephen Meredith, the Kentucky Office of the Attorney General issued a formal opinion, OAG 25-13, on October 1, 2025, about the KBOE's waivers.⁵ **The Attorney General's Opinion found that the KBOE had "acted beyond its authority in waiving licensure requirements without adhering to KRS Chapter 13A."** The Opinion noted that the KBOE's regulations in effect at the time of the waivers required applicants for initial licensure to pass all three parts of the NBEO examinations, without any provision that would allow an applicant to use any alternative examination results. The Opinion stated that:

The General Assembly has expressly prohibited an administrative body from "modify[ing] a statute or administrative regulation" via its own "internal policy, memorandum, or other form of action." KRS 13A.130(1)(a). In fact, any such modification "is null, void, and unenforceable." KRS 13A.130(2). Only "[d]uly promulgated administrative regulations have the 'force and effect of law.'" ... [The KBOE's] resolutions [granting waivers of examination requirements], therefore, cannot modify a regulation, and the Board's attempt to use them to change the exam requirements was invalid.

As such, the waiver and allowance for alternative testing were without the force and effect of law. It is further the opinion of this Office that any person who applied for a license to practice optometry using the waiver and alternative testing did not comply with the relevant regulations.

The KBOE appears not to have been fully forthcoming to the Attorney General's Office about its actions, providing information to the Attorney General only about two votes to waive Part III of the NBEO exam and only about waivers granted during the COVID-19 state of emergency.⁶ Contrary to the KBOE's representations to the Office of Attorney General, subsequent reporting based on the KBOE's minutes show that (1) there were at least six votes, (2) the waivers were also granted with respect to Part I of the NBEO examination, and (3) the KBOE voted to waive examination licensure requirements for licensure candidates even after the end of the COVID-19 state of emergency.⁷ The Attorney General's Opinion that the waivers the

⁵ See <https://www.ag.ky.gov/Resources/Opinions/Opinions/OAG%2025-13.pdf>.

⁶ According to the Opinion: "In response to a request for information, the Board explained to the Office that, during the COVID-19 state of emergency, the Board 'temporarily waived the requirement that prospective licensees pass Part III of the National Board exam, which mandated completion of an in-person test at an out-of-state location.' To replace Part III of the exam, the Board 'instituted alternative testing measures.' These changes to the licensure requirements were made via resolutions presented at Board meetings on September 17, 2020 (initially authorizing the waiver) and November 4, 2022 (extending the waiver through 2023)." The Opinion further noted that "Meeting minutes for these meetings are not available on the Board's website, and **this information comes only from statements made by the Board in response to the Office's request for information.**"

⁷ See <https://kentuckyantenn.com/2025/12/11/questionable-testing-waivers-put-kys-licensing-of-optometrists-under-scrutiny/>.

KBOE granted were invalid and without the force and effect of the law would apply equally to any waivers that the KBOE did not disclose to the Attorney General, including the waivers of the NBEO Part I requirement in 2023. All of the waivers granted by the KBOE were subject to the Attorney General’s instruction that “the Board must review the licensure of those optometrists who were licensed under the waiver and alternative testing measures to ensure they have met the licensure requirements as established in 201 KAR 5:010.”

Bases to Find 201 KAR 5:020E Deficient

In promulgating its emergency regulation 201 KAR 5:020E, the KBOE purports to be implementing the directive of the Attorney General. The emergency regulation’s Statement of Emergency states that the regulation “is necessary in response to” OAG 25-13.⁸ The emergency regulation provides, in relevant part:

Section 1. For all initial licenses approved by the Board for individuals who graduated optometry school between 2020-2023, the following credentials must be in possession of the Board prior to license renewal for 2027:

- (1) National Board of Examiners in Optometry (NBEO) Part 1 results or Optometry Examining Board of Canada (OEBC) Part 1 results;*
- (2) NBEO Part 2 and TMOD results; and*
- (3) NBEO Part 3 results or results of the Kentucky Clinical Competency Test.⁹*

Section 2. The Kentucky Clinical Competency Test shall be developed and utilized for this limited purpose and specific review of licenses.

Section 3. Any licensee without these credentials will be notified by the Board in writing and is eligible to submit the results above by December 31, 2026.

⁸ See <https://apps.legislature.ky.gov/law/kar/titles/201/005/020/>.

⁹ Although the regulatory language is phrased in terms of a requirement only that licensees provide examination “results” to the KBOE, the governing statute makes clear that the KBOE can grant licenses only to candidates whose results show that they passed the approved examination. Under KRS 320.250, “[l]icenses to engage in the practice of optometry shall be issued only to those . . . who successfully pass examinations conducted or approved by the board at a time and place fixed by the board.” Licensure examinations “may consist of written, clinical, or practical examinations and shall relate to the skills needed for the practice of optometry in this Commonwealth.”

In actuality, KBOE's emergency regulation does not remedy and cannot be used to address the KBOE's invalidly granted waivers.¹⁰

1. The Emergency Regulation Was Adopted and Filed in Violation of the Open Meetings Act, With No Transparency

There is no publicly available information about how or when the emergency regulation was developed or adopted by the KBOE. The KBOE is subject to the Kentucky Open Meetings Act, a law designed to ensure transparency for agency actions that affect the public, but no agenda of any public meeting of the KBOE after issuance of the Attorney General's Opinion included an item relating to the Opinion or indicating discussion of developing an emergency regulation (or any other rulemaking on this topic). As has been publicly reported, at KBOE's last public meeting on December 12, 2025, the KBOE met in closed session to discuss "proposed litigation regarding board waivers" and then adjourned without taking any action in the public portions of the meeting and without responding to questions about the waivers.¹¹ Under the Kentucky Open Meetings Act, at KRS 61.810(1), "all meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times," subject to certain limited enumerated exceptions, which include "discussions of proposed or pending litigation against or on behalf of the public agency." However, as set forth in the Attorney General's Guide to the Kentucky Open Records & Open Meetings Act,¹²

courts have stated that public agencies must give "specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting." The Attorney General has stated that "notification must include both a statement of the exception authorizing the closed session and a description of the business to be discussed couched in sufficiently specific terms to enable the public to assess the propriety of the agency's actions," [except with respect to closed meetings for discussion of] "matters inherent to litigation, such as preparation, strategy, or tactics...."

¹⁰ As with the KBOE's incomplete and misleading information to the Attorney General about when the waivers were granted, the emergency regulation likewise recites that the waivers the KBOE granted were "because of the state of emergency in the Commonwealth regarding COVID-19." This explanation does not address or admit to the waivers that were granted after the state of emergency ended. In addition, the KBOE has never provided an explanation as to how, even during the pandemic, any optometry candidate would have been prevented from or endangered by taking the Part I computer-based NBEO examination.

¹¹ See <https://kentuckylantern.com/2025/12/12/kentucky-optometrist-board-meets-in-private-but-takes-no-action-as-groups-question-patient-safety/>.

¹² See <https://www.ag.ky.gov/Press%20Release%20Attachments/2025%20Open%20Records%20Open%20Meetings%20Guide.pdf>.

While it is unclear whether this emergency regulation was discussed in closed session or was viewed by the KBOE as relevant to any proposed litigation against or on behalf of the KBOE, in no sense can this emergency regulation be classified as a matter “inherent to litigation.” Accordingly, **because the emergency regulation was not noticed, discussed, or adopted at a public meeting, the adoption by the KBOE of the emergency regulation “was wrongfully promulgated” and “appears to be in conflict with an existing statute.”** NBEO will therefore urge the Subcommittee to find the emergency regulation deficient on this basis, under KRS 13A.030(2)(a)(1) and (2).

2. The Kentucky Administrative Procedure Act Prohibits Curing Invalid Agency Actions Through Emergency Regulations

Even if the emergency regulation had been adopted in compliance with the Open Meetings Act, the Kentucky Administrative Procedure Act, at KRS 13A.190, prohibits the KBOE from addressing the invalidly granted waivers through an emergency regulation. The Attorney General’s Opinion found that any granting of an initial optometry license other than through passage of the three-part NBEO examination required under the then-current regulations should have been done through “duly promulgated administrative regulations.” The KBOE failed to follow that process. As a result, per KRS 13A.190(2), **the KBOE must go through the notice and comment process of promulgating an ordinary administrative regulation if it wants to authorize a different path to licensure for the individuals who were granted invalid waivers:** “An agency’s finding of an emergency pursuant to this section shall not be based on the agency’s failure to timely process and file administrative regulations through the ordinary administrative regulation process.” NBEO will therefore urge the Subcommittee to find the emergency regulation deficient for this reason as well.

3. The KBOE Enables Continued Threats to Public Health Safety by Permitting Invalidly Licensed and Potentially Unqualified Optometrists to Continue to Practice

Moreover, the KBOE has not adequately demonstrated that its emergency regulation “meets an imminent threat to public health, safety, welfare, or the environment,” which is the KBOE’s stated basis for the emergency regulation, in accordance with KRS 13A.190(1)(a)(1). To be clear, **NBEO agrees that it poses an imminent threat to public health and safety for potentially unqualified optometrists in Kentucky who did not meet the licensure requirements that were in effect and who have not been able to demonstrate that they meet baseline competency standards to continue to practice – especially because the KBOE has not disclosed to the public which licensed optometrists were granted waivers, denying patients the ability to make an informed choice about whether to receive treatment from those optometrists.** The Kentucky legislature has granted optometrists the broadest scope of practice of any optometrists in the United States; licensed optometrists in Kentucky can perform surgeries, prescribe and dispense controlled medications, and perform certain medical procedures that in other states only licensed physicians may lawfully perform. Accordingly, it is indeed a threat to public health and safety that individuals who have not demonstrated their competence to

practice optometry independently in Kentucky – and, in some cases, may have repeatedly failed their competency assessments – are allowed to clinically practice.

There are a number of ways that this imminent threat could have been mitigated that would have prevented further clinical practice by these waived-in optometrists until they can demonstrate that they have met existing regulatory requirements for initial licensure, given that the Attorney General found that the optometry licenses granted to them via waiver were “null, void, and unenforceable.” However, the emergency regulation in no way meets that imminent threat or protects public health and safety. Instead, the emergency regulation:

- Permits the invalidly licensed optometrists to continue practicing for up to a year without meeting current licensure requirements, through December 31, 2026;
- Includes no provision for the KBOE to make public which individuals received a license pursuant to waivers, and
- Perhaps most astoundingly, does not require these individuals ever to demonstrate that they can pass the Part III NBEO live examination of patient skills. Instead, the emergency regulation would allow these individuals to remain licensed by passing an examination that does not yet even exist, the so-called Kentucky Clinical Competency Test.

NBEO is on record as opposing the KBOE’s regulatory amendment last year that permitted optometrists seeking licensure in Kentucky to substitute Canada’s online OEBC exam for NBEO’s Part I examination; the NBEO opposed this measure because, among other reasons, the OEBC exam does not assess the same fundamental biomedical knowledge as the NBEO Part I examination. But the OEBC examination is, at least, not an imaginary examination: it has been designed by test developers; it has a publicly available content blueprint; it has a passing score set by professionals; and it currently exists.

The KBOE’s emergency regulation concedes that the so-called Kentucky Clinical Competency Test still “needs to be developed.” There are no provisions in the emergency regulation that relate to the content this currently non-existent test will cover or that address whether and how it will be psychometrically validated, how it will be scored, or whether anyone outside of the KBOE and the invalidly licensed optometrists themselves will ever have the opportunity to review its content or blueprint.¹³ Indeed, the emergency regulation calls for the so-called Kentucky Clinical Competency Test to be used only for the “limited purpose” of reviewing those individuals who were granted waivers; it will never be used again. There is no

¹³ The content blueprint for NBEO’s Part III exam is published on the NBEO website, at https://www.optometry.org/media/documents/peps/2026/Part_III_PEPS_Restructure_Blueprint_&_Model_date_removed.pdf. The Part III NBEO examination is administered year-round in NBEO’s state-of-the-art testing facility.

discussion or explanation in the emergency regulation as to why this alternative to Part III of the NBEO examination is appropriate or necessary. It is a huge red flag that the KBOE is inventing the so-called Kentucky Clinical Competency Test while not proposing that the Test serve as an alternative measure of clinical competency for any optometry applicants other than the subset of individuals who were granted invalid waivers. This suggests that the KBOE recognizes that main utility of the currently non-existent alternative test is to provide a flimsy cover for the invalidly licensed individuals to earn a legally valid license, despite their potential inability to pass the national standard exam that measures competency in patient care skills. **The emergency regulation provides no assurance at all that passing the so-called Kentucky Clinical Competency Test will demonstrate competency to practice optometry independently or protect public health and safety.**

There is also another large indication that the so-called Kentucky Clinical Competency Test will in no way be equivalent to the NBEO Part III examination. The emergency regulation indicates that the budgetary cost of developing and administering the so-called Kentucky Clinical Competency Test will be \$1,000 in total. In contrast, NBEO expended approximately \$9.5 million in exam development and administrative expenses in 2024, of which roughly one third was devoted entirely to the Part III PEPS examination. The Part III PEPS examination uses more than 200 subject matter experts (including some from Kentucky), a clinical examinations staff of 15, approximately 80 standardized patients, and 6 onsite examiners.; NBEO also employs a full-time Ph.D. psychometrician (an expert on test development and scoring) and utilizes a team of external psychometricians to externally validate the licensure exam process. Although the KBOE unquestionably has expertise in optometric practice, it does not have expertise in examination development. It seems readily apparent that the so-called Kentucky Clinical Competency Test is highly unlikely to be a psychometrically valid or reliable assessment of an individual's ability to apply evidence-based knowledge to patient care.

For these reasons too, the emergency regulation on its face does not satisfy the statutory standard of “meet[ing] an imminent threat to public health [or] safety” and therefore should be found deficient.

4. The Emergency Regulation's Compliance Requirements are Illusory

In addition to all of these serious deficiencies with the emergency regulation, it also is doomed to be ineffective. **All of the requirements in the emergency regulation are illusory: the emergency regulation will expire months before the invalidly licensed optometrists who received waivers are required to comply with it.** The emergency regulation states that it “will not be replaced by an ordinary administrative regulation.” However, the emergency regulation became effective upon filing, on December 31, 2025, and, per KRS 13A.190(4)(a), “emergency administrative regulations shall expire two hundred seventy (270) days after the date of filing.” Because the emergency regulation requires no action by the invalidly licensed individuals who received waivers until 365 days after the effective date, by the time that deadline approaches, the emergency regulation will have already expired and will no longer be in effect.

In addition, by its own terms, the emergency regulation imposes requirements for “license renewal for 2027.” However, the Attorney General’s Opinion made clear that the KBOE’s “waiver and allowance for alternative testing were without the force and effect of law” and that the licenses granted to these individuals were “null, void, and unenforceable.” **As the invalidly licensed optometrists granted waivers have no lawfully issued initial license to practice optometry in Kentucky, it is impossible for them to renew a license.**

For these reasons also, NBEO will urge the Subcommittee to find the emergency regulation “deficient in any other manner” under KRS 13A.030(2)(a)(13).

It is rare for NBEO to issue statements in response to actions of a state licensing agency. As noted, however, the actions of the KBOE have been highly irregular and gravely fail to protect the safety of patients in Kentucky. Consistent with its mission, NBEO has an obligation to explain to the public why the KBOE’s emergency regulation is deficient.

For more information, contact NBEO at media@optometry.org.