

Regulatory Analysis Form

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REVIEW COMMISSION



(1) Agency

Department of State, Bureau of Professional and Occupational Affairs, State Board of Psychology

(2) I.D. Number (Governor's Office Use)

16A-633

IRRC Number: 1931

(3) Short Title

Sexual Intimacies

(4) PA Code Cite

49 Pa. Code §§41.1 and 41.81-41.85

(5) Agency Contacts & Telephone Numbers

Primary Contact: Judith Pachter Schulder, Counsel
State Board of Psychology
(717) 783-7200

Secondary Contact: Joyce McKeever, Deputy Chief
Counsel, Department of State
(717) 783-7200

(6) Type of Rulemaking (check one)

Proposed Rulemaking
Final Order Adopting Regulation X
Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

No X
Yes: By the Attorney General
Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation will better protect consumers of psychological services and provide guidance to the profession on issues relating to: (1) sexual intimacies between a psychologist and a current

(Continued on Page 9)

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

Section 3.2(2) of the Professional Psychologists Practice Act, the act of March 23, 1972, P.L. 136, as amended, Act of April 25, 1986, P.L. 89, 63 P.S. §1203.2(2).

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

No.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

Ethical Principle 6(b) of the Code of Ethics for psychologists practicing in the Commonwealth instructs that "[S]exual intimacies with clients are unethical." 49 Pa. Code §41.61. Despite this clear pronouncement, complaints are filed against psychologists every year by consumers of psychological services who suffer emotional harm by psychologists who violate this Ethical Principle.

Psychologists have attempted in the past to defend against prosecutions brought under Ethical Principle 6(b) by arguing that: (1) the psychologist/client relationship had terminated prior to the commencement of any sexual relationship; (2) the psychologist had ceased billing the client/patient throughout the duration of the sexual relationship; (3) the client/patient had initiated the relationship; and (4) the psychologist did not engage in "sexual intercourse." The latter argument assumed that "sexual intimacies" within the meaning of Ethical Principle 6(b) was limited to "sexual intercourse."

The regulation will better protect consumers of psychological services and provide guidance to the profession on issues relating to: (1) sexual intimacies between a psychologist and a current or former client/patient, and an immediate family member of a current client/patient, (2) former sexual partners as client/patients; and, (3) sexual intimacies between a psychologist and a psychology trainee, student or research participant.

(Continued on Page 9)

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

Absent specific regulations, consumers of psychological services will be dependent upon court decisions to address, on a case-by-case basis, the specific issues which the regulation seeks to clarify. By the time a case is decided on appeal, the consumer has already suffered harm.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Consumers of psychological services and the psychological profession as a whole will benefit from the guidance to be provided by the regulations. Currently, there are 5,892 licensed psychologists in Pennsylvania who will benefit from the regulation.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There are no perceived people or groups of people who would be adversely affected by this regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All licensed psychologists in the Commonwealth will be required to comply with the regulation. Currently there are 5,892 licensed psychologists in Pennsylvania.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

In compliance with Executive Order 1996-1, prior to drafting this regulation, the Board extended an invitation to the following associations to participate in preliminary discussions relative to the proposed amendments: Delaware County Association of School Psychologists, Laurel Mountains Psychological Association, Hospital Association of Pennsylvania, Pennsylvania Psychological Association, Pennsylvania Mental Health Consumers' Association, Association of School Psychologists of Pennsylvania, National Association of School Psychologists, Academy of Psychologists engaged in Private Practice in Lehigh Valley, Berks Area Psychological Society, Central Pennsylvania Psychological Association, Greater Pittsburgh Psychological Association, Harrisburg Area Psychological Association, Lancaster/Lebanon Psychological Association, Lehigh Valley Psychological Association, Mideast PA School Psychological Association, Northeastern PA Psychological Association, Northwestern PA Psychological Association, Philadelphia Society of Clinical Psychologists and the Philadelphia Neuropsychology Society.

(Continued on Page 9)

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

There should be no cost to the regulated community associated with compliance with this regulation. Savings to the regulated community are not specifically quantifiable, but, would include legal fees and expenses which otherwise would be spent by psychologists in defending Ethical Principle 6(b) violations.

Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

N/A.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

N/A.

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A
Regulated						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

N/A.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
N/A				

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

There should be no adverse effects and costs associated with compliance with the regulation. The benefits of the regulation are described in paragraphs 11 and 13 above.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Nonregulatory alternatives were not considered by the Board for two reasons: (1) A policy statement on the issue of sexual intimacies would not have the force or the effect of law; (2) Waiting for court decisions to address the issues addressed by the regulation would benefit neither consumers of psychological services nor the psychological profession.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No other regulatory schemes were considered.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

There are no applicable federal standards; however, the regulation is fairly consistent with the Ethics code of the American Psychological Association to which many State Boards of Psychology adhere.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

It is unknown how this regulation compares with those of other states; however, the regulation is fairly consistent with the Ethics Code of the American Psychological Association to which many State Boards of Psychology adhere.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulation will amplify the meaning of "Sexual intimacies with clients" currently proscribed by Ethical Principle 6(b) of the Pennsylvania Code of Ethics for psychologists, 49 Pa. Code §41.61. The regulation should have no effect on existing regulations of other state agencies.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

In light of the extensive public outreach already conducted in promulgation of this regulation, the Board has scheduled no public hearings or informational meetings regarding this regulation.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Board is aware of no special needs of any subset or group which should be excepted.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon publication as an Order of Final Rulemaking in the Pennsylvania Bulletin. Compliance will be required as of that date.

(31) Provide the schedule for continual review of the regulation.

The Board continuously reviews its regulations, periodically communicates with licensees through newsletters and obtains information and feed-back from its licensees on a frequent basis.

(Continued from #8, Page 1)

and former client/patient, and an immediate family member of a current client/patient, an authority figure of a child client/patient; (2) former sexual partners as client/patients; and, (3) sexual intimacies between a psychologist and a psychology trainee, student or research participant. The amendments will also put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary proceedings brought under §§41.81-41.83, and that a psychologist who engages in conduct prohibited by the amendments will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective action.

(Continued from #11, Page 2)

child client/patient. The amendments will also put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary proceedings brought under §§41.81-41.83, and that a psychologist who engages in conduct prohibited by the amendments will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective action.

The regulation also defines "sexual intimacies", "client/patient," "immediate family member," "professional relationship" and "psychologist" to eliminate arguments and/or confusion by psychologists on the meanings of these terms.

(Continued from #16, Page 3)

These same associations were subsequently extended an opportunity to preliminarily review and comment on the Board's draft regulatory proposal.

Notice of proposed rulemaking was published at 28 Pa. B. 1421 (March 21, 1998). Publication was followed by a 30-day public comment period during which the Board received comments from the Pennsylvania Psychological Association (PPA). Following the close of the public comment period, the Board also received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The regulation is responsive to the comments and suggestions received by all commentators.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

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REVIEW COMMISSION

(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Copy below is approved as to form and legality. Executive or Independent Agencies.

BY: _____
(DEPUTY ATTORNEY GENERAL)

State Board of Psychology
(AGENCY)

BY: *Margy E. Douglas*

DOCUMENT/FISCAL NOTE NO. 16A-633

DATE OF APPROVAL

DATE OF ADOPTION: _____

11/19/99
DATE OF APPROVAL

BY: *Yvonne E. Keairns*
Yvonne E. Keairns, Ph.D.

(Deputy General Counsel
(~~Chief Counsel,~~
~~Independent Agency~~
(Strike inapplicable title)

TITLE: Chairperson
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

[] Check if applicable
Copy not approved.
Objections attached.

[] Check if applicable. No Attorney General approval or objection within 30 day after submission.

NOTICE OF FINAL RULEMAKING
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF PSYCHOLOGY
49 Pa. Code, Chapter 41
Sexual Intimacies

The State Board of Psychology (Board) amends §41.1 (relating to definitions) and adopts §§41.81-41.85 (relating to sexual intimacies) as set forth in Annex A.

The amendments are intended to better protect consumers of psychological services and provide guidance to the profession on issues relating to: (1) sexual intimacies between a psychologist and a current or former client/patient, and an immediate family member of a current or former client/patient; and, (2) former sexual partners as client/patients; and, (3) sexual intimacies between a psychologist and a psychological trainee, student or research participant. The amendments will also put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary proceedings brought under §§41.81-41.83, and that a psychologist who engages in conduct prohibited by the amendments will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective action.

Notice of proposed rulemaking was published at 28 Pa. B. 1421 (March 21, 1998). Publication was followed by a 30-day public comment period during which the Board received comments from the Pennsylvania Psychological Association (PPA). Following the close of the public comment period, the Board also received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) offered no comments, suggestions or objections regarding the amendments.

The amendments reflected in Annex A are responsive to the comments and suggestions received by all commentators. In addition, the Board considered this rulemaking and its purpose under the directives of Executive Order 1996-1, Regulatory Review and Promulgation.

For ease of reference, the Board will address the comments in the order in which the amendments appear.

§41.1 Definitions.

IRRC commented that section 41.81(a) provides examples of who will be considered "immediate family," but, that no actual definition of the term is provided. The IRRC suggested that rather than provide examples, the Board should define "immediate family" under §41.1. The Board has followed this suggestion. For purposes of this regulation, the term "immediate family member" will include a parent/guardian, child, sibling or spouse or family member with whom the child lives.

All commentators objected to the proposed definition of "sexual intimacies" on the ground that the wording does not sufficiently clarify that verbal and non-verbal communications, kissing, hugging, touching, physical contact and self-disclosure refers to romantic, sexually suggestive, sexually demeaning or erotic behavior. The PPA pointed out that a psychologist should not be prohibited from or disciplined for engaging in an occasional hug or touching a patient as part of a normal social interaction. For example, some patients (especially children) may feel offended if a psychologist avoids a hug or withdraws quickly from a handshake or an accidental physical touch. The PPA opined that the proposed definition could lead to consistent misinterpretations by psychologists and patients. The PPA suggested that the definition be reworded to clarify that sexualized or eroticized hugging, touching, physical contact or self-disclosure constitute prohibited conduct. Both the HPLC and the IRRC expressed similar opinions. In response to these comments, the Board has revised the definition of "sexual intimacies" accordingly.

§41.81. Prohibited conduct.

Consistent with the amendments to §41.1, subsection (a) has been amended by deleting the examples of who will be considered "immediate family".

Subsection (b) has also been amended at the suggestion of the IRRC to prohibit sexual intimacies between a psychologist and a psychology trainee, student or research participant. The IRRC expressed concern that the phrase "supervisory, . . . or other authority" and the term "supervisee" in the proposed wording of this subsection could be interpreted to prohibit a psychologist from having a relationship with an office administrator or receptionist. The intent of the original wording was to prohibit a relationship between a psychologist and a student, a research participant, an individual who is fulfilling the supervised experience requirements for licensure, or an applicant for licensure who is continuing in training under §41.31(c)(5). Since the term "psychology trainee" is already defined under §41.1 to cover this group of individuals, the amendments more clearly describe the intended prohibition.

§41.83. Sexual intimacies with a former client/patient, or an immediate family member of a former client/patient.

The IRRC expressed three concerns about proposed section 41.83. First, the IRRC commented that Section 41.84 needs to clarify that the factors contained in section 41.83(b) must be demonstrated only after an order to show cause has been issued, and prior to or at the time of initiation of the relationship. IRRC

commented that a psychologist would not be required to present proof there has been no exploitation until after an Order to Show Cause has been issued. A psychologist who desires to commence a relationship with a former client/patient two years following the termination of the professional relationship must satisfy himself, prior to engaging in the relationship, that there will be no exploitation of the client/patient.

Sexual relationships with former clients are generally deemed to be inappropriate because of the many ongoing responsibilities that a psychologist has to his client after termination. For example, psychologists have an ongoing responsibility to maintain a client's privacy, confidentiality and privilege after termination. Psychologists are responsible for maintaining professional records beyond termination. Psychologists may be subpoenaed to offer expert witness testimony beyond termination. Additionally, psychologists must be cognizant of the fact that initiating or agreeing to a post-therapy sexual relationship with a client interferes with the client's option to return to therapy and may interfere with the integration and consolidation of the transference phenomena and therapeutic work.

In light of these on-going ethical responsibilities, a psychologist who desires to commence a sexual relationship with a client/patient after two years must satisfy himself prior to engaging in the relationship that there has been no exploitation of the client/patient. The seven factors listed in subsection (b) assist the licensee, prior to entering the relationship, and Board when evaluating the relationship, in determining whether exploitation occurs.

Second, the IRRRC requested the Board to explain why each factor contained in subsections (b)(1) through (b)(7) is necessary in each type of relationship.

The first factor requires a psychologist to consider the amount of time that has passed since the professional relationship terminated. The longer the period following the termination of the professional relationship, the less likely an exploitation occurs.

The second factor recognizes that there are differences between the intensity and depth of different therapies, such as intensive psychodynamic therapy versus biofeedback for headaches. Therapy which consists of one or two sessions differs substantially from therapy which spans several years. Thus, psychologists must consider the nature and the duration of the therapy in order to fully determine whether a past therapeutic relationship would exploit the client's trust and

dependency. The more intensive the therapeutic relationship, the more likely an exploitation occurs.

The third factor recognizes that circumstances surrounding termination may have a large bearing on the likelihood of a post-therapy sexual relationship ever occurring without exploitation and/or harm to the client/patient. Examples of such circumstances where exploitation may occur include abrupt or explosive terminations of therapy or therapeutic relationships in which transference or counter transference issues are not manageable.

The fourth factor requires the psychologist to consider the client/patient's personal history. This factor recognizes that unique vulnerabilities of a client/patient may increase the risk of vulnerability and harm to the client/patient if a sexual relationship with a former therapist were to develop. The more vulnerable the client, the more likely an exploitation occurs.

The fifth factor requires a psychologist to consider the client/patient's current mental status, i.e., state of mind. For example, an individual who is struggling with mental conflicts may be more easily exploited or harmed than a person whose mental status is stable.

The sixth factor requires consideration into whether or not the psychologist had suggested to the client/patient during therapy that a romantic relationship between them would be possible at the end of two years.

Finally, the seventh factor requires consideration of whether or not a post-therapy sexual relationship would likely adversely affect the client/patient or immediate family members of the client/patient. IRRRC requested an example of an "adverse impact" under subsection 41.83(b)(7). The following hypothetical is illustrative of how a post-therapy sexual relationship with a family member of a former client can adversely affect the client.

The mother of a seven-year-old child client/patient takes the child to a psychologist for help in dealing with multiple losses experienced by the child. (Two of the child's older siblings with whom the child was especially close died instantly in a tragic accident; the child's parents could not cope with the loss and divorced. In addition, the child's pet dog and "best friend" got struck by a car and died). Through therapy, the psychologist was successful in helping the child deal with his losses. Two years after therapy has terminated, the psychologist and the child's mother run into each other at a social event hosted by a mutual friend. Psychologist

and mother start dating. The child, now ten years of age, forms a close bond with the psychologist. One year later, the relationship between mother and psychologist ends. The child falls apart because of another loss. In this hypothetical, consideration by the psychologist of the child client/patient's personal history would have ruled out the possibility of the psychologist commencing a relationship with the child's mother.

§41.84. Disciplinary Proceedings

The IRRC again commented that the Board should clarify that the psychologist's burden of proof occurs only after an order to show cause has been issued. As previously explained, the psychologist is not required to provide the Board with proof until a disciplinary action commences. Nonetheless, the psychologist must consider the seven factors contained in Section 41.83(b) prior to entering into the relationship. The Board believes that no revision is necessary to subsection (c) as disciplinary proceedings requires the filing of an Order to Show Cause unless settled in advance through a Consent Agreement between the parties.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

The Board reviewed this rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final regulation addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact and Paperwork Requirements

The amendments should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the amendments should not necessitate any legal, accounting, reporting or other paperwork requirements.

Statutory Authority

The amendments are adopted under the authority of section 3.2(2) of the Act (63 P.S. §1203.2(2)).

Sunset Date

The Board continually monitors the effectiveness of its regulations through communications with the regulated population; accordingly, no sunset date has been set.

Regulatory Review

Under Section 5(a) of the Regulatory Review Act, the Act of June 30, 1989 (P.L. 73, No. 19), (71 P.S. §§745.1 -745.15), the agency submitted a copy of the Notice of Proposed Rulemaking, published at 28 Pa. B. 1421, on _____, 1999, to the IRRC and the Chairmen of the HPLC and the SCP/PLC for review and comment. In compliance with Section 5(b.1), the agency also provided the IRRC and the committees with copies of all comments received, as well as other documentation.

In preparing this final form regulation the agency has considered all comments received from the IRRC and the public.

This final form regulation was (deemed) approved by the HPLC on _____ and (deemed) approved by the SCP/PLC on _____. The IRRC met on _____ and (deemed) approved the regulation in accordance with Section 5(c) of the Act.

Contact Person

Further information may be obtained by contacting Melissa Wilson, Administrative Assistant, State Board of Psychology, at P. O. Box 2649, Harrisburg, PA 17105-2649; telephone (717) 783-7155.

Findings

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769) (45 P.S. §§1201 and 1202) and the regulations promulgated thereunder at 1 Pa. Code §§7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) This amendment does not enlarge the purpose of proposed rulemaking published at 28 Pa. B. 1421.

(4) This amendment is necessary and appropriate for administration and enforcement of the Board's authorizing statute.

Order

The Board, acting under its authorizing statute, orders that:

(1) The regulations of the Board, 49 Pa. Code Chapter 41, are amended as set forth in Annex A.

(2) The Board shall submit this order and Annex A to the Office of General Counsel and to the Office of Attorney General as required by law.

(3) The Board shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(4) This order shall take effect upon publication in the Pennsylvania Bulletin.

ANNEX A
TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS
PART I. DEPARTMENT OF STATE
SUBPART A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS
CHAPTER 41. STATE BOARD OF PSYCHOLOGY

GENERAL

§41.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * *

[Client] Client/patient - A person, system, organization, group or family for whom a psychologist provides psychological services. In the case of individuals with legal guardians, including minors and legally incapacitated adults, the legal guardian shall be the client/patient for decision-making purposes. The minor, legally incapacitated adult or other person actually receiving the service shall be the client/patient for issues specifically reserved to the individual, such as confidential communications in a therapeutic relationship and issues directly affecting the physical or emotional safety of the individual, such as sexual or other exploitive dual relationships.

* * *

IMMEDIATE FAMILY MEMBER - PARENT/GUARDIAN, CHILD, SIBLING, SPOUSE OR OTHER FAMILY MEMBER WITH WHOM THE CLIENT/PATIENT LIVES.

Professional relationship - A therapeutic relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a psychologist and a client/patient and continuing thereafter until the last date of a professional service. If a psychologist sees a client/patient on an intermittent basis, the professional relationship shall be

deemed to start anew on each date that the psychologist provides a professional service to the client/patient.

* * *

Psychologist - A person who holds a license issued under the provisions of the Act to engage in the practice of psychology.

* * *

Sexual intimacies - Any romantic, sexually suggestive, sexually demeaning or erotic behavior. Examples of this behavior include, but are not limited to, sexual intercourse, non-therapeutic verbal communications, OR inappropriate non-verbal communications OF A SEXUAL OR ROMANTIC NATURE, sexual invitations, soliciting a date from a client/patient, masturbating in the presence of a client/patient (or encouraging a client/patient to masturbate in the presence of the psychologist), exposure, kissing, inappropriate OR hugging, or touching, or any other inappropriate physical contact or inappropriate self disclosure OF A SEXUAL OR EROTIC NATURE.

* * *

SEXUAL INTIMACIES

§41.81. Prohibited conduct.

a. Sexual intimacies between a psychologist and a current client/patient, or an immediate family member of a current client/patient, (for example, parent/guardian, child, and spouse) are prohibited.

b. Sexual intimacies with BETWEEN A PSYCHOLOGIST AND A PSYCHOLOGY TRAINEE, STUDENT OR RESEARCH PARTICIPANT persons over whom psychologists have current supervisory, evaluative or other authority are prohibited. Such persons include students, supervisees, or research participants.

§41.82. Former sexual partners as client/patients.

Psychologists may not accept as client/patients persons with whom they have engaged in sexual intimacies.

§41.83. Sexual intimacies with A former client/patients, CLIENT/PATIENT, or an immediate family member of a former client/patient.

a. Sexual intimacies between a psychologist and a former client/patient, or an immediate family member of a former client/patient are prohibited for at least 2 years following the termination of the professional relationship, and then only under very limited circumstances.

b. Following the passage of the 2-year period, psychologists who engage in sexual intimacies with A former client/patients, CLIENT/PATIENT, or AN immediate family member of A former client/patients, shall have the burden of demonstrating that there has been no exploitation of the client/patient in light of all relevant factors, including:

(1) The amount of time that has passed since the professional relationship terminated.

(2) The nature and duration of the therapy.

(3) The circumstances of termination.

(4) The client/patient's personal history, e. g., unique vulnerabilities.

(5) The client/patient's current mental status.

(6) Statements or actions made by the psychologist during the course of therapy suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client/patient.

(7) The likelihood of adverse impact on the

client/patient and others. IMMEDIATE FAMILY MEMBERS OF THE CLIENT/PATIENT.

§41.84. Disciplinary proceedings.

a. The consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary action brought under §§41.81-41.83 (relating to prohibited conduct; former sexual partners as client patients; and sexual intimacies with A former elient/patients CLIENT/PATIENT or, AN immediate family member of a former client/patient.

b. With the exception of information contained in a professional record, neither opinion evidence, reputation evidence nor specific instances of the past sexual conduct of an individual may be admissible in any disciplinary action brought under §§41.81-41.83.

c. In any disciplinary proceeding brought under §§41.81-41.83, the psychologist shall have the burden of proving that there has been no exploitation of the client/patient in light of all of the relevant factors enumerated under §41.83(b)(1)-(7).

§41.85. Impaired professional program.

When the Board takes disciplinary or corrective action against a psychologist under section 8(a) of the Act, 63 P.S. §1208(a), for conduct prohibited by §§41.81-41.83 (relating to prohibited conduct; former sexual partners as client/patients; and sexual intimacies with A former elient/patients, CLIENT/PATIENT or an immediate family member of a former client/patient. The psychologist will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

PROPOSED RULEMAKING

STATE BOARD OF PSYCHOLOGY

[49 PA. CODE CH. 41]

Sexual Intimacies

The State Board of Psychology (Board) proposes to amend § 41.1 (relating to definitions) and to adopt §§ 41.81—41.85 (relating to sexual intimacies) to read as set forth in Annex A.

Background

Under Ethical Principle 6(b) of the Code of Ethics for psychologists practicing in this Commonwealth, § 41.61, psychologists are advised that "[s]exual intimacies with clients are unethical." Despite this clear pronouncement, complaints are filed against psychologists every year by consumers who suffer emotional harm by psychologists who violate this Ethical Principle.

In the past, psychologists have attempted to defend against prosecutions brought under Ethical Principle 6(b) by arguing that: (1) the psychologist/client relationship had terminated prior to the commencement of any sexual relationship; (2) the psychologist had ceased billing the client/patient throughout the duration of the sexual relationship; (3) the client/patient had initiated the relationship; and (4) the psychologist did not engage in "sexual intercourse" with the client/patient during the therapeutic relationship. The latter argument assumed that "sexual intimacies" within the meaning of Ethical Principle 6(b) was limited to "sexual intercourse."

The proposed amendments seek to better protect consumers of psychological services and to provide guidance to the profession by defining the terms "client/patient," "professional relationship," "psychologist" and "sexual intimacies," and by providing specific guidance to psychologists on issues relating to: (1) sexual intimacies with current client/patients, immediate family members of current client/patients, students, supervisees or research participants; (2) sexual intimacies with former client/patients or an immediate family member of a former client/patient; and (3) former sexual partners as client/patients. The proposed amendments also seek to put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary proceeding brought under §§ 41.81—41.83, and that a psychologist who engages in conduct prohibited by the proposed amendments will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective action.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

In compliance with Executive Order 1996-1, prior to drafting these proposed amendments, the Board extended an invitation to the following associations to participate in preliminary discussions relative to the proposed amendments: Delaware County Association of School Psychologists, Laurel Mountains Psychological Association, Hospital Association of Pennsylvania, Pennsylvania Psychological Association, Pennsylvania Mental Health Consumers Association, Association of School Psychologists of Pennsylvania, National Association of School Psychologists, Academy of Psychologists Engaged in Private Prac-

tice in the Lehigh Valley, Berks Area Psychological Society, Central Pennsylvania Psychological Association, Greater Pittsburgh Psychological Association, Harrisburg Area Psychological Association, Lancaster/Lebanon Psychological Association, Lehigh Valley Psychological Association, Mideast PA School Psychological Association, Northeastern PA Psychological Association, Northwestern PA Psychological Association, Philadelphia Society of Clinical Psychologists and the Philadelphia Neuropsychology Society.

These same associations were subsequently extended an opportunity to preliminarily review and comment on the Board's draft regulatory proposal. In addition, a copy of the Board's draft regulatory proposal was made available for comment to at least 450 attendees of the June 1997 Pennsylvania Psychological Association's Annual meeting in Harrisburg.

In formulating this proposal, the Board reviewed and considered all comments and suggestions received by interested parties during the regulatory development process.

Description of Proposed Amendments

§ 41.1 (relating to definitions).

Definitions are proposed to be added to § 41.1 for the terms "client/patient," "professional relationship," "psychologist" and "sexual intimacies." As proposed, the term "client/patient" would be defined to mean: A person, system, organization, group or family for whom a psychologist provides psychological services. In the case of individuals with legal guardians, including minors and legally incapacitated adults, the legal guardian shall be the client/patient for issues specifically reserved to the individual, such as confidential communications in a therapeutic relationship and issues directly affecting the physical or emotional safety of the individual, such as sexual or other exploitive dual relationships.

The term "professional relationship" would be defined to mean: A therapeutic relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a psychologist and a client/patient and continuing thereafter until the last date of a professional service. If a psychologist sees a client/patient on an intermittent basis, the professional relationship shall be deemed to start anew on each date that the psychologist provides a professional service to the client/patient. Reference to "professional relationship" is found in proposed § 41.83 (relating to sexual intimacies with former client/patients or an immediate family member of a former client/patient). The definition is intended to provide guidance to psychologists on the issue of when a client/patient relationship terminates, if ever. As proposed, if a psychologist sees a client/patient on an intermittent basis, the professional relationship would be deemed to start anew on each date that the psychologist provides a professional service to the client/patient.

The proposal would define "psychologist" to mean a person who holds a license issued under the act to engage in the practice of psychology. Although the Professional Psychologists Practice Act (act) (63 P. S. §§ 1201.1—1218) empowers the Board to license and regulate psychologists, the term "psychologist" is not defined by the act.

Finally, the term "sexual intimacies" would be defined to include any romantic, sexually suggestive, sexually

demeaning or erotic behavior. Examples of this behavior includes but is not limited to, sexual intercourse, nontherapeutic verbal communications, inappropriate nonverbal communications, sexual invitations, soliciting a date from a client/patient, masturbating in the presence of a client/patient (or encouraging a client/patient to masturbate in the presence of the psychologist), exposure, kissing, inappropriate hugging or touching or any other inappropriate physical contact or inappropriate self-disclosure. The definition is intended to emphasize that "sexual intimacies" within the context of Ethical Principle 6(b) includes not only sexual intercourse but, also, any other type of inappropriate sexualized behavior or nontherapeutic touch.

§ 41.81 (relating to prohibited conduct).

Proposed § 41.81(a) addresses the issue of sexual intimacies between a psychologist and a current client/patient or an immediate family member of a current client/patient, such as, parent/guardian, child or spouse. Subsection (b) addresses sexual intimacies between psychologists and persons over whom they have current supervisory, evaluative or other authority.

As proposed, subsection (a) would outright prohibit an intimate relationship between a psychologist and a current client/patient or an immediate family member of a current client/patient. The sole goal of the therapeutic alliance is to help the patient. During the therapeutic relationship, trust, openness and empathy are promoted, dependency often develops and confidences are fostered. For sexual intimacies to intrude upon this relationship, distorts therapy, creates unrealistic expectations and shame in the patient, and exploits the patient's trust and dependency. Proposed subsection (a) seeks to reinforce the prohibition against sexual intimacies with clients announced in Ethical Principle 6(b), and to extend the prohibition to immediate family members of a current client/patient.

Ethical Principle 6(b) of the Code of Ethics, also directs psychologists to avoid relationships which might impair their professional judgment or increase the risk of exploitation. Consistent with this directive, proposed subsection (b) would prohibit sexual intimacies between psychologists and persons over whom they have current supervisory, evaluative or other authority. These persons would include students, supervisees or research participants.

§ 41.82 (relating to former sexual partners as client/patients).

Proposed § 41.82 addresses the issue of former sexual partners as client/patients. For reasons similar to those which support the outright ban of sexual intimacies with current client/patients, the proposal would prohibit psychologists from accepting as client/patients persons with whom they have engaged in sexual intimacies. This prohibition is consistent with a new provision added to the 1992 Ethics Code of the American Psychological Association.

§ 41.83 (relating to sexual intimacies with former client/patients or an immediate family member of a former client/patient).

Proposed § 41.83 addresses the issue of sexual intimacies with a former client/patient or an immediate family member of a former client/patient.

As proposed, subsection (a) would establish an absolute prohibition against this conduct for a period of at least 2 years following the termination of the professional relationship. The phrase "termination of the professional

relationship" is key. If a psychologist sees a patient on only a periodic basis, the 2 year period would not begin to run until the last date of professional service. Any professional contact or service thereafter, for example, telephone contacts, brief consults or providing psychological reports about the client/patient, would restart the 2-year period.

Proposed subsection (b) addresses behavior after 2 years. As proposed, following the passage of the 2-year period, psychologists who engage in sexual intimacies with former client/patients or immediate family members of former client/patients will have the burden of demonstrating that there has been no exploitation of the client/patient in light of all relevant factors including: (1) the amount of time that has passed since the professional relationship terminated; (2) the nature and duration of the therapy; (3) the circumstances of termination; (4) the client/patient's personal history, such as, unique vulnerabilities; (5) the client/patient's current mental status; (6) any statements or actions made by the psychologist during the course of therapy suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client/patient; and (7) the likelihood of adverse impact on the client/patient and others.

The intent of subsection (b) is not to suggest that sexual intimacies between a psychologist and a former client/patient or immediate family member of a former client/patient are always acceptable after 2 years. On the contrary, the proposal is a very restrictive rule which contemplates that sexual involvement after 2 years would occur only under very limited circumstances. After 2 years, the onus would be on the psychologist who engages in the activity to demonstrate that there has been no exploitation of the client/patient in light of all relevant factors, including the seven enumerated factors in subsection (b).

The proposal outlined in § 41.83 is consistent with the Ethics Code of the American Psychological Association.

§ 41.84 (relating to disciplinary proceedings).

Proposed § 41.84 would address procedural issues in disciplinary proceedings before the Board.

As proposed, the section would be divided into three subsections, (a)—(c). Proposed subsection (a) would put psychologists on notice that the consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in a disciplinary action brought under §§ 41.81—41.83. Courts have traditionally rejected these arguments on two grounds: (1) that consent in these instances cannot be voluntary or informed because it is affected by the powerful transference created by therapy; and (2) that as a matter of public policy, a patient cannot consent to unprofessional forms of treatment. Stromberg, Clifford D. and his colleagues of the law firm of Hogan & Hartson, "Physical Contact and Sexual Relations with Patients," *The Psychologist's Legal Handbook*, Chapter 8, § 8.07 (1988).

Proposed subsection (b) would similarly put psychologists on notice that, with the exception of information contained in a professional record, neither opinion evidence, reputation evidence nor specific instances of the past sexual conduct of an individual may be admissible in any disciplinary action brought under §§ 41.81—41.83. With one exception, this provision, as proposed, is consistent with the Pennsylvania's Rape Shield Law, 18 Pa.C.S.

§ 3104 (relating to evidence of victim's sexual conduct). The Rape Shield Law allows evidence of an alleged victim's past sexual conduct with the defendant when the consent of the victim is at issue. Proposed § 41.82 would prohibit a psychologist from accepting as a client/patient a person with whom he has engaged in sexual intimacies. Proposed § 41.84 would bar consent as a defense in any proceeding before the Board. Thus, the Rape Shield Law exception would not be germane to Board disciplinary proceedings.

Proposed subsection (c) would put psychologists on notice that in a disciplinary proceeding brought under §§ 41.81—41.83, the psychologist has the burden of proving that there has been no exploitation of the client/patient in light of all of the relevant factors enumerated under § 41.83(b)(1)—(7).

§ 41.85 (relating to impaired professional program).

Under section 18(b) of the act (63 P. S. § 1218(b)), the Board is empowered to defer and ultimately dismiss any types of corrective action that the Board may otherwise impose against a psychologist who violates the act or regulations of the Board, for an impaired professional. Proposed § 41.85 would put psychologists on notice that they would be ineligible for placement into an impaired professional program in lieu of disciplinary or corrective action for engaging in conduct prohibited by proposed §§ 41.81—41.83.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 10, 1998, the Board submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Professional Licensure and the Senate Committee on Consumer Protection and Professional Licensure. In addition to submitting the proposed amendments, the Board has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Board in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed amendments, it will notify the Board within 10 days of the close of the Committee's review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for the Board, the Governor and the General Assembly to review these objections before final publication of the proposed amendments.

Fiscal Impact and Paperwork Requirements

The proposed amendments should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the proposed amendments should not necessitate any legal, accounting, reporting or other paperwork requirements.

Statutory Authority

The amendments are proposed under the authority of section 3.2(2) of the act (63 P. S. § 1203.2(2)).

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to Jackie Wiest Lutz, Counsel, State Board

of Psychology, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking.

YVONNE E. KEAIRNS, Ph.D.,
Chairperson

Fiscal Note: 16A-633. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 41. STATE BOARD OF PSYCHOLOGY GENERAL

§ 41.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

[*Client*] *Client/patient*—A person, system, organization, group or family for whom a psychologist provides psychological services. In the case of individuals with legal guardians, including minors and legally incapacitated adults, the legal guardian shall be the client/patient for decision making purposes. The minor, legally incapacitated adult or other person actually receiving the service shall be the client/patient for issues specifically reserved to the individual, such as confidential communications in a therapeutic relationship and issues directly affecting the physical or emotional safety of the individual, such as sexual or other exploitive dual relationships.

* * * * *

Professional relationship—A therapeutic relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a psychologist and a client/patient and continuing thereafter until the last date of a professional service. If a psychologist sees a client/patient on an intermittent basis, the professional relationship shall be deemed to start anew on each date that the psychologist provides a professional service to the client/patient.

* * * * *

Psychologist—A person who holds a license issued under the act to engage in the practice of psychology.

* * * * *

Sexual intimacies—Any romantic, sexually suggestive, sexually demeaning or erotic behavior. Examples of this behavior include, but are not limited to, sexual intercourse, nontherapeutic verbal communications, inappropriate nonverbal communications, sexual invitations, soliciting a date from a client/patient, masturbating in the presence of a client/patient (or encouraging a client/patient to masturbate in the presence of the psychologist), exposure, kissing, inappropriate hugging or touching or any other inappropriate physical contact or inappropriate self disclosure.

SEXUAL INTIMACIES

§ 41.81. Prohibited conduct.

(a) Sexual intimacies between a psychologist and a current client/patient or an immediate family member of a current client/patient (for example, parent/guardian, child and spouse) are prohibited.

(b) Sexual intimacies with persons over whom psychologists have current supervisory, evaluative or other authority are prohibited. These persons include students, supervisees or research participants.

§ 41.82. Former sexual partners as client/patients.

Psychologists may not accept as client/patients persons with whom they have engaged in sexual intimacies.

§ 41.83. Sexual intimacies with former client/patients or an immediate family member of a former client/patient.

(a) Sexual intimacies between a psychologist and a former client/patient or an immediate family member of a former client/patient are prohibited for at least 2 years following the termination of the professional relationship, and then only under very limited circumstances.

(b) Following the passage of the 2-year period, psychologists who engage in sexual intimacies with former client/patients or immediate family members of former client/patients shall have the burden of demonstrating that there has been no exploitation of the client/patient in light of all relevant factors, including:

- (1) The amount of time that has passed since the professional relationship terminated.
- (2) The nature and duration of the therapy.
- (3) The circumstances of termination.
- (4) The client/patient's personal history (for example, unique vulnerabilities).
- (5) The client/patient's current mental status.

(6) Statements or actions made by the psychologist during the course of therapy suggesting or inviting the possibility of a posttermination sexual or romantic relationship with the client/patient.

(7) The likelihood of adverse impact on the client/patient and others.

§ 41.84. Disciplinary proceedings.

(a) The consent of an individual to engage in sexual intimacies with the psychologist may not be a defense in any disciplinary action brought under §§ 41.81—41.83 (relating to prohibited conduct; former sexual partners as client/patients; and sexual intimacies with former client/patients or an immediate family member of a former client/patient).

(b) With the exception of information contained in a professional record, neither opinion evidence, reputation evidence nor specific instances of the past sexual conduct of an individual may be admissible in any disciplinary action brought under §§ 41.81—41.83.

(c) In a disciplinary proceeding brought under §§ 41.81—41.83, the psychologist shall have the burden of proving that there has been no exploitation of the client/patient in light of all of the relevant factors enumerated under § 41.83(b)(1)—(7).

§ 41.85. Impaired professional program.

When the Board takes disciplinary or corrective action against a psychologist under section 8(a) of the act (63 P. S. § 1208(a)) for conduct prohibited by §§ 41.81—41.83 (relating to prohibited conduct; former sexual partners as client/patients; and sexual intimacies with former client/patients or an immediate family member of a former client/patient), the psychologist will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

[Pa.B. Doc. No. 98-449. Filed for public inspection March 20, 1998, 9:00 a.m.]



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF PSYCHOLOGY

(717) 783-7155

116 PINE STREET
P. O. BOX 2649
HARRISBURG, PA
17105-2649

April 6, 2000

The Honorable John R. McGinley, Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

RE: Final Regulation
State Board of Psychology
Sexual Intimacies: 16A-633

Dear Chairman McGinley:

Enclosed is a copy of a final rulemaking package of the State Board of Psychology pertaining to sexual intimacies.

The Commission will be pleased to provide whatever information your Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Joseph L. French".

Joseph L. French, Ed.D., Chairman
State Board of Psychology

JLF:JPS:apm
Enclosures

cc: Hon. Kim Pizzingrilli, Secretary of the Commonwealth
Department of State
C. Michael Weaver, Deputy Secretary of Regulatory Programs
Department of State
John T. Henderson, Jr., Chief Counsel
Department of State
Joyce McKeever, Deputy Chief Counsel
Department of State
Dorothy Childress, Commissioner
Bureau of Professional and Occupational Affairs
Gerald S. Smith, Senior Counsel in Charge
Bureau of Professional and Occupational Affairs
Judith Pachter Schulder, Counsel
State Board of Psychology
State Board of Psychology

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

I.D. NUMBER: 16A=633
SUBJECT: State Board of Psychology - Sexzual Intimacies
AGENCY: DEPARTMENT OF STATE

RECEIVED

2000 APR -6 PM 12:04

REGULATORY REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
4/16/00	<i>Adrienne D. ...</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
4/16/00	<i>Sammy Weaver</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
4/6/00	<i>St. Belmont</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU