

<h1 style="text-align: center;">Regulatory Analysis Form</h1>		<p style="text-align: center;">This space for use by IRRC RECEIVED</p> <p style="text-align: center;">2000 MAY 23 PM 1:23</p> <p style="text-align: center;">INDEPENDENT LEGISLATIVE REVIEW COMMISSION</p> <p style="text-align: right;">IRRC Number: 1952</p>
<p>(1) Agency Department of State, Bureau of Professional and Occupational Affairs, State Board of Nursing</p>		
<p>(2) I.D. Number (Governor's Office Use) 16A-5110</p>		
<p>(3) Short Title Sexual Misconduct</p>		
<p>(4) PA Code Cite 49 Pa. Code §§21.1, .4a, .18, .18a, .141, .146a, .148, and .148a.</p>	<p>(5) Agency Contacts & Telephone Numbers</p> <p style="text-align: center;">Primary Contact: Robert G. Cameron, Counsel, State Board of Nursing (717) 783-7200</p> <p style="text-align: center;">Secondary Contact: Joyce McKeever, Deputy Chief Counsel, Department of State (717) 783-7200</p>	
<p>(6) Type of Rulemaking (check one)</p> <p><input type="checkbox"/> Proposed Rulemaking</p> <p><input checked="" type="checkbox"/> Final Order Adopting Regulation</p> <p><input type="checkbox"/> Final Order, Proposed Rulemaking Omitted</p>	<p>(7) Is a 120-Day Emergency Certification Attached?</p> <p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes: By the Attorney General</p> <p><input type="checkbox"/> Yes: By the Governor</p>	
<p>(8) Briefly explain the regulation in clear and nontechnical language.</p> <p style="text-align: center;">The regulations protect consumers of nursing services and provide professional standards addressing issues of sexual misconduct committed by licensees. The regulations define the period of the professional relationship for nurses involved in mental health services and other nurses, and sexual impropriety and sexual violation; identify sexual impropriety and sexual violation as prohibited conduct; preclude a defense of patient consent to charges of sexual misconduct; preclude evidence of the patient's past sexual conduct in proceedings alleging sexual misconduct; and provide that a nurse who has engaged in sexual misconduct will not be eligible for placement in an impaired professional program.</p>		
<p>(9) State the statutory authority for the regulation and any relevant state or federal court decisions.</p> <p style="text-align: center;">Section 2.1(k) of the Professional Nursing Law, Act of May 22, 1951, P.L. 317, as amended, 63 P.S. §212.1(k), and section 17.6 of the Practical Nurse Law, Act of March 2, 1956, P.L. (1955) 1211, as amended, 63 P.S. §667.6</p>		

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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?

This proposed rulemaking was developed against a background of increasing complaints of sexual misconduct against health care professionals who are licensed by the Bureau of Professional and Occupational Affairs. There is currently no language in the regulations of the Board that explicitly prohibits sexual misconduct or that defines the period of the professional relationship or sexual improprieties or sexual violations. This rulemaking will put licensees on notice that sexual improprieties and violations constitute intolerable conduct.

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

Absent specific regulations, consumers of nursing services will be dependent on court decisions to address, on a case-by-case basis, the specific issues which the proposed regulations seek to clarify.

(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 nursing services and the nursing profession as a whole will benefit from the regulations, although the benefits cannot be quantified. The State Board of Nursing currently licenses 251,765 registered and practical nurses.

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(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 registered and practical nurses in the Commonwealth will be required to comply with the regulation. Pennsylvania has 251,765 registered and practical nurses.

(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.

Prior to drafting this proposed regulation, the Board invited interested associations, which represent the professions, educational institutions and interested individuals, to comment on a preliminary draft. The Board reviewed and considered all comments and suggestions received by interested parties during the regulatory development process. The interested associations included the American Association of Neuroscience Nurses, American Nephrology Nurses' Association, Association of Operating Room Nurses, Inc., Council on Health Professions Education, Emergency Nurses Association, Forum for Nurse Executives, GPC-Oncology Nursing Society, Hospital Association of Pennsylvania, Intravenous Nurses Society, Licensed Practical Nurses Association of Pennsylvania, Northeastern Pennsylvania League of Licensed Practical Nurses, Pennsylvania Association of Home Health Agencies, Pennsylvania Association of Non-Profit Homes for the Aging, Pennsylvania Association of Nurse Anesthetists, Pennsylvania Association of Occupational Health Nurses, Pennsylvania Association of Practical Nursing Program Coordinators, Pennsylvania Coalition of Nurse Practitioners, Pennsylvania College of Associate Degree Nursing, Pennsylvania Higher Education Nursing Schools Association, Pennsylvania League for Nursing, Inc., Pennsylvania Nurses Association, Pennsylvania Organization of Nurse Leaders, Pennsylvania Society of Gastroenterology Nurses and Associates, and School Nurse Section of Pennsylvania State Education Association.

(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 costs or savings associated with complying with this regulation.

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(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.

There are no costs or savings to local governments associated with compliance.

(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.

By rulemaking, the Board establishes standards of conduct which will be enforced in disciplinary proceedings. The standards of conduct embodied in the regulations, and procedural rules relating to disciplinary proceedings and outcomes, will replace adjudication on a case-by-case basis. As a result some savings of enforcement costs may be achieved. However, any such savings are impossible to quantify at this time.

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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

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(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. See, paragraphs (11) and (13) for benefits.

(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 misconduct would not have the force of regulation; (2) Waiting for court decisions to address the issues addressed by the regulation would benefit neither consumers nor the nursing 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.

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(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.

No federal standards apply; licensure of professional and practical nurses is a state function.

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

This regulation is consistent with other states. Other states generally deem sexual misconduct with patients as unprofessional conduct subject to disciplinary action. This regulation will not put Pennsylvania at a competitive disadvantage with other states.

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

This regulation will not affect existing or proposed regulations of the Board or other 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, the Board has scheduled no public hearings or informational meetings regarding this regulation. However, the Board will consider comment from the public during its regularly scheduled meetings. Board meetings are held in the Board's offices at 116-124 Pine Street, Harrisburg, Pennsylvania. Board meeting dates are posted on the Board's web page and are available by calling (717) 783-8200.

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(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 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.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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

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BY: _____
(DEPUTY ATTORNEY GENERAL)

Bureau Of Professional and Occupational Affairs
(AGENCY)

BY: *[Signature]*

DOCUMENT/FISCAL NOTE NO. 16A-5110

DATE OF ADOPTION _____

1/29/99
DATE OF APPROVAL

DATE OF APPROVAL _____

BY: *[Signature]*
M. Christine Michnie, PhD, RN

(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
49 PA. CODE, CHAPTER 21
STATE BOARD OF NURSING
SEXUAL MISCONDUCT

The State Board of Nursing (Board) adopts regulations regarding sexual misconduct by amending Chapter 21 as set forth in annexes A and B.

A. Effective Date

The amendments will be effective upon publication in the Pennsylvania Bulletin.

B. Statutory Authority

These amendments are adopted by the Board under the authority of Section 2.1(k) of the Professional Nursing Law (63 P.S. §212.1(k)) and Section 17.6 of the Practical Nurse Law (63 P.S. §667.6).

C. Background and Purpose

These amendments were proposed against a background of increasing complaints of sexual misconduct against health care professionals who are licensed by the Bureau of Professional and Occupational Affairs. The sexual exploitation of patients by health care practitioners presents a threat to public health and safety.

The amendments are intended to protect patients from sexual exploitation and to inform nurses that sexual misconduct is subject to disciplinary action. The amendments establish that conduct defined as a sexual violation or sexual impropriety with a patient during the course of a professional relationship violates standards of nursing conduct. Further, the amendments establish additional standards for registered nurses involved in mental health services by deeming their professional relationship with a patient to extend for two years after services are discontinued. The amendments establish that the consent of a patient to a sexual impropriety or sexual violation cannot be a defense in a disciplinary proceeding before the Board and that a nurse who engages in conduct prohibited by the amendments is not eligible for placement into an impaired professional program under either the Professional Nursing Law or the Practical Nurse Law.

D. Summary of Comments and Responses on Proposed Rule Making

Notice of the proposed rulemaking was published at 28 Pa. B. 2693 (June 13, 1998). The Board received comments from the Independent Regulatory Review Commission (IRRC) and one public commentator, The Hospital and Healthsystem Association of Pennsylvania (HAP). Responses to these comments are organized by subject as follows.

§§21.1 and 21.141. Definitions.

The commentators objected to the term "behavioral/mental health nurse therapist" in § 21.1 (relating to registered nurses). HAP commented that the term "therapist" in the definition could be interpreted to mean that the nurse is also an independent practitioner providing therapy services. HAP suggested that the definition should be clarified to reflect what categories of nurses are included in the definition. IRRC commented that the definition was beyond the Board's authority and conflicted with the Professional Nursing Law in that it could be interpreted to allow a nurse to unilaterally prescribe medical treatment or regimens. IRRC recommended deletion of the term "behavioral/mental health nurse therapist," but did not object to a different standard for nurses providing services in the mental health field. IRRC suggested, and the Board concurs, that this distinction should be made in the definition of a professional relationship. In final rulemaking, the Board has deleted the term "behavioral/mental health nurse therapist" and placed the distinction pertaining to the duration of the professional relationship for nurses practicing in the mental health field in the definition of "professional relationship."

As proposed, the regulations in §21.1 provide that for a nurse not involved in mental health services, the professional relationship ends with the patient's discharge from or discontinuance of services by the nurse or by the nurse's employer. IRRC questioned how this provision applies when an individual returns to a nurse's employer for treatment which is not related to the treatment provided by the original nurse. The Board's intent is that the professional relationship terminates for the original nurse when she last treats the patient. The Board believes the proposed regulations adequately reflect the Board's intent, and therefore, no change in final rulemaking has been made.

IRRC suggested editorial changes to §21.1(i) (relating to the professional relationship for professional nurses). The Board has made the changes. The Board also has made similar editorial changes to §21.141(i) (relating to the professional relationship for practical nurses) for clarity and uniformity.

§§ 21.18 and 21.148. Standards of nursing conduct.

IRRC suggested that the specific citations to the relevant statutes authorizing civil penalties in these sections should be provided. IRRC's suggestion has been adopted in the final version.

§§21.18a and 21.148a. Post-adjudication reporting.

As proposed, §§21.18a and 21.148a provide that as a condition for reinstatement, the Board may require the nurse to obtain prior, written, informed consent of the patient to be treated by the nurse. Prior to treatment, the patient would sign a form that indicates that the patient consents to being treated by a nurse who had committed a sexual misconduct violation.

IRRC questioned the need for this provision because the condition for reinstatement would apply after the Board had already made a determination that a nurse with a sexual misconduct violation was fit to resume practice. IRRC also questioned the practicality and reasonableness of requiring the form to be signed by a patient. Both IRRC and HAP noted that a hospital or doctor's office would be unlikely to hire a nurse if patients would have to sign a consent form before that nurse could treat them. IRRC and HAP also expressed concern about the circumstances under which the Board might require the consent form. HAP expressed concern that this could lead to staffing problems at hospitals that hired nurses with a sexual misconduct violation if patients refused treatment by the nurse. HAP noted that additional problems could arise if a patient refused treatment by a nurse with a sexual misconduct violation, but the nurse with a violation was the only one on duty. HAP suggested that signing the consent form may produce undue anxiety in patients. HAP further noted that this kind of reporting is not required for any other standard of conduct violation. Both commentators suggested that these sections be reconsidered.

The Board concurs with these concerns and suggestions. The Board has determined that the proposed rulemaking would be impractical and unduly burdensome for the reasons raised by IRRC and HAP. Therefore, the Board has deleted §§21.18a and 21.148a from final rulemaking.

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

In accordance with the requirements of Executive Order 1996-1 (February 6, 1996), in drafting and promulgating the amendments, the Board solicited input and suggestions from the regulated community by providing drafts to interested associations and organizations, which represent the professions, educational institutions, and interested individuals. The Board reviewed and considered all comments and suggestions by interested parties received during the regulatory development process. The final regulations address a compelling public interest as described in this preamble and otherwise comply with Executive Order 1996-1.

F. Fiscal Impact and Paperwork Requirements.

There should be no adverse fiscal impact or additional paperwork requirements incurred by the Board, political subdivisions, or the private sector.

G. Sunset Date

The Board continuously monitors its regulations. Therefore, no sunset date has been assigned.

H. 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 Board submitted a copy of the notice of proposed rulemaking on June 13, 1998, published at 28 Pa.B. 2693-2697, to the Independent Regulatory Review Commission and to the Chairmen of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee for review and comment. In compliance with Section 5(b.1), the Board also provided the Commission and the Committees with copies of all comments received, as well as other documents.

In preparing this final form regulation, the Board has considered all comments received from the Commission and the public. No comments were received from the Committees.

This final form regulation was (deemed) approved by the House Committee on _____ and (deemed) approved by the Senate Committee on _____. The Commission met on _____ and (deemed) approved the regulation in accordance with Section 5(c) of the Regulatory Review Act.

I. Contact Person

Interested persons may obtain information regarding the amendments by writing to Ann Steffanic, Board Administrator, State Board of Nursing, P.O. Box 2649, 124 Pine Street, Harrisburg, PA 17105-2649.

J. 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. 2693-2697 (June 16, 1998).

(4) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts identified in Part B. of this Preamble.

K. Order

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

(1) The regulations of the Board, 49 Pa. Code Chapter 21, are amended as set forth in Annexes A and B.

(2) The Board shall submit this order and Annexes A and B 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 Annexes A and B and deposit them with the Legislative Reference Bureau as required by law.

(4) This order shall take effect on 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 21. STATE BOARD OF NURSING
Subchapter A. REGISTERED NURSES

GENERAL PROVISIONS

§21.1. Definitions.

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

* * * * *

~~Behavioral/mental health nurse therapist. A registered nurse engaged in a specialized practice involving assessment, diagnosis, counseling or treatment, including psychotherapy, of any mental or emotional problem, impairment, dysfunction or illness.~~

* * * * *

~~Patient (includes residents and clients). A person, other than a spouse or immediate family member, who receives professional services from a registered nurse, regardless of whether or not the nurse receives remuneration for the services.~~

* * * * *

Professional Relationship.

~~(i) Except for a behavioral/mental health nurse therapist, FOR A REGISTERED NURSE NOT INVOLVED IN PROVIDING MENTAL HEALTH SERVICES, the relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a registered nurse and a patient and ending with the patient's discharge from or discontinuance of services by~~

the nurse or by the nurse's employer, except that a professional nurse may administer necessary emergency medical treatment or transitory trauma care. THE ADMINISTRATION OF EMERGENCY MEDICAL TREATMENT OR TRANSITORY TRAUMA CARE SHALL NOT BE DEEMED TO ESTABLISH A PROFESSIONAL RELATIONSHIP.

(ii) For a behavioral/mental health nurse therapist, the therapeutic relationship which FOR A REGISTERED NURSE INVOLVED IN PROVIDING MENTAL HEALTH SERVICES, THE RELATIONSHIP WHICH shall be deemed to exist for a period of time beginning with the first professional contact or consultation between the behavioral/mental health nurse therapist NURSE and patient and ending 2 years after discharge from or discontinuance of services, except for a minor, when the term means 2 years or until 1 year after the age of majority, whichever is longer, after discharge from or discontinuance of services. FOR PATIENT WHO IS A MINOR, A PROFESSIONAL RELATIONSHIP SHALL BE DEEMED TO EXIST FOR 2 YEARS OR UNTIL 1 YEAR AFTER THE AGE OF MAJORITY, WHICHEVER IS LONGER, AFTER DISCHARGE FROM OR DISCONTINUANCE OF SERVICES.

* * *

Sexual Impropriety. The term includes the following offenses:

(i) Making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments.

(ii) Unnecessarily exposing a patient's body or watching a patient dress or undress, unless for therapeutic purposes or when a THE patient specifically requests assistance.

(iii) Examining or touching genitals without the use of gloves when performing an otherwise appropriate examination.

(iv) Discussing or commenting on a patient's potential sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive

health care. Discussion of a patient's sexual practices and preferences shall be fully documented in the patient's chart.

(v) Soliciting a date from a patient.

(vi) Volunteering information to a patient about one's sexual problems, preferences or fantasies.

Sexual Violation. The term includes the following offenses:

(i) Sexual intercourse between a registered nurse and a patient during the period of the professional relationship.

(ii) Genital to genital contact between a nurse and a patient during the professional relationship.

(iii) Oral to genital contact between a nurse and a patient during the period of the professional relationship.

(iv) Touching breasts, genitals, or any other body part for any purpose other than appropriate examination or treatment, or using prolonged or improper examination techniques, or after the patient has refused or withdrawn consent.

(v) Encouraging a patient to masturbate in the presence of the nurse or masturbating while a patient is present.

(vi) Providing or offering to provide drugs or treatment in exchange for sexual favors.

(vii) Using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in conduct that would constitute a sexual impropriety or sexual violation.

* * * * *

§21.4a Procedural Matters.

(a) The consent of the patient to any sexual impropriety or violation is not be a defense to any disciplinary charge for violation of the act or this subchapter.

(b) Evidence of specific instances, opinion evidence, or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under § 21.18(b)(9) (relating to standards of nursing conduct). The Board may consider sexual relationships between the nurse and the patient occurring prior to the professional relationship.

(c) A nurse who attempts to raise as a defense an argument that conduct prohibited as a sexual violation or sexual impropriety was necessary or appropriate to the treatment of any patient shall be required to demonstrate competency in practice which relates directly to the treatment of sexual function or dysfunction. This competence may be demonstrated through educational training and supervised clinical experience. Appropriate discussions of sexual matters between a nurse and a patient shall be fully documented in patient records.

RESPONSIBILITIES OF THE REGISTERED NURSE

§ 21.18. Standards of nursing conduct.

* * * * *

(b) A registered nurse may not:

* * * * *

(9) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.

(c) A registered nurse who fails to comply with an obligation or prohibition under this section is subject to disciplinary [action under section 14(a)(3) of the act (63 P.S. §224(a)(3))] and corrective measures under section 14 of the act (63 P.S. §224).

(d) The Board may, in addition to any other disciplinary or corrective measure set forth in this section, levy appropriate civil penalties as authorized by law SECTION 13(b) OF THE ACT (63 P.S. § 223(b)) upon a nurse found to have engaged in conduct constituting a sexual impropriety or sexual violation.

~~§ 21.18a. Post Adjudication Reporting.~~

~~(a) As a condition to reinstatement of a license from any disciplinary measure arising out of a violation of § 21.18(b)(9) (relating to standards of nursing conduct), the Board may require the nurse to obtain the prior, written, informed consent of patients treated by the nurse on a form approved by the Board. The form shall set forth the following:~~

~~(1) The effective date and duration of the suspension, revocation or other sanction;~~

~~(2) A citation to the statutory provisions under which the sanction was issued, and a copy of the specific text of the act cited.~~

~~(3) The address and telephone number of the Board.~~

~~(b) The form shall be maintained on file in the nurse's primary practice location and shall be subject to inspection, with or without notice, by representatives of the Board.~~

~~§21.18ba. Impaired Professional Program.~~

~~When the Board is empowered to take disciplinary or corrective action against a nurse for conduct defined as a sexual violation or sexual impropriety, the nurse will not be eligible for placement into an impaired professional program under section 14.1 of the act (63 P.S. § 224.1).~~

Annex B
Title 49. Professional and Vocational Standards
Part I. Department of State
Subpart A. Professional and Occupational Affairs
Chapter 21. State Board of Nursing
Subchapter B. PRACTICAL NURSES

GENERAL PROVISIONS

§21.141. Definitions.

* * * * *

Patient (includes residents and clients). A person, other than a spouse or immediate family member, who receives professional services from a licensed practical nurse, regardless of whether or not the nurse receives remuneration for the services.

* * *

Professional Relationship. The relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a licensed practical nurse and a patient and ending with the final professional contact between them, ~~except that a licensed practical nurse may administer necessary emergency medical treatment or transitory trauma care.~~ THE ADMINISTRATION OF EMERGENCY MEDICAL TREATMENT OR TRANSITORY TRAUMA CARE SHALL NOT BE DEEMED TO ESTABLISH A PROFESSIONAL RELATIONSHIP.

* * * * *

Sexual Impropriety. The term includes the following offenses:

(i) Making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments.

(ii) Unnecessarily exposing a patient's body or watching a

patient dress or undress, unless for therapeutic purposes or when a THE patient specifically requests assistance.

(iii) Examining or touching genitals without the use of gloves when performing an otherwise appropriate examination.

(iv) Discussing or commenting on a patient's potential sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive health care. Discussion of a patient's sexual practices and preferences shall be fully documented in the patient's chart.

(v) Soliciting a date from a patient.

(vi) Volunteering information to a patient about one's sexual problems, preferences or fantasies.

Sexual Violation. The term includes the following offenses:

(i) Sexual intercourse between a licensed practical nurse and a patient during the period of the professional relationship.

(ii) Genital to genital contact between a nurse and a patient during the period of the professional relationship.

(iii) Oral to genital contact between a nurse and a patient during the period of the professional relationship.

(iv) Touching breasts, genitals, or any other body part for any purpose other than appropriate examination or treatment, or using prolonged or improper examination techniques, or after the patient has refused or withdrawn consent.

(v) Encouraging a patient to masturbate in the presence of the nurse or masturbating while the patient is present.

(vi) Providing or offering to provide drugs or treatment in exchange for sexual favors.

(vii) Using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in any conduct that would constitute a sexual impropriety or sexual violation.

* * * * *

§21.146a. Procedural Matters.

(a) The consent of the patient to any sexual impropriety or violation is not a defense to any disciplinary charge for violation of the Act or this subchapter.

(b) Evidence of specific instances, opinion evidence, or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under § 21.148(b)(9) (relating to standards of nursing conduct). The Board may consider sexual relationships between the nurse and the patient occurring prior to the professional relationship.

(c) A nurse who attempts to raise as a defense an argument that conduct prohibited as a sexual violation or sexual impropriety was necessary or appropriate to the treatment of a patient shall be required to demonstrate competency in practice which relates directly to the treatment of sexual function or dysfunction. This competence may be demonstrated through educational training and supervised clinical experience. Appropriate discussions of sexual matters between a nurse and a patient shall be fully documented in patient records.

§ 21.148. Standards of nursing conduct.

* * * * *

(b) A licensed practical nurse may not:

* * * * *

(9) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.

(c) Failure to comply with an obligation or prohibition imposed by this section is subject to disciplinary [action under section 16(a)(3) of the act (63 P.S. §666(a)(3))] and corrective measures under section 16 of the act (63 P.S. § 666).

(d) The Board may, in addition to any other disciplinary or corrective measure set forth in this section, levy appropriate civil penalties as authorized by law SECTION 15 OF THE ACT (63 P.S. § 665) upon a nurse found to have engaged in conduct constituting a sexual impropriety or sexual violation.

~~§21.148a. Post-Adjudication Reporting.~~

~~(a) As a condition to reinstatement of a license from a disciplinary measure arising out of a violation of § 21.148(b)(9) (relating to standards of nursing conduct), the Board may require a practical nurse to obtain the prior, written, informed consent of patients treated by the nurse on a form approved by the Board. The form shall set forth the following:~~

~~(1). The effective date and duration of the suspension, revocation or other sanction;~~

~~(2). A citation to the statutory provisions under which the sanction was issued, and a copy of the specific text of the act cited;~~

~~(3). The address and telephone number of the Board.~~

~~(b) The form shall be maintained on file in the nurse's primary practice location and shall be subject to inspection, with or without notice, by representatives of the Board.~~

§21.148ba. Impaired Professional Program.

When the Board is empowered to take disciplinary or corrective

Sexual Misconduct
16A-5110
September 25, 1998

action against a practical nurse for conduct defined as a sexual violation or sexual impropriety, the nurse will not be eligible for placement into an impaired professional program under section 16.2 of the act (63 P.S. § 666.2).

PROPOSED RULEMAKING

STATE BOARD OF NURSING

[49 PA. CODE CH. 21]

Sexual Misconduct

The State Board of Nursing (Board) proposes to adopt amendments regarding sexual misconduct committed by registered and licensed practical nurses by amending §§ 21.1 and 21.141 (relating to definitions) and §§ 21.18 and 21.148 (relating to standards of nursing conduct) and adopting §§ 21.4a and 21.146a (relating to procedural matters), §§ 21.18a and 21.148a (relating to post-adjudication reporting) and §§ 21.18b and 21.148b (relating to impaired professional program) to read as set forth in Annex A.

Effective Date

The proposed amendments will be effective upon publication of final-form regulations in the *Pennsylvania Bulletin*.

Statutory Authority

The Board is authorized to adopt regulations necessary for the administration of its enabling statutes under section 2.1(k) of the Professional Nursing Law (63 P.S. § 212.1(k)) and section 17.6 of the Practical Nurse Law (63 P.S. § 667.6).

Background and Purpose

This proposed rulemaking was developed against a background of increasing complaints of sexual misconduct against health care professionals who are licensed by the Bureau of Professional and Occupational Affairs. A presentation by Dr. Kenneth Pope, a National authority on sexual misconduct committed by health care practitioners, to a joint session of various health boards on April 25 and 26, 1996, made clear that the sexual exploitation of patients by health care practitioners presents a threat to public health and safety.

The proposed amendments seek to better protect consumers of nursing services and to provide guidance to the profession by defining terms such as "behavioral/mental health nurse therapist," "patient," "professional relationship," "sexual impropriety" and "sexual violation." The proposed amendments guide nurses by informing them that conduct defined as a sexual violation or impropriety with a patient during the course of a professional relationship violates standards of nursing conduct. The proposed amendments guide behavioral/mental health nurse therapists by informing them that their professional relationship with a patient extends for 2 years after services are discontinued. The proposed amendments notify nurses that the consent of a patient to a sexual impropriety or violation cannot be a defense in a disciplinary proceeding before the Board and that a nurse who engages in conduct prohibited by the proposed amendments will not be eligible for placement into an impaired professional program under either the Professional Nursing Law or the Practical Nurse Law.

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 invited interested associations to comment on a preliminary draft. The Board reviewed and considered all comments and suggestions received by interested parties during the regulatory development process. The interested associations included the American Association of Neuroscience Nurses, American Nephrology Nurses' Association, Association of Operating Room Nurses, Inc., Council on Health Professions Education, Emergency Nurses Association, Forum for Nurse Executives, GPC-Oncology Nursing Society, Hospital Association of Pennsylvania, Intravenous Nurses Society, Licensed Practical Nurses Association of Pennsylvania, Northeastern Pennsylvania League of Licensed Practical Nurses, Pennsylvania Association of Home Health Agencies, Pennsylvania Association of Non-Profit Homes for the Aging, Pennsylvania Association of Nurse Anesthetists, Pennsylvania Association of Occupational Health Nurses, Pennsylvania Association of Practical Nursing Program Coordinators, Pennsylvania Coalition of Nurse Practitioners, Pennsylvania College of Associate Degree Nursing, Pennsylvania Higher Education Nursing Schools Association, Pennsylvania League for Nursing, Inc., Pennsylvania Nurses Association, Pennsylvania Organization of Nurse Leaders, Pennsylvania Society of Gastroenterology Nurses and Associates and School Nurse Section of Pennsylvania State Education Association.

Description of Proposed Amendments

§§ 21.1 and 21.141 (relating to definitions)

The amendments proposed for both registered and practical nurses contain identical definitions of "sexual impropriety" and "sexual violation."

The term "patient" includes resident and client and is defined to mean a person other than a spouse or immediate family member, who receives professional services from a registered nurse or a licensed practical nurse, regardless of whether the nurse receives remuneration for the services.

The term "sexual impropriety" is defined as making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments; unnecessarily exposing a patient's body or watching a patient dress or undress, unless for therapeutic purposes or the patient specifically requests assistance; examining or touching genitals without the use of gloves when performing an otherwise appropriate examination; discussing or commenting on a patient's sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive health care; soliciting a date from a patient; and volunteering information to a patient about one's sexual problems, preferences or fantasies.

The term "sexual violation" is defined as offenses including, but not limited to, sexual intercourse, genital to genital contact, and oral to genital contact between a nurse and a patient during the period of the professional relationship; touching breasts, genitals, or any other body part for any purpose other than appropriate examination or treatment; using prolonged or improper examination

techniques, or examining a patient after the patient has refused or withdrawn consent; encouraging a patient to masturbate in the presence of the nurse or masturbating while a patient is present; providing or offering to provide drugs or treatment in exchange for sexual favors; and using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in any conduct that would constitute a sexual impropriety or violation.

The term "behavioral/mental health nurse therapist" is defined as a registered nurse engaged in a specialized practice involving the assessment, diagnosis, counseling or treatment, including psychotherapy, of any mental or emotional problem, impairment, dysfunction or illness.

The term "professional relationship" for a registered nurse who is not a behavioral/mental health nurse therapist means the period of time beginning with the first professional contact or consultation with the patient and ending with the patient's discharge from or discontinuance of services by the nurse or the nurse's employer. For the behavioral/mental health nurse therapist, the professional relationship extends to 2 years after discharge or discontinuance of services. If the patient is a minor, the professional relationship extends 2 years or until 1 year after the age of majority, whichever is longer, after discharge from or discontinuance of services. For a practical nurse the professional relationship begins with the first professional contact between the nurse and a patient and ends with the final professional contact. An exception to the existence of a professional relationship is made for a nurse who administers emergency medical treatment or transitory trauma care.

§§ 21.4a and 21.146a (relating to procedural matters)

These proposed amendments pertaining to registered and practical nurses address procedural issues in disciplinary matters before the Board. Subsection (a) would put all licensees on notice that the consent of a patient to a sexual impropriety or violation may not be a defense in a sexual misconduct proceeding. A patient cannot consent to unprofessional forms of treatment. Subsection (b) would put all licensees on notice that neither evidence of specific instances, nor opinion evidence, nor reputation evidence of a patient's past sexual conduct is admissible in proceedings alleging a sexual impropriety or violation. Subsection (c) puts all licensees on notice that if a licensee accused of a sexual impropriety or violation raises the defense that his conduct was appropriate to the treatment, the licensee will have to demonstrate that he is competent in practice which relates directly to the treatment of sexual function or dysfunction.

§§ 21.18 and 21.148 (relating to standards of nursing conduct)

The provisions of the regulations pertaining to registered and practical nurses are proposed to be amended to specifically prohibit a nurse from engaging in conduct defined as a sexual violation or impropriety. These proposed amendments further inform licensees that the failure to comply with an obligation or prohibition under this section is subject to disciplinary and corrective measures, including the imposition of civil penalties, under the Professional Nursing Law and the Practical Nurse Law.

§§ 21.18a and 21.148a (relating to post-adjudication reporting)

The provisions of the regulations pertaining to registered and practical nurses are proposed to be amended to allow the Board to require a licensee whose license had

been suspended or revoked for committing a sexual impropriety or violation to be reinstated subject to the condition that the licensee obtains the written consent of patients before providing nursing services. The consent would inform patients of the date and duration of the disciplinary action; the text of the law that was violated; and the address and telephone number of the Board. The consent form would have to be maintained in the licensee's primary practice location and would be subject to the Board's inspection.

§§ 21.18b and 21.148b (relating to impaired professional program)

These provisions of the regulations pertaining to registered and practical nurses are proposed to be added to inform licensees that a licensee subject to disciplinary action for a sexual impropriety or violation will not be eligible for an impaired professional program under either the Professional Nursing Law or the Practical Nurse Act.

Fiscal Impact and Paperwork Requirements

The proposed amendments should have no fiscal impact and will not impose additional paperwork on the private sector, the general public and the Commonwealth and its political subdivisions.

Sunset Date

The Board continuously monitors its regulations. Therefore, no sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 28, 1998, the Board submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Professional Licensure and the Senate Consumer Protection and Professional Licensure Committee. In addition to submitting the proposed amendments, the Board has provided the Committees and IRRC 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 Committees' review period. The notification shall specify the regulatory review criteria that have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the amendments, by the Board, the General Assembly and the Governor of objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to Edward Vavro, Counsel, State Board of Nursing, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days following publication of the proposed amendments in the *Pennsylvania Bulletin*. Please reference (16A-5110) Sexual Misconduct, when submitting comments.

M. CHRISTINE ALICHNIE, Ph.D., R.N.,
Chairperson

Fiscal Note: 16A-5110. No fiscal impact; (8) recommends adoption.

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(b) A registered nurse may not:

* * * *

(9) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.

(c) A registered nurse who fails to comply with an obligation or prohibition under this section is subject to disciplinary [action under section 14(a)(3) of the act (63 P. S. § 224(a)(3))] and corrective measures under section 14 of the act (63 P. S. § 224).

(d) The Board may, in addition to another disciplinary or corrective measure set forth in this section, levy appropriate civil penalties as authorized by law upon a nurse found to have engaged in conduct constituting a sexual impropriety or sexual violation.

§ 21.18a. Post-adjudication reporting.

(a) As a condition to reinstatement of a license from a disciplinary measure arising out of a violation of § 21.18(b)(9) (relating to standards of nursing conduct), the Board may require the nurse to obtain the prior, written, informed consent of patients treated by the nurse on a form approved by the Board. The form shall set forth the following:

(1) The effective date and duration of the suspension, revocation or other sanction.

(2) A citation to the statutory provisions under which the sanction was issued, and a copy of the specific text of the act cited.

(3) The address and telephone number of the Board.

(b) The form shall be maintained on file in the nurse's primary practice location and shall be subject to inspection, with or without notice, by representatives of the Board.

§ 21.18b. Impaired professional program.

When the Board is empowered to take disciplinary or corrective action against a nurse for conduct defined as a sexual violation or sexual impropriety, the nurse will not be eligible for placement into an impaired professional program under section 15 of the act (63 P. S. § 224.1).

Subchapter B. PRACTICAL NURSES
GENERAL PROVISIONS

§ 21.141. Definitions.

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

* * * *

Patient (includes residents and clients)—A person, other than a spouse or immediate family member, who receives professional services from a licensed practical nurse, regardless of whether or not the nurse receives remuneration for the services.

* * * *

Professional relationship—The relationship which shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a licensed practical nurse and a patient and ending with the final professional contact between them, except that a licensed

practical nurse may administer necessary emergency medical treatment or transitory trauma care.

* * * *

Sexual impropriety—The term includes the following offenses:

(i) Making sexually demeaning or sexually suggestive comments about or to a patient, including comments about a patient's body or undergarments.

(ii) Unnecessarily exposing a patient's body or watching a patient dress or undress, unless for therapeutic purposes or when a patient specifically requests assistance.

(iii) Examining or touching genitals without the use of gloves when performing an otherwise appropriate examination.

(iv) Discussing or commenting on a patient's potential sexual performance or requesting details of a patient's sexual history or preferences during an examination or consultation, except when the examination or consultation is pertinent to the issue of sexual function or dysfunction or reproductive health care. Discussion of a patient's sexual practices and preferences shall be fully documented in the patient's chart.

(v) Soliciting a date from a patient.

(vi) Volunteering information to a patient about one's sexual problems, preferences or fantasies.

Sexual violation—The term includes the following offenses:

(i) Sexual intercourse between a licensed practical nurse and a patient during the period of the professional relationship.

(ii) Genital to genital contact between a nurse and a patient during the period of the professional relationship.

(iii) Oral to genital contact between a nurse and a patient during the period of the professional relationship.

(iv) Touching breasts, genitals or another body part for a purpose other than appropriate examination or treatment, or using prolonged or improper examination techniques, or after the patient has refused or withdrawn consent.

(v) Encouraging a patient to masturbate in the presence of the nurse or masturbating while the patient is present.

(vi) Providing or offering to provide drugs or treatment in exchange for sexual favors.

(vii) Using or causing the use of anesthesia or any other drug affecting consciousness for the purpose of engaging in any conduct that would constitute a sexual impropriety or sexual violation.

§ 21.146a. Procedural matters.

(a) The consent of the patient to a sexual impropriety or violation is not a defense to a disciplinary charge for violation of the act or this subchapter.

(b) Evidence of specific instances, opinion evidence or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under § 21.148(b)(9) (relating to standards of nursing conduct). The Board may consider

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sexual relationships between the nurse and the patient occurring prior to the professional relationship.

(c) A nurse who attempts to raise as a defense an argument that conduct prohibited as a sexual violation or sexual impropriety was necessary or appropriate to the treatment of a patient shall be required to demonstrate competency in practice which relates directly to the treatment of sexual function or dysfunction. This competence may be demonstrated through educational training and supervised clinical experience. Appropriate discussions of sexual matters between a nurse and a patient shall be fully documented in patient records.

§ 21.148. Standards of nursing conduct.

* * * * *

(b) A licensed practical nurse may not:

* * * * *

(9) Engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship.

(c) Failure to comply with an obligation or prohibition imposed by this section is subject to disciplinary [action under section 16(a)(3) of the act (63 P. S. § 666(a)(3))] and corrective measures under section 16 of the act (63 P. S. § 666).

(d) The Board may, in addition to another disciplinary or corrective measure set forth in this section, levy appropriate civil penalties as authorized by law upon a nurse found to have engaged in

conduct constituting a sexual impropriety or sexual violation.

§ 21.148a. Post-adjudication reporting.

(a) As a condition to reinstatement of a license from a disciplinary measure arising out of a violation of § 21.148(b)(9) (relating to standards of nursing conduct), the Board may require a practical nurse to obtain the prior, written, informed consent of patients treated by the nurse on a form approved by the Board. The form shall set forth the following:

(1) The effective date and duration of the suspension, revocation or other sanction.

(2) A citation to the statutory provisions under which the sanction was issued, and a copy of the specific text of the act cited.

(3) The address and telephone number of the Board.

(b) The form shall be maintained on file in the nurse's primary practice location and shall be subject to inspection, with or without notice, by representatives of the Board.

§ 21.148b. Impaired professional program.

When the Board is empowered to take disciplinary or corrective action against a practical nurse for conduct defined as a sexual violation or sexual impropriety, the nurse will not be eligible for placement into an impaired professional program under section 16.2 of the act (63 P. S. § 666.2).

[Pa.B. Doc. No. 98-924. Filed for public inspection June 12, 1998, 9:00 a.m.]



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF NURSING
Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649
(717) 783-7142

May 23, 2000

The Honorable John R. McGinley, Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14TH Floor, Harristown 2
333 Market Street
Harrisburg, Pennsylvania 17120

Re: Notice of Final Rulemaking of the State Board of Nursing
Pertaining to Sexual Misconduct (16A-5110)

Dear Chairman McGinley:

Enclosed is a copy of a notice of final rulemaking package of the State Board of Nursing pertaining to sexual misconduct.

The State Board of Nursing, as always, will be pleased to provide your Committee with any assistance it may require during the course of its review this regulation.

Sincerely,

K. Stephen Anderson, CRNA, Chairperson
State Board of Nursing

KSA/dn
Enclosure

cc: John T. Henderson, Jr., Chief Counsel
Department of State
Dorothy Childress, Commissioner
Bureau of Professional and Occupational Affairs
Joyce McKeever, Deputy Chief Counsel
Department of State
Herbert Abramson, Senior Counsel in Charge
Bureau of Professional and Occupational Affairs
Robert G. Cameron, Counsel
State Board of Nursing
Roberta Silver, Counsel
State Board of Nursing
Ann Steffanic, Board Administrator
State Board of Nursing

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

RECEIVED

2000 MAY 23 PM 1:23

INDEPENDENT REGULATORY
REVIEW COMMISSION

①

I.D. NUMBER: 16A-5110
SUBJECT: State Board of Nursing - Sexual Misconduct
AGENCY: DEPARTMENT OF STATE

TYPE OF REGULATION

- Proposed Regulation
- 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
5-23-00	Lou A. Clark	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
5/24/00	Sammy Weaver	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
5/23/00	J. Vaillancourt	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU