

<b>Regulatory Analysis Form</b>		<b>This space for use by IRRC</b> 2022 MAY -1 PM 11:51 REGULATORY REVIEW COMMISSION
(1) Agency <b>Department of State, Bureau of Professional and Occupational Affairs, State Board of Physical Therapy</b>		IRRC Number: <b>2176</b>
(2) I.D. Number (Governor's Office Use) <b>16A-656</b>		
(3) Short Title <b>Sexual Misconduct</b>		
(4) PA Code Cite  <b>49 Pa. Code §§ 40.301, 40.302, 40.303 and 40.304</b>	(5) Agency Contacts & Telephone Numbers  <b>Primary Contact: Beth Sender Michlovitz, Counsel, State Board of Physical Therapy (717)783-7200</b>  <b>Secondary Contact: Joyce McKeever, Deputy Chief Counsel for Regulatory and Legislative Affairs (717)783-7200</b>	
(6) Type of Rulemaking (check one)  <input type="checkbox"/> Proposed Rulemaking <input checked="" type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final, Proposed Omitted	(7) Is a 120-Day Emergency Certification Attached?  <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and nontechnical language.  <b>The regulations protect consumers of physical therapy services and provide professional standards addressing issues of sexual misconduct committed by licensees. The regulations define the period of the professional relationship between a physical therapist or physical therapist assistant and the patient for purposes of sexual impropriety and sexual violations; 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 licensee who has engaged in sexual misconduct will not be eligible for placement in an impaired professional program.</b>		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions.  <b>Section 3(a) of the Physical Therapy Practice Act, Act of October 10, 1975, P.L. 383, No. 110 <u>as amended</u>, 63 P.S. § 1303(a).</b>		

## Regulatory Analysis Form

(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 rulemaking was 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. 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 physical therapy 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 physical therapy services and the profession of physical therapy as a whole will benefit from the guidance to be provided by these regulations. Currently, there are 9,562 physical therapists and 3,176 physical therapist assistants 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 physical therapists and physical therapist assistants in the Commonwealth will be required to comply with the regulation. Pennsylvania has 9,562 physical therapists, and 3,176 physical therapist assistants who are licensed by the Board.**

(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 and colleges and universities 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 and colleges and universities included the following: Pennsylvania Physical Therapy Association, Hospital and Health System Association of Pennsylvania, Pennsylvania Association of Rehabilitation Facilities, Pennsylvania Athletic Trainers Society, Beaver College, Chatham College, College Misericordia, Duquesne University, Gannon University, Medical College of Pennsylvania and Hahnemann University, Philadelphia College of Pharmacy and Science, Slippery Rock University, Temple University, Thomas Jefferson University, University of Pittsburgh, University of Scranton, Alvernia College, Central Pennsylvania Business School, Community College of Allegheny County Boyce Campus, Harcum College, Lehigh Carbon Community College, Mercyhurst College, Mount Aloysius College, Penn State University, Penn State University Mont Alto Campus, East Stroudsburg University, Lock Haven University, California University of Pennsylvania, University of Pittsburgh, Slippery Rock University, West Chester University, Temple University, Messiah College, Waynesburg College, and Mercyhurst College.**

(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.**

## 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.

**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.**

## Regulatory Analysis Form

(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
<b>SAVINGS:</b>	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A	\$N/A
<b>Regulated</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Savings</b>						
<b>COSTS:</b>						
<b>Regulated</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Costs</b>						
<b>REVENUE LOSSES:</b>						
<b>Regulated</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Revenue Losses</b>						

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

See items 17, 18, 19.

## Regulatory Analysis Form

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

	FY 1998-99 Expenses	FY 99-00 Expenses	Projected FY 00-01 Expenses	FY 01-02 Budget
Program	FY -3	FY -2	FY -1	Current FY
	\$239,918.62	\$268,110.98	\$259,949.13	\$262,000
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 physical therapy 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 federal standards that apply.**

(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 those of other states. All states were surveyed. Out of 30 states which responded to the survey, 22 have regulations specifically prohibiting physical therapists from engaging in sexual misconduct. These states are: Colorado, Florida, Indiana, Kentucky, Nebraska, New Mexico, Ohio, Texas, Virginia, New Jersey, California, Delaware, Iowa, Rhode Island, South Carolina, Maryland, Massachusetts, Maine, Arizona, North Carolina, Nevada, Utah.**

(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 extensive public outreach already conducted, 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 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)

RECEIVED  
2002 MAY -1 AM 11:51  
LEGISLATIVE SECRETARY  
REVIEW COMMISSION

2176

DO NOT WRITE IN THIS SPACE

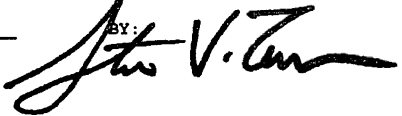
Copy below is hereby approved as to form and legality. Attorney General

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 Physical Therapy  
(AGENCY)

BY: 

DOCUMENT/FISCAL NOTE NO. 16A-656

\_\_\_\_\_  
DATE OF APPROVAL

DATE OF ADOPTION: \_\_\_\_\_

BY:   
James Irrgang

DATE OF APPROVAL  
4/10/02  
(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.

FINAL RULEMAKING  
COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
STATE BOARD OF PHYSICAL THERAPY  
49 PA. CODE, CHAPTER 40  
SEXUAL MISCONDUCT

The State Board of Physical Therapy (Board) adopts regulations regarding sexual misconduct by amending Chapter 40 as set forth in Annex A.

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 3(a) of the Physical Therapy Practice Act (Act), 63 P.S. § 1303(a).

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. This regulation addresses issues concerning sexual misconduct in the context of the provision of physical therapy services.

The amendments are intended to protect consumers of physical therapy services and to provide guidance to the profession by defining such terms as “patient,” “professional relationship,” “sexual impropriety,” and “sexual violation.” The regulations guide licensees by informing them that conduct defined as a sexual violation or sexual impropriety with a patient during the course of a professional relationship violates standards of professional conduct for physical therapists (PTs) and assistants (PTAs). The regulations guide PTs and PTAs by informing them that their professional relationship with a patient exists for a time period beginning with the first professional contact or consultation and ends upon discharge from or discontinuance of services. The regulations notify PTs and PTAs 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 PT or PTA who engages in conduct prohibited by the amendments will not be eligible for placement into an impaired professional program under the Physical Therapy Practice Act.

D. Summary of Comments and Responses on Proposed Rulemaking

Notice of the proposed rulemaking was published at 31 Pa.B. 1470 (March 17, 2001). The Board received comments from the Independent Regulatory Review Commission (IRRC), the House Professional Licensure Committee, and one public commentator, the Pennsylvania Physical Therapy Association (PPTA). The Senate Consumer Protection and Professional Licensure Committee did not submit comments. Responses to these comments are organized by subject as follows.

### § 40.301. Definitions.

Both the House Professional Licensure Committee and IRRC recommended that the term “immediate family member” found in the definition of “patient” should also be defined. However, on further review, it appears that excluding the PT’s other family members from the definition of “patient” seems unnecessary because the only family member with whom a PT may appropriately engage in sexual activities is the PT’s spouse. To improve clarity, the Board, in final rulemaking, has deleted the term “immediate family member” from the definition of “patient.”

IRRC also commented that the definition of “sexual impropriety” contained the requirement that discussion of a patient’s sexual practices and preferences must be fully documented in the patient’s chart. IRRC noted that a substantive requirement should not be included in a definition and that furthermore, the sentence is unnecessary because the documentation requirement is contained elsewhere in § 40.302(3). The Board agreed with IRRC’s comment and deleted this sentence from the definition of sexual impropriety under subsection (iv).

The PPTA recommended that the definition of “professional relationship” be expanded to include language which clearly emphasizes the responsibility of the physical therapist to inform the patient of the purpose and nature of any examination and/or treatment technique. The Board decided against adding this language for two reasons: first, it is a substantive requirement that does not belong in a definition, and second, § 40.302(3), regarding procedural matters, already states that in order to apply the defense that the conduct complained of was necessary or appropriate to the treatment of any patient, it must be demonstrated that the conduct in question is relevant to the patient’s condition or diagnosis. It is further required that appropriate discussions of sexual matters between a PT, the PTA and a patient shall be fully documented in patient records. Accordingly, the Board believes that this concern is adequately addressed under § 40.302(3).

On December 10, 2001, Governor Schweiker signed into law Senate Bill 370 (P.L. 859, No. 92) (Act 92) which gave the State Boards of Medicine and Osteopathic Medicine jurisdiction over certified athletic trainers (ATCs) and repealed provisions of the Physical Therapy Practice Act that were inconsistent with Act 92. Accordingly, since the Board no longer oversees ATCs, it has deleted all references to ATCs in these regulations.

### § 40.302. Procedural Matters.

IRRC questioned the intent of § 40.302(2) which permits the Board to consider sexual relationships between the PT or the PTA and the patient occurring prior to the professional relationship. IRRC questioned whether a sexual relationship occurring prior to the professional relationship could be used as a defense to sexual misconduct. IRRC also questioned whether this provision is in direct conflict with subsection (1) which provides that consent is not a defense to any disciplinary charge for violation of the Act or this chapter. The intent of the Board with respect to these provisions is that consent of a patient to any sexual impropriety or violation may not be used as a defense. However, evidence of a sexual relationship that occurred between the practitioner and the

patient prior to the initiation of the professional relationship may be considered by the Board in mitigation of any sanction. The Board does not believe that these provisions are in conflict with each other. The Board believes the proposed regulations adequately reflect the Board's intent and, therefore, no change in final rulemaking has been made.

§ 40.304. Disciplinary Action.

Both the House Professional Licensure Committee and IRRC recommended that the word "sexual" should be inserted before the word "violation" in the first sentence of § 40.304 pertaining to disciplinary action. The Board has adopted this recommendation by revising its final rulemaking accordingly. The Board has also inserted the word "sexual" in Section 40.302(1) pertaining to procedural matters.

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

The Board reviewed this rulemaking and considered its purpose and likely impact on the public and the regulated population under the directives of 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 divisions 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, (71 P.S. §§ 745.5(a)), the Board submitted a copy of the notice of proposed rulemaking published at 31 Pa.B. 1470 on March 17, 2001 to IRRC, 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) of the Regulatory Review Act (71 P.S. §745(b.1)), the Board also provided the Committees and IRRC with a copy of all comments received, as well as other documents.

In preparing this final form regulation, the Board has considered all comments received from IRRC, the House Professional Licensure Committee and the public. No comments were received from the Senate Consumer Protection and Professional Licensure Committee.

Under Section 5.1(d) of the Regulatory Review Act (71 P.S. §745.5a(d)) this final form regulation was (deemed) approved by the House Committee on \_\_\_\_\_ and (deemed) approved by the Senate Committee on \_\_\_\_\_. IRRC met on \_\_\_\_\_ and (deemed) approved the regulation in accordance with Section 5.1(e) of the Regulatory Review Act. (71 P.S. §745.5a(e)).

I. Contact Person

Interested persons may obtain information regarding the amendments by writing to Robert Kline, Board Administrator, State Board of Physical Therapy, P.O. Box 2649, 116 Pine Street, Harrisburg, PA 17105-2649.

J. Findings.

(1) Public notice of proposed rulemaking was given under Sections 201 and 202 of the Commonwealth Documents Law (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 31 Pa.B. 1470 (March 17, 2001).

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

K. Order.

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

(1) The regulations of the Board, 49 Pa. Code, Chapter 40, are amended as set forth in Annex A.

(2) The Board shall submit this Order and Annex 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.

JAMES J. IRRGANG, CHAIRPERSON

ANNEX A  
TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS  
PART I. DEPARTMENT OF STATE  
SUBPART A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
CHAPTER 40. STATE BOARD OF PHYSICAL THERAPY

SUBCHAPTER E. SEXUAL MISCONDUCT

§ 40.301. Definitions.

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

**Patient (includes resident and client).** A person, other than THE a spouse or immediate family member OF THE PHYSICAL THERAPIST OR PHYSICAL THERAPIST ASSISTANT, who receives professional services from THE a physical therapist, OR physical therapist assistant or certified athletic trainer, regardless of whether the services are provided for remuneration.

**Professional Relationship.**

For a physical therapist, OR physical therapist assistant or certified athletic trainer, the relationship shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a physical therapist, OR physical therapist assistant or certified athletic trainer and a patient and ending upon discharge from or discontinuance of services provided by the physical therapist, OR physical therapist assistant. or certified athletic trainer.

**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 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 physical therapist, OR physical therapist assistant ~~or certified athletic trainer~~ and a patient during the professional relationship.

(ii) Genital to genital contact between a physical therapist, OR physical therapist assistant ~~or certified athletic trainer~~ and a patient during the professional relationship.

(iii) Oral to genital contact between a physical therapist, OR physical therapist assistant ~~or certified athletic trainer~~ and a patient during the professional relationship.

(iv) Touching breasts, the genitals, or any other part of the body of a patient in a sexual, erotic or romantic manner. Touching for the purpose of an appropriate examination or treatment does not constitute a sexual violation.

(v) Encouraging a patient to masturbate in the presence of the physical therapist, OR physical therapist assistant ~~or certified athletic trainer~~ or masturbating while a patient is present.

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

**§ 40.302. Procedural Matters.**

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

(2) Evidence of specific instances, opinion evidence, or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under §§ 40.52, ~~40.121~~ and 40.181 (relating to standards of unprofessional conduct). The Board may consider sexual relationships between the physical therapist or the physical therapist assistant ~~or the certified athletic trainer~~ and the patient occurring prior to the professional relationship.

(3) A physical therapist or the physical therapist assistant ~~or the certified athletic trainer~~ 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 the relevancy of the conduct in question to the patient's condition or diagnosis. Appropriate discussions of sexual matters between a physical therapist, ~~or the physical therapist assistant or the certified athletic trainer~~ and a patient shall be fully documented in patient records.

**§ 40.303. Impaired Professional Program.**

When the Board is empowered to take disciplinary or corrective action against a physical therapist, ~~or the physical therapist assistant or the certified athletic trainer~~ for conduct defined as a sexual violation or sexual impropriety, the physical therapist, ~~OR physical therapist assistant or certified athletic trainer~~ will not be eligible for placement into an impaired professional program under section 13 of the act (63 P.S. § 1313).

**§ 40.304. Disciplinary Action.**

A physical therapist, ~~OR physical therapist assistant or certified athletic trainer~~ who engages in sexual impropriety or SEXUAL violation as defined in Section 40.301 will be subject to



disciplinary action under Section 40.52 (pertaining to unprofessional conduct; physical therapists); Section 40.121(a)(6) (pertaining to unprofessional conduct of certified athletic trainers); and Section 40.181(a)(6) (pertaining to unprofessional conduct of physical therapist assistants) of this chapter and section 11 of the act (63 P.S. § 1311).

Address change with inspection.....	\$[ 60 ]	125
Reinspection after failure .....		\$85
Certification.....	\$[ 15 ]	25
Verification of licensure or registration ..		\$15

\* \* \* \* \*

[Pa.B. Doc. No. 01-446. Filed for public inspection March 16, 2001, 9:00 a.m.]

# STATE BOARD OF PHYSICAL THERAPY

[49 PA. CODE CH. 40]

## Sexual Misconduct

The State Board of Physical Therapy (Board) proposes to adopt regulations regarding sexual misconduct committed by physical therapists, physical therapist assistants and certified athletic trainers (PTs, PTAs and ATCs) by adding §§ 40.301—40.304 to read as set forth in Annex A.

### *Effective Date*

These regulations 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 statute under section 3(a) of the Physical Therapy Practice Act (63 P. S. § 1303(a)) (act).

### *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. In this proposal, the Board addresses issues concerning sexual misconduct in the context of the provision of physical therapy and athletic training services.

The proposed regulations seek to better protect consumers of physical therapy and athletic training services and to provide guidance to the professions by defining terms such as "patient," "professional relationship," "sexual impropriety" and "sexual violation." The proposed regulations guide licensees and certificateholders by informing them that conduct defined as a sexual violation or sexual impropriety with a patient during the course of a professional relationship violates standards of professional conduct for PTs, PTAs and ATCs. These proposed regulations guide PTs, PTAs and ATCs by informing them that their professional relationship with a patient exists for a time period beginning with the first professional contact or consultation and ends upon discharge from or discontinuance of services. The proposed regulations notify PTs, PTAs and ATCs 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 PT, PTA or ATC who engages in conduct prohibited by the regulations will not be eligible for placement into an impaired professional program under the act.

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

In compliance with Executive Order 1996-1, prior to drafting these proposed regulations, the Board invited

interested associations and colleges and universities 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, colleges and universities included the Pennsylvania Physical Therapy Association, Hospital Association of Pennsylvania, Pennsylvania Association of Rehabilitation Facilities, Pennsylvania Athletic Trainers Society, Beaver College, Chatham College, College Misericordia, Duquesne University, Gannon University, Medical College of Pennsylvania and Hahnemann University, Philadelphia College of Pharmacy and Science, Slippery Rock University, Temple University, Thomas Jefferson University, University of Pittsburgh, University of Scranton, Alvernia College, Central Pennsylvania Business School, Community College of Allegheny County Boyce Campus, Harcum College, Lehigh Carbon Community College, Mercyhurst College, Mount Aloysius College, Penn State University, Penn State University Mont Alto Campus, East Stroudsburg University, Lock Haven University, California University of Pennsylvania, University of Pittsburgh, Slippery Rock University, West Chester University, Temple University, Messiah College, Waynesburg College and Mercyhurst College.

### *Description of Amendments*

#### *§ 40.301 (relating to definitions)*

The proposed regulation defines "patient," "professional relationship," "sexual impropriety" and "sexual violation" as used in §§ 40.302—40.304.

The term "patient" is defined to mean a person other than a spouse or immediate family member, who receives professional services from a PT, PTA or ATC regardless of whether the practitioner receives remuneration for the services.

The term "sexual impropriety" is defined as offenses including 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 sexual intercourse, genital to genital contact and oral to genital contact between a PT, PTA or ATC 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 when the patient has refused or has withdrawn consent; encouraging a patient to masturbate in the presence of the PT, PTA or ATC or masturbating while the patient is present; and providing or offering to provide treatment in exchange for sexual favors.

The term "professional relationship" for a PT, PTA or ATC means the period of time beginning with the first

professional contact or consultation with the patient and ending upon discharge from or discontinuance of services by the PT, PTA or ATC.

§ 40.302 (relating to procedural matters)

This proposed section of the regulations addresses procedural issues in disciplinary matters before the Board. Subsection (a) would put all licensees and certificateholders on notice that the consent of a patient to a sexual impropriety or violation will not be a defense in a sexual misconduct proceeding. A patient cannot consent to unprofessional forms of treatment. Subsection (b) would put all licensees and certificateholders 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 conduct which constitutes a sexual impropriety or violation. Subsection (c) would put all licensees and certificateholders on notice that if a licensee or certificateholder accused of a sexual impropriety or violation raises the defense that the certificateholder's conduct was appropriate to the treatment, the licensee or certificateholder will have to demonstrate the relevancy of the conduct in question to the patient's condition or diagnosis.

§ 40.303 (relating to impaired professional program)

This proposed provision of the regulations would inform licensees and certificateholders that a licensee or certificateholder subject to disciplinary action for a sexual impropriety or violation will not be eligible for an impaired professional program under the act.

§ 40.304 (relating to disciplinary action)

This provision would notify licensees and certificateholders that a PT, PTA or ATC who engages in sexual misconduct will be subject to discipline under the act and § 40.52, § 40.121(a)(6) or § 40.181(a)(6) (relating to unprofessional conduct, physical therapists; refusal, suspension or revocation of certificate; and refusal, suspension or revocation of registration).

*Fiscal Impact and Paperwork Requirements*

The proposed regulations should have no fiscal impact and will not impose additional paperwork on the private sector, the general public, the Commonwealth or 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)), the Board submitted a copy of these proposed regulations on March 6, 2001, 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 regulations, 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 Act, if IRRC has any objections to any portion of the proposed regulations, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify that regulatory review criteria which have not been met

by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the regulations, 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 regulations to Beth Sender Michlovitz, Counsel, State Board of Physical Therapy, P. O. Box 2649, Harrisburg, PA 17105-2649 within 30 days following publication of the proposed regulations in the *Pennsylvania Bulletin*. Reference (16A-656) Sexual Misconduct when submitting comments.

JAMES J. IRRANG,  
*Chairperson*

**Fiscal Note:** 16A-656. No fiscal impact; (8) recommends adoption.

**(Editor's Note:** The following subchapter is new. It has been printed in regular type to enhance readability.)

**Annex A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 40. STATE BOARD OF PHYSICAL THERAPY**

**Subchapter E. SEXUAL MISCONDUCT**

Sec.	
40.301.	Definitions.
40.302.	Procedural matters.
40.303.	Impaired professional program.
40.304.	Disciplinary action.

**§ 40.301. Definitions.**

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

*Patient (includes resident and client)*—A person, other than a spouse or immediate family member, who receives professional services from a physical therapist, physical therapist assistant or certified athletic trainer, regardless of whether the services are provided for remuneration.

*Professional relationship*—For a physical therapist, physical therapist assistant or certified athletic trainer, the relationship shall be deemed to exist for a period of time beginning with the first professional contact or consultation between a physical therapist, physical therapist assistant or certified athletic trainer and a patient and ending upon discharge from or discontinuance of services provided by the physical therapist, physical therapist assistant or certified athletic trainer.

*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 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 physical therapist, physical therapist assistant or certified athletic trainer and a patient during the professional relationship.

(ii) Genital to genital contact between a physical therapist, physical therapist assistant or certified athletic trainer and a patient during the professional relationship.

(iii) Oral to genital contact between a physical therapist, physical therapist assistant or certified athletic trainer and a patient during the professional relationship.

(iv) Touching breasts, the genitals, or any other part of the body of a patient in a sexual, erotic or romantic manner. Touching for the purpose of an appropriate examination or treatment does not constitute a sexual violation.

(v) Encouraging a patient to masturbate in the presence of the physical therapist, physical therapist assistant or certified athletic trainer or masturbating while a patient is present.

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

#### § 40.302. 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 chapter.

(b) Evidence of specific instances, opinion evidence or reputation evidence of a patient's past sexual conduct is

not admissible in proceedings brought under §§ 40.52, 40.121 and 40.181 (relating to unprofessional conduct, physical therapists; refusal, suspension or revocation of certificate; and refusal, suspension or revocation of registration). The Board may consider sexual relationships between the physical therapist or the physical therapist assistant or the certified athletic trainer and the patient occurring prior to the professional relationship.

(c) A physical therapist or the physical therapist assistant or the certified athletic trainer 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 the relevancy of the conduct in question to the patient's condition or diagnosis. Appropriate discussions of sexual matters between a physical therapist, or the physical therapist assistant or the certified athletic trainer and a patient shall be fully documented in patient records.

#### § 40.303. Impaired professional program.

When the Board is empowered to take disciplinary or corrective action against a physical therapist, physical therapist assistant or certified athletic trainer for conduct defined as a sexual violation or sexual impropriety, the physical therapist, physical therapist assistant or certified athletic trainer will not be eligible for placement into an impaired professional program under section 13 of the act (63 P. S. § 1313).

#### § 40.304. Disciplinary action.

A physical therapist, physical therapist assistant or certified athletic trainer who engages in sexual impropriety or violation as defined in § 40.301 (relating to definitions) will be subject to disciplinary action under §§ 40.52, 40.121(a)(6) and 40.181(a)(6) (relating to unprofessional conduct; physical therapists; refusal, suspension or revocation of certificate; and refusal, suspension or revocation of registration) and section 11 of the act (63 P. S. § 1311).

[Pa.B. Doc. No. 01-447. Filed for public inspection March 16, 2001, 9:00 a.m.]



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
STATE BOARD OF PHYSICAL THERAPY  
Post Office Box 2649  
Harrisburg, Pennsylvania 17105-2649  
(717) 783-7134

May 1, 2002

The Honorable John R. McGinley, Jr., Chairman  
INDEPENDENT REGULATORY REVIEW COMMISSION  
14<sup>th</sup> Floor, Harrisstown 2, 333 Market Street  
Harrisburg, Pennsylvania 17101

Re: Final Regulation  
State Board of Physical Therapy  
16A-656: Sexual Misconduct

Dear Chairman McGinley:

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "James J. Irrgang".

James J. Irrgang, Chairperson  
State Board of Physical Therapy

JJI/BSM:kp

Enclosure

c: David M. Williams, Acting Commissioner  
Bureau of Professional and Occupational Affairs  
John T. Henderson, Jr., Chief Counsel  
Department of State  
Joyce McKeever, Deputy Chief Counsel  
Department of State  
Philip Zarone, Regulatory Counsel  
Department of State  
Herbert Abramson, Senior Counsel in Charge  
Department of State  
Beth Sender Michlovitz, Counsel  
State Board of Physical Therapy  
State Board of Physical Therapy

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT

I.D. NUMBER: 16A-656  
SUBJECT: State Board of Physical Therapy - Sexual Misconduct  
AGENCY: DEPARTMENT OF STATE

RECEIVED  
2002 MAY -1 AM 11:51  
INDEPENDENT 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
5-1-02	Lori A. Clark	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
5/1/02	Jimmy Wilson	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
5/1/02	E. Pagan	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU