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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 3, 2004

Ronald E. Hays, Chairman  
State Board of Social Workers, Marriage and Family Therapists and Professional Counselors  
2601 North 3rd Street  
Harrisburg, PA 17110

Re: Regulation #16A-691 (IRRC #2419)  
State Board of Social Workers, Marriage/Family Therapists and Professional Counselors  
Sexual Misconduct

Dear Chairman Hays:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulation review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce  
Executive Director

wbg

Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional  
Licensure Committee  
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and  
Professional Licensure Committee  
Honorable Thomas P. Gannon, Majority Chairman, House Professional Licensure  
Committee  
Honorable William W. Rieger, Democratic Chairman, House Professional Licensure  
Committee  
Honorable Pedro A. Cortes, Secretary, Department of State

# Comments of the Independent Regulatory Review Commission

on

## State Board of Social Workers, Marriage and Family Therapists and Professional Counselors Regulation #16A-691 (IRRC #2419)

### Sexual Misconduct

November 3, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The State Board of Social Workers, Marriage and Family Therapists and Professional Counselors (Board) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on October 4, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

#### 1. Section 47.61., Section 48.21. and Section 49.21. Definitions. – Clarity.

##### *Client/Patient*

Under the definition of this term, minors and legally incapacitated adults “shall be the client/patient for issues specifically reserved to the individual, such as confidential communications in a therapeutic relationship and issues directly affecting the physical or emotional safety of the individual, such as sexual or other exploitive dual relationships.” In its comments, the House Professional Licensure Committee (House Committee) asked for clarification of “other exploitive dual relationships.” We agree that this terminology is vague and request the Board provide examples of these relationships.

##### *Sexual intimacies*

These sections define this term and list examples of behavior that meets the definition. The examples include “exposure, kissing, hugging, touching, physical contact or self-disclosure of a sexual or erotic nature.” In the preamble, the Board states that it “seeks to insure that nonsexual hugging, touching, physical contact or self-disclosure are excluded from the definition.” The Board goes on to note that nonsexual physical conduct or self-disclosure can be healing and supportive to clients because it “may create trust and facilitate a therapeutic alliance particularly with children, the physically and mentally disabled and the elderly.”

We note that the text of the regulation does not reflect the Board’s position on nonsexual contact or self-disclosure. We suggest the Board amend the definition of “sexual intimacies” to clarify that nonsexual physical conduct or self-disclosure does not fall under the definition of “sexual intimacies,” and therefore, is not prohibited behavior.

The House Committee commented that Paragraph (iv) of the definition of “sexual intimacies” prohibits a licensee from soliciting a date from a client/patient, but does not prohibit a licensee

from accepting a date from a client/patient. The House Committee suggests expanding the language of this paragraph to also prohibit a licensee from accepting a date. We agree.

**2. Section 47.64., Section 48.24. and Section 49.24. Sexual intimacies with a former client/patient or an immediate family member of a former client/patient. – Reasonableness, Feasibility, Clarity.**

Subsection (a) of these sections establishes a seven-year period after termination of the professional relationship during which sexual intimacies between a licensee and client/patient are prohibited. According to the preamble, the Board researched the ethics codes of several professional associations and found time periods during which sexual intimacies were prohibited to range from two years to indefinitely. The seven-year prohibition in this regulation is a compromise between a two-year and an indefinite prohibition.

In reviewing the Board's proposal, we researched the comparable requirements imposed by the State Board of Psychology and the State Board of Medicine. The State Board of Psychology imposes a two-year period within which sexual intimacies are prohibited (49 Pa. Code § 41.83(a)). The State Board of Medicine also imposes a two-year time period on practitioners who are involved in the management or treatment of a mental health disorder (49 Pa. Code § 16.110(c)). It would appear that issues concerning sexual intimacies would be similar among licensees of this Board and the Boards of Medicine and Psychology. Therefore, we request the Board explain the relevant factors that support a seven-year time period, rather than the two-year time period.

Subsection (a) of these sections also provides that sexual conduct after seven years is permitted "only under very limited circumstances." The House Committee commented that this language does not give licensees adequate notice as to what conduct is prohibited. We agree. If the Board wants to continue to prohibit a sexual relationship after the seven-year period under certain circumstances, it should specifically delineate what those circumstances are.

**3. Section 47.65., Section 48.25. and Section 49.25. Disciplinary proceedings. – Reasonableness, Clarity.**

Subsection (c) of these sections requires that in a disciplinary proceeding, the licensee "shall have the burden of proving that there has been no exploitation of the client/patient . . ." in light of "relevant factors" listed in the sections related to sexual intimacies with former client/patients and their immediate family members. We have two concerns with this provision.

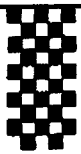
First, this language contradicts the absolute prohibition in Sections 47.62, 48.22 and 49.22, against sexual intimacies between a licensee and a client/patient, as well as the absolute prohibition in Sections 47.63, 48.23 and 49.23 against a licensee accepting as a client/patient someone with whom the licensee has had sexual intimacies. We agree with the House Committee that sexual conduct under these circumstances is per se exploitative. The only situation in which evidence that the relationship was not exploitative is relevant is when the sexual conduct occurs more than seven years after termination of the professional relationship. Therefore, we recommend that references to Sections 47.62-47.63, 48.22-48.23 and 49.22-49.24 be deleted from Subsection (c) of the above sections.

Second, we note that Subsection (b) of Sections 47.64, 48.24 and 49.24 uses the phrase "burden of demonstrating" while Subsection (c) of Sections 47.65, 48.25 and 49.25 uses "burden of proving." We agree that the licensee must demonstrate factors over which he or she would have

direct control or knowledge. However, as the House Committee correctly notes, the Due Process Clause prohibits the shifting of the burden of proof to the licensee in disciplinary matters. To avoid this confusion, and for the sake of consistency, the phrase "burden of proving" should be replaced with "burden of demonstrating" in Subsection (c).

#### 4. Miscellaneous clarity issues.

- The House Committee comments that the term "person" in the definition of "client/patient" should be replaced with "individual." We agree and suggest the Board make this change in the definition of "client/patient" and in Sections 47.63, 48.23 and 49.23 relating to *Former sexual partners as client/patients*.
- A commentator noted that the Social Workers, Marriage and Family Therapists and Professional Counselors Act (63 P.S. § 1903) defines the terms "licensed clinical social worker," "licensed marriage and family therapist," "licensed professional counselor" and "licensed social worker." However, the proposed regulation does not use the term "licensed" in referring to these professionals. The commentator suggests that the Board insert the term "licensed" before all references to these professionals throughout the regulation to be consistent with the terminology used in the statute. We agree and suggest the Board adopt the commentator's recommendation.



# Facsimile Cover Sheet

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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
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**To:** Suzanne Hoy  
**Agency:** Department of State  
Licensing Boards and Commissions  
**Phone:** 7-2628  
**Fax:** 7-0251  
**Date:** November 3, 2004  
**Pages:** 5

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the State Board of Social Workers, Marriage/Family Therapists and Professional Counselors' regulation #16A-691 (IRRC #2419). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *Suzanne J. Hoy* Date: 11/04/04