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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

CHAIRMAN
PROFESSIONAL LICENSURE COMMITTEE

March 16, 2005

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

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Dear Chairman McGinley:

The House Professional Licensure Committee held a meeting on March 15, 2005, to consider the following:

Regulation 16A-698 - Proposed rulemaking of the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors relating to supervised clinical experience. The committee voted to take no formal action until the final regulation is promulgated. The committee submits the following comments:

1. The committee notes the important work of clinical social workers, marriage and family therapists, and professional counselors with respect to helping the Commonwealth's citizens.

The committee also notes the policy shift embodied in this regulation. The board's policy has been to limit the amount of individuals that could be supervised in a group, regardless of whether the applicants were applying to become clinical social workers, marriage and family therapists or professional counselors. However, the board provided a detailed procedure to waive that limit, with that procedure entailing a written application for waiver which must be reviewed on a case-by-case basis.

Further, the committee notes the extensive requirements placed on supervisors. Those requirements include writing written reports about the competence of supervisees and reviewing those reports at least every quarter, observing patient sessions, making recommendations bearing on acquiring skills necessary for independent practice, to name only three.

Given the importance of the clinical experience and the demanding work of supervisors with respect to developing professional competence on the part of applicants for licensure, the committee recommends a limit be placed on the amount of supervisees that form the group with whom a supervisor may work in an educational, institutional, or agency setting.

The committee notes the policy of the board in this proposed regulation that six is too few a number in terms of supervision, but the committee is concerned that, from a public safety standpoint, an unlimited number is too many. Consequently, the committee recommends that a limit be placed on the number and asks the board to consider whether the maximum

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number of supervisees that make up a group in these settings should be 10. Further, the committee asks the board to consider whether a waiver provision, such as the one currently in the regulation, should be provided for those clinical programs that seek to go beyond a group of 10 supervisees.

Regulation 16A-4814 – Proposed rulemaking of the State Board of Funeral Directors relating to unprofessional conduct. The committee “went over” this regulation.

Regulation 16A-4919 – Proposed rulemaking of the State Board of Medicine relating to registration and practice of acupuncturists. The committee voted to take no formal action until final regulations are promulgated.

Regulation 16A-4918 – Final rulemaking of the State Board of Medicine relating to disciplinary process. The committee voted to approve the regulation.

Regulation 5414 – Proposed rulemaking of the State Board of Pharmacy relating to biennial renewal fees. The committee voted to take no formal action until final regulations are promulgated.

Regulation 5120 – Proposed rulemaking of the State Board of Nursing relating to dietician-nutritionists. The committee voted to take no formal action until final regulations are promulgated. The committee submits the following comments:

1. The committee notes with favor that the board has included provisions prohibiting sexual conduct between a patient and a licensed dietician-nutritionist. The committee agrees with the board that sexual contact between a licensee and a patient is per se exploitative.

Having noted the board's efforts, however, the committee recommends that certain changes be made to strengthen and clarify the prohibitions against sexual misconduct.

The committee notes that there are some drafting errors in the definition of “sexual impropriety.” By way of example, subparagraph (iii) of the definition, (“examining or touching genitals or breasts of a patient”) does not include prohibitions against touching the buttocks of a patient. Subparagraph (v), (“soliciting a date from a patient”) does not prohibit accepting a date from a patient. Subparagraph (vi), (“volunteering information to a patient about one's sexual problems, preferences, or fantasies”) allows a licensee to provide that information if asked to do so by the patient.

The committee recommends that these subparagraphs be re-written to eliminate these infirmities.

With respect to the definition of “sexual violation,” the committee recommends that changes be made to strengthen and clarify the prohibitions against sexual conduct.

By way of example, subparagraph (i) of “sexual violation,” (“engaging in sexual intercourse with a patient during the professional relationship”) contains no definition of

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the term "during the professional relationship." Licenses must be put on notice as to what conduct is prohibited or the regulation violates the Due Process Clause of the U.S. Constitution. Consequently, the committee recommends such a definition be added.

Subparagraph (ii) and (iii) of the definition of "sexual violation," ("engaging in genital to genital contact with a patient during the professional relationship" and "engaging in oral to genital contact with a patient during the professional relationship," respectively) does not encompass a prohibition against digital penetration or penetration by a foreign object or anal contact on the part of a licensee.

Subparagraph (v), ("providing or offering to provide drugs, herbs, nutritional supplements or treatment in exchange for sexual favors") introduces a new term, that of "sexual favors." There is no definition for the term "sexual favors." If the board intends to prohibit the licensee from trading drugs for an act that constitutes "sexual impropriety" or a "sexual violation," it should use those terms. If the board intends to prohibit another category of sexual contact by using the term "sexual favors," then the board should define that term.

Just as with "sexual impropriety," the definition of "sexual violation" employs the phrase, "during the professional relationship." Again, to comport with the requirements of the Due Process Clause, a definition of "during the professional relationship" should be added. This is especially true given the fact that a patient may see the licensee at intermittent periods. The committee notes that Regulation 16A-691, regulations of the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors, contains a definition of "professional relationship."

The committee recommends that the definition of "sexual violation" be re-written to eliminate these infirmities.

With respect to the committee's recommendation regarding re-drafting the definition of "sexual impropriety" and "sexual violation," the committee asks the board to consider whether it should borrow language from Chapter 31 (Sexual Offenses) of Title 18 of the Pennsylvania Consolidated Statutes. For example, the board may want to borrow language from the definition of "indecent contact" found at 18 PaCS 3101, ("any touching of the sexual or other intimate parts of the person..."), as well as other definitions found in that section.

The committee further notes that in some sections of the regulation the word "patient" is used and in others the word "client" is used. There is no definition for either term. The committee seeks clarification from the board regarding the board's intention with respect to these terms. Is a "client" the same thing as a "patient?" In the context of sexual misconduct, this is an important question: The prohibitions against sexual conduct only apply to a "patient." If "client" includes a natural person, then the committee recommends that the prohibitions against sexual contact apply equally to a "patient" and a "client." The committee believes the prohibitions against sexual conduct should apply equally to a "patient" and a "client" when both refer to a natural person.

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With respect to the definitions of "sexual impropriety" and "sexual misconduct," the committee asks whether the board intends to prohibit sexual contact between a licensee and a patient's or client's family members and also asks the board to consider whether a specific time period should be included. The committee notes that the regulations governing other professions, such as psychologists and physicians, not only include prohibitions against sexual contact with a member of a patient's or client's family but also include discrete periods of time, namely a period of years, during which sexual contact between a patient or a client and a licensee is prohibited.

2. The committee notes that the board prohibits sexual impropriety and sexual violations in the list of the many prohibited activities under Section 21.711. Given that the regulation contains a section entitled Matters Related to Allegations of Sexual Impropriety or Violation, (Section 21.704), the committee recommends that language be added to Section 21.704 so that the section includes these legal propositions:
 - (1) a licensee shall not engage in conduct constituting a sexual violation or sexual impropriety;
 - (2) engaging in conduct constituting a sexual violation or sexual impropriety is unprofessional conduct and will subject the licensee to disciplinary action.
3. With respect to Section 21.704, if a "client" can be a natural person, then the committee recommends that subsections (a), (b), and (c) be re-written so that these provisions apply to a "client."
4. The committee asks the board for clarification with respect to subsection (b) of Section 21.704. Specifically, the first sentence seems to conflict with the second sentence of that subsection. The first sentence reads, "Evidence of specific instances, opinion evidence or reputation evidence of a patient's past sexual conduct is not admissible in proceedings brought under Section 21.711 (relating to standards of professional conduct)." However, the second sentence allows the board to consider a past sexual relationship between a licensee and a patient. Presumably, evidence of a past relationship would include specific instances of sexual conduct. Hence, the committee asks the board to clarify its intent and to make the rule about admissibility of evidence clear.
5. With respect to Section 21.711(a)(4), ("Licensed dietitian-nutritionists shall provide information that will enable clients to make their own informed decisions regarding nutrition and dietetic therapy..."), the committee seeks clarification from the board regarding whether this provision should also apply to a "patient." Further, the committee notes that in some portions of the regulation, the provisions only apply to a "patient," while in other they only apply to a "client." The committee asks the board to review the regulation to ensure that the regulation is drafted so that the appropriate provisions apply to both a "client" and a "patient." Paragraph 5 of Section 21.711(a) is an example of where this review is especially needed, as this paragraph refers to

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confidentiality on the part of client information. As drafted by the board, this provision only applies to a "patient."

6. The committee notes a word has been left out of subparagraph (iv) of Section 21.711(b)(9). The word "by" should be inserted after "misunderstood."
7. The committee recommends that Section 21.711(b)(8), ("The licensed dietician-nutritionist may not engage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship"), apply to both a "patient" and a "client."
8. The committee notes that Section 6(b) of the Professional Nursing Law provides:

"An applicant applying for licensure as a dietician-nutritionist shall submit a written application on forms provided by the Board evidencing and insuring to the satisfaction of the Board that the applicant:

- (1) Is of good moral character.
- (2) Has received a baccalaureate or higher degree from a Board-approved, regionally accredited college or university, including a major course of study in human nutrition, food and nutrition, dietetics or food systems management.
- (3) Has completed a planned continuous preprofessional experience component in dietetic practice of not less than nine hundred (900) hours under the supervision of a registered dietician, a dietician-nutritionist licensed under this act or an individual with a doctoral degree conferred by a regionally accredited college or university in the United States with a major course of study in human nutrition, food and nutrition, nutrition education, dietetics or food system management as approved by the Board.

The committee notes that the regulation is silent as to the requirement for licensure found in Section 6(b)(3) of the Professional Nursing Law, that of 900 hours of clinical experience. The committee recommends that Section 21.721, Education and Examination of Applicants, include language regarding the statutory requirement of 900 hours of supervised experience.

9. With respect to subsection (b) of Section 21.722, the committee recommends that the board change the language of that subsection. The language of Section 21.722(b) states:

A dietician-nutritionist license issued under this act will be renewed if the licensee applying for the renewal:

- (1) Completes the renewal application, including disclosing a license to practice dietetics-nutrition in any other state, territory, possession or country.
- (2) Pays the required fee as set forth in Section 21.705 (relating to fees).

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- (3) Submits proof to the Board that he or she has satisfactorily completed a minimum of 30 hours of CPE approved by the Board in accordance with Section 21.723 (relating to continuing education) during the 2 calendar years immediately preceding the application for renewal.
- (4) Discloses any discipline imposed by any state licensing board in the previous biennial period or any criminal charges pending a criminal conviction, plea of guilty or nolo contendere, or admission into a probation without verdict or accelerated rehabilitative disposition program during the previous biennial period.

While the committee recognizes that renewal is a ministerial act and that the board will take action later to address criminal convictions, etc., the committee recommends that the language of subsection (b) re-written so that it states, "When applying for a renewal of a license, the licensee shall..." and then list the items the board seeks. The committee recommends this change to avoid giving licensees (and members of the public) the impression that dietitian-nutritionists will retain their licenses in spite of criminal convictions and other behavior that will subject them to disciplinary action.

Please feel free to contact my office if any questions should arise.

Sincerely,

A handwritten signature in cursive script that reads "Thomas P. Gannon".

Thomas P. Gannon
Chairman
House Professional Licensure Committee

cc: The Honorable Pedro A Cortes, Secretary of the Commonwealth
Department of State
The Honorable Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
The Honorable Peter V. Marks, Sr., Deputy Commissioner
Bureau of Professional and Occupational Affairs
Albert H. Masland, Chief Counsel
Department of State
Cynthia K. Montgomery, Regulatory Counsel
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Eric Battisti, Director of Legislative Affairs
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State Board of Social Workers, Marriage & Family Therapists
And Professional Counselors

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DEPARTMENT/COMPANY: IRRC

NAME: Mary Wyatt, Esq.

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MESSAGE: Please find attached a letter
to Chairman McGinley regarding
regulations

SENT FROM:

NAME: Karen L. Dalton, Executive Director

DEPARTMENT: Professional Licensure Committee

FAX NUMBER: (717) 772-2003