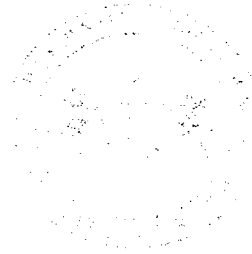


JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
DANIEL F. CLARK, ESQ.
ARTHUR COCCODRILLI
MURRAY UFBERG, ESQ.
MARY S. WYATTE, ACTING EXECUTIVE DIRECTOR/CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

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

April 13, 2005

Janet H. Shields, MSN, CRNP, CS, Chairperson
State Board of Nursing
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-5120 (IRRC #2457)
State Board of Nursing
Dietitian-Nutritionists

Dear Chairperson Shields:

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 regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me at 783-5506.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary S. Wyatt", is written over a thin horizontal line.

Mary S. Wyatt
Acting Executive Director/Chief Counsel

evp
Enclosure

cc: Honorable Thomas P. Gannon, Majority Chairman, House Professional Licensure Committee
Honorable William W. Rieger, Democratic Chairman, House Professional Licensure Committee
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

Comments of the Independent Regulatory Review Commission

on

State Board of Nursing Regulation #16A-5120 (IRRC #2457)

Dietitian-Nutritionists

April 13, 2005

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 Nursing (Board) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on March 14, 2005. 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regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.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 21.701. Definitions. – Protection of the public safety and welfare; Clarity.

Sexual impropriety, Sexual violation

The Board's proposed provisions on sexual misconduct for licensed dietitian-nutritionists (LDNs) differ from the parallel provisions in existing regulation for Registered Nurses (RNs) and Licensed Practical Nurses (LPNs). (See 49 Pa. Code §§ 21.1, 21.18, 21.141 and 21.148). While we recognize that the scope of practice of nurses differs from that of LDNs, we note the following:

- The definition of "sexual impropriety" for LDNs differs from the definition of this term for RNs and LPNs in 49 Pa. Code §§ 21.1 and 21.141. Paragraph (iv) lists the offense of discussing or commenting on a "patient's potential sexual history." It is not clear what this offense entails. Another difference is that Paragraph (iv) does not include the phrase "potential sexual performance" as used in the RN and LPN regulations.
- The definition of "sexual impropriety" lists in Paragraph (iii) the offense of "examining or touching genitals or breasts of a patient." This differs from the RN and LPN definitions in three ways. First, this offense is listed in the definition of "sexual violation" in both 49 Pa. Code §§ 21.1 and 21.141. Second, the proposed definition omits the phrase "or other body part" as used in the definition of "sexual violation" in 49 Pa. Code §§ 21.1 and 21.141. Third, the RN and LPN definitions also contain qualifiers including "for any purpose other than appropriate examination or treatment"

The Board should amend these LDN definitions to parallel the definitions used for RNs and LPNs. The Board should also ensure that the level of detail in the regulation is sufficient to enforce the regulation and prosecute actions that constitute sexual misconduct by LDNs.

Finally, the definition of “sexual impropriety” includes a substantive provision in the last sentence of Paragraph (iv). Substantive provisions in definitions are not enforceable. We recommend deleting this sentence from this definition because its content is in the last sentence of Section 21.704(c).

Patient

The term “patient” is defined in this section. However, the term “client” is also used in the regulation. If these terms have the same meaning, the Board should use the term “patient” consistently in the regulation and delete use of the term “client.” If there is a distinction between the two terms, the Board should add a definition of “client.”

Professional relationship

This term is used to set limitations on interaction between a licensee and a patient, particularly relating to the definition of “sexual violation.” A definition of “professional relationship” is needed to establish when the provisions of the regulation that use this term apply. It should clearly state when the professional relationship is established and when it is terminated.

2. Section 21.721. Education and examination of applicants. – Reasonableness; Clarity.

Initial licensure

The proposed regulation addresses Board-approved educational programs and examinations, license renewal and continuing education. However, the regulation is silent on initial licensure requirements. Act 99 of 2002 (Act) (63 P.S. § 216(b)) establishes initial licensure requirements which include:

- A baccalaureate or higher degree with a major course of study in human nutrition, food and nutrition, dietetics or food systems management;
- At least 900 hours of preprofessional experience under the supervision of a registered dietitian, a licensed dietitian-nutritionist or an individual with a doctoral degree in this discipline; and
- Completion of a Board-approved examination.

We recommend that the Board add a section to the final-form regulation which sets forth these initial licensure requirements and the application process.

Equivalent education programs and licensure without examination.

The Act (63 P.S. §§ 215(b) and (c)) authorizes the Board to admit to examination a person who has completed an education program in another state, territory or country which is equivalent to that required in Pennsylvania. The Act (63 P.S. § 217) also authorizes the Board to issue a license without examination to a person who has graduated from a dietetics-nutrition program with a course of study equivalent to that required in Pennsylvania and who is registered or licensed by examination in another state or territory of the United States or Canada. The final-form regulation should include or cross-reference these statutory provisions. The regulation should also include the procedures an individual must follow to apply for consideration under these provisions.

Denial of licensure

The Act (63 P.S. § 216(c)) precludes the Board from issuing a license to “an applicant who has been convicted of a felonious act prohibited by . . . ‘The Controlled Substance, Drug, Device and Cosmetic Act’ . . . or convicted of a felony relating to a controlled substance” unless certain conditions are met. The final-form regulation should include or cross-reference these statutory provisions.

3. Section 21.722. License renewal. – Statutory Authority; Need; Reasonableness; Clarity.

Subsection (b) states that a license will be renewed if the licensee performs certain actions, including disclosure of disciplinary action or criminal convictions. In its comments, the House Professional Licensure Committee (Committee) notes that as written, the regulation appears to guarantee license renewal regardless of criminal convictions or other behavior that subjects the licensee to disciplinary action simply upon disclosure. Since the Board has discretion in granting license renewals, the Committee suggests that Subsection (b) be rewritten to state, “When applying for a renewal of a license, the licensee shall: . . .” followed by the listing of actions and disclosures the licensee must make. We agree and suggest that the Board make this change.

Subsection (b)(4) requires a licensee applying for renewal to disclose “criminal charges pending.” We question the Board’s statutory authority for this provision. If the Board does justify its statutory authority, it should explain why this information is needed and how it intends to act on this information.

4. Section 21.723. Continuing education. – Statutory Authority; Reasonableness; Clarity.

Subsection (b)

This subsection lists the entities which the Board will recognize as accepted continuing professional education (CPE) providers. The Pennsylvania Dietetic Association commented that there are other reputable groups which provide CPE but are not listed in the regulation. These groups include medical centers, Amerinet, Nutrition Dimension, Renfrew Center for Eating Disorders and certain private practitioners.

We agree that further clarification on CPE providers is needed. Subsection (b) refers to continuing education “sponsored by . . . approved college or dietetic programs.” The final-form regulation should specify what is an “approved college or dietetic program.”

Additionally, we recommend that the final-form regulation establish a process by which an organization or individual can apply to become a Board-approved CPE provider. The application process and the substantive requirements for obtaining CPE provider status should be included in the final-form regulation.

Subsections (b)(1)(i) through (iv) list non-lecture-based activities for which “the Board will accept documentation” of attendance. Based on discussions with Board staff, we understand that an LDN who engages in one of these activities will not automatically be awarded CPE credit. Rather, the LDN will have to apply to the Board to request CPE credit. The Board will review requests on a case by case basis and, at its discretion, may award CPE credit.

Subsection (b)(1) should be amended in the final-form regulation to clearly state that an LDN may apply to the Board for CPE credit for attending a program listed in Paragraphs (i) through (iv) and that the Board will review the request and determine if CPE credit will be given. The

final-form regulation should also list the criteria the Board will use in deciding whether or not to give CPE credit.

Subsection (d)

This subsection provides that an LDN who can demonstrate a verified hardship may request that the Board grant a waiver of CPE requirements. Did the Board consider allowing LDNs to apply for additional time to meet the CPE requirements, instead of a waiver?

The Act (63 P.S. § 221(c)) states:

A dietetics-nutrition license issued under this act shall not be renewed unless the licensee applying for renewal submits proof to the Board that during the two (2) calendar years immediately preceding the application for renewal the licensee has satisfactorily completed a minimum of thirty (30) hours of continuing dietetic-nutrition education approved by the Board by regulation.

In light of this statutory mandate, what is the Board's authority to waive the CPE requirements?

