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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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2006 NOV 22 AM 9:46
INDEPENDENT REGULATORY
REVIEW COMMISSION

November 21, 2006

Alvin C. Bush, Chairman
Independent Regulatory Review Commission
14th Floor, Harrisstown 2
333 Market Street
Harrisburg, PA 17101

Dear Chairman Bush:

The House Professional Licensure Committee held a meeting on November 21, 2006, to consider the following:

Regulation 16-32 – Final rulemaking of the Commissioner of the Bureau of Professional and Occupational Affairs pertaining to schedule of civil penalties. The committee voted to approve the regulation.

Regulation 16A-4511 – Final rulemaking of the State Board of Cosmetology pertaining to accreditation of licensed schools. The committee voted to approve the regulation.

Regulation 16A-4618 – Proposed rulemaking of the State Board of Dentistry pertaining to sexual misconduct. The committee voted to take no formal action until the final regulation is promulgated. The committee submits the following comments:

1. The committee thanks the board for its efforts to address sexual misconduct on the part of dentists, dental hygienists and expanded function dental assistants. Given that patients in dental offices are undergoing invasive procedures and may be sedated, the committee believes it is essential that the board enact meaningful and comprehensive regulations which address sexual misconduct. As the committee has commented when reviewing the sexual misconduct regulations of other boards, the committee believes that sexual conduct between a patient and a health care practitioner is per se exploitative.
2. The committee notes that in its comments submitted to the board when reviewing the 2002 regulation, the committee asked the board to address the issue of "significant others" who become patients. The committee notes that this proposed regulation does not fully address that situation and asks the board to do so in this rulemaking.

Alvin C. Bush, Chairman
November 21, 2006
Page 2

3. The committee notes that when the board submitted proposed regulations in 2002, the committee commented that the definitions lacked specificity and were vague. Similarly, the committee, when reviewing the current regulation, notes that the term "sexual misconduct" lacks specificity. Indeed, in defining the term "sexual misconduct," the board uses the phrases "sexual conduct" and "sexual in nature."

The committee is concerned that this definition will not put practitioners on notice as to what conduct is prohibited, as required by the Due Process Clause of the U.S. Constitution. Because the definition is vague, the committee is concerned that the regulation will be difficult to enforce.

The committee notes the comments of the board in the preamble to the regulation that the board is trying to avoid specific examples of prohibited conduct because the list may not be comprehensive enough. The committee understands the board's concern. However, the committee notes that the regulations of other boards which address sexual misconduct are specific with respect to what is prohibited. The committee cites, as an example, regulations of the State Board of Nursing.

Further, the committee cites the recently enacted provisions of the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors with respect to sexual misconduct.

The committee asks the board to carefully review the definition of "sexual intimacies" found at 49 Pa. Code 48.1 and urges the board to consider adopting that definition with respect to conduct which is prohibited, as well as to consider building the remainder of the regulation around that definition. The definition of "sexual intimacies" read:

Sexual intimacies - - Romantic, sexually suggestive, sexually demeaning or erotic behavior. Examples of this behavior include the following:

- (i) Sexual intercourse, or any touching of the sexual or intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person.
- (ii) Nontherapeutic verbal communication or inappropriate nonverbal communication of a sexual or romantic nature.
- (iii) Sexual invitations.
- (iv) Soliciting or accepting a date from a client/patient.
- (v) Masturbating in the presence of a client/patient or encouraging a client/patient to masturbate in the presence of the licensed marriage and family therapist.
- (vi) Indecent exposure, kissing, hugging, touching, physical contact or self-disclosure of a sexual or erotic nature. 49 Pa. Code 48.1.

Alvin C. Bush, Chairman
November 21, 2006
Page 3

4. The committee notes that the board, in the Regulatory Analysis Form, cites the regulations of the Board of Dental Examiners in Maryland as an example of a regulation which lists specific prohibited conduct with respect to sexual activity between dentists and patients. The committee notes that the regulations of the Board of Dental Examiners in Maryland prohibits: (1) taking photographs or videotapes of a patient for sexual purposes, and (2) the use of a drug on a patient for the purpose of sexual behavior. The committee asks the board to consider adding these two prohibitions to the board's regulation.
5. The committee notes that the definitions in the regulation do not appear in the definitions section of the existing regulations of the board, but appear in the new section only. Further, the committee notes that the term "practitioner" is used in the new section, but that the term found at 49 Pa. Code 33.1 Definitions is "board regulated practitioner." The committee asks the board whether the existing definition should be used and also asks the board to consider placing any definitions the board adopts during final rulemaking in Section 33.1 Definitions.

Further, the committee notes that 49 Pa. Code 33.1 lists "auxiliary personnel." The definition is "Persons who perform dental supportive procedures authorized by the act and this chapter under the general or direct supervision of a dentist." In addition, "auxiliary personnel" is part of the definition of "board regulated practitioner." The committee asks the board to give examples of auxiliary personnel and their role in patient care. Finally, the committee asks the board to consider whether the sexual misconduct regulations should address the behavior of auxiliary personnel.

6. The committee notes the existing language of the regulation which addresses sexual abuse by a practitioner and a patient. The committee recommends that the language which the board will enact in the future regarding sexual misconduct be harmonized with the language of 49 Pa. Code 33.211. The committee suggests the board review whether it should amend that section to more fully address sexual misconduct.
7. The committee notes that the regulation does not speak to inadmissibility of the patient's past sexual conduct as evidence in disciplinary proceedings. The committee notes that this language appears in the regulations of the State Board of Psychology, for example, and asks the board to consider adding similar language.
8. As part of the committee's comments for Regulation 16A-4618, the committee is attaching the committee's comments addressing the 2002 regulation, the IRRC's comments addressing the 2002 regulation, and the regulations of the Board of Dental Examiners in Maryland.

Alvin C. Bush, Chairman
November 21, 2006
Page 4

Regulation 16A-6912 – Final rulemaking of the State Board of Social Workers, Marriage & Family Therapists & Professional Counselors pertaining to continuing education. The committee voted to approve the regulation.

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

Sincerely,



Thomas P. Gannon, Chairman
House Professional Licensure Committee

TPG/lis

- cc: The Honorable Pedro A Cortes, Secretary of the Commonwealth
Department of State
- The Honorable Kenneth A. Rapp, Deputy Secretary
Regulatory Programs, Department of State
- The Honorable Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
- Barbara Adams, General Counsel to the Governor
- Peter V. Marks, Sr., Executive Deputy General Counsel
- Albert H. Masland, Chief Counsel
Department of State
- Cynthia K. Montgomery, Regulatory Counsel
Department of State
- Susan Rineer, Chairperson
State Board of Cosmetology
- Susan E. Calderbank, D.M.D., Chairperson
State Board of Dentistry
- Ronald E. Hays, Chairperson
State Board of Social Workers, Marriage and Family Therapists and
Professional Counselors