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House of Representatives
 COMMONWEALTH OF PENNSYLVANIA
 HARRISBURG

November 16, 2006

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

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 INDEPENDENT REGULATORY
 REVIEW COMMISSION

Dear Chairman Bush:

The House Professional Licensure Committee held a meeting on November 14, 2006, to consider the following:

Regulation 16A-4313 – Proposed rulemaking of the State Board of Chiropractic pertaining to patient records. The committee voted to take no formal action until the regulation is promulgated. The Committee submits the following comments:

1. The committee asks the board to provide specific information regarding the event which caused the board to write this regulation. In addition, the committee asks the board to explain in detail the problem(s) with chiropractic practice the board is trying to address with this regulation, as well as a detailed explanation of how the current regulation is inadequate to address the problem(s).

The committee notes that in the Regulatory Analysis Form, the board stated that it received a petition in December 2001 asking the board to write regulations regarding medical necessity. The board further stated in the Regulatory Analysis Form that it decided to write regulations regarding patient records instead of "defining what is medically necessary." The committee seeks detailed information regarding the rationale for this regulation, as well as the process it went through to promulgate this regulation.

2. The committee asks the board to conduct a survey of other boards with respect to regulations addressing patient records, in order to determine whether the State Board of Chiropractic is seeking to utilize a unique approach regarding the content of patient records.
3. The committee notes that the board, by promulgating this regulation, is providing criminal and civil penalties, as well as license revocation and suspension, for practitioners who do not adhere to the provisions of the proposed regulation. The committee asks the board if this was the intention of the board.

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4. The committee notes that the definitions contained in the regulation do not provide guidance to practitioners regarding the type of care rendered. For example, the committee is having difficulty distinguishing the difference between "maintenance care" and "palliative care." Since there are different standards of recordkeeping based on the type of care given, the committee is concerned that practitioners will unintentionally err in making the proper notation in the patient record, thereby subjecting the practitioner to license revocation or suspension, civil penalty, and criminal prosecution.

In addition, the committee is concerned that if the definitions, which are linked to substantive provisions, are not descriptive enough, practitioners will not be put on notice as to what is expected of them. Under the Due Process Clause of the U.S. Constitution, penalties can only be assessed if the regulation puts the regulated community on notice as to what is required.

Finally, with respect to definitions, the committee seeks examples of the different kind of care which illustrates "maintenance care," "palliative care," "elective care," "preventive services," and "supportive care."

5. The committee notes the comments submitted by Michael D. Miscoe of Practice Masters regarding the definitions contained in the regulation and asks the board to review them very carefully.
6. The committee notes the language the board added to Section 5.51(c) does not speak to the existing language of the regulation ("care rendered, ordered or prescribed"). Hence, that phrase is not given legal meaning in terms of the type of records which must be kept. The committee asks the board to review this language and to determine whether additional provisions should be added which address "care rendered, ordered or prescribed."
7. The committee notes the existing language of Section 5.51(c) ("care rendered, ordered or prescribed") is very similar to the new language ("treatment, care or service provided"). The committee seeks an explanation from the board regarding the legal distinction between the two phrases as well as a legal rationale for including both phrases in the regulation.
8. The committee notes that in Section 5.51(c)(3), the term "therapeutic treatment, care or service" is used and that in other places in the regulation the phrase "treatment, care or service" is used.
9. The committee notes the provision of Section 5.51(c)(4)(v) and asks whether this language requires a practitioner to withdraw care in order to meet the recordkeeping requirements. Further, if the plain meaning of the language requires the practitioner to withdraw care, the committee asks the board to consider the effect such withdrawal may have on a patient.

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10. The committee asks the board to consider requiring in the patient record a list of patient complaints and diagnosis of the ailment.
11. The committee notes "disease" is mentioned sparingly in the regulation. The committee asks the board whether it is appropriate to include information about a patient's disease in other portions of the regulation. For example, the committee asks the board to consider adding "disease" to that portion of the regulation which speaks to diagnostic testing.
12. With respect to elective care found at Section 5.51(c)(4)(i), the committee seeks examples of how a practitioner can demonstrate "how human performance and the sense of well-being was enhanced."

Regulation 16A-5719 – Proposed rulemaking of the State Board of Veterinary Medicine pertaining to recordkeeping. The committee voted to take no formal action until the final regulation is promulgated. The committee submits the following comments:

1. The preamble of the rulemaking references federal regulations with respect to recordkeeping responsibilities of those veterinarians who provide medical services for production animals. The committee observes that no citations to federal regulation have been referenced in the text of this regulation and asks whether such citations should be provided.
2. With respect to Section 31.22(a), the last sentence of this provision reads, "The veterinary medical record shall identify the treating individual after each chart entry." The committee asks whether the term "individual" could be both a veterinarian and a veterinary technician, or whether the Board intended to only mean the veterinarian. Further, if the Board intended to refer to a veterinarian only, the committee asks the Board to consider whether the term "licensee" should be used.
3. The committee observes that a title has not been provided for subsections 31.22 (d) and (e) and asks, for purposes of consistency, whether titles to these subsections should be provided. Further, the committee notes that the language first appearing after Section 31.22 Recordkeeping, does not have a designation referencing a subsection. It is the committee's understanding that if language first appearing is not designated as a subsection, then paragraphs are the proper unit of drafting, not subsections.
4. The committee notes that in some places of the regulation the term "patient" is used and in other places the term "animal" is used, and asks the Board, for consistency, whether one term should be used throughout. In the alternative, the committee asks if there is a legal distinction between a "patient" and an "animal."

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5. As a veterinarian is subject to discipline for failing to comply with recordkeeping requirements established by regulation, the committee asks the Board for clarification with respect to the public policy contained in Section 31.32(j). The first sentence establishes a bright line rule that notice must be given to clients at least 30 days in advance. However, the last sentence states that if prior notice could not be provided, the successor veterinarian shall provide notice. The committee asks the Board to provide guidance to veterinarians and successor veterinarians when: (1) the 30 day notice is not required; and (2) under what circumstance(s) the successor veterinarian will have to provide notice.

Regulation 16A-676 – Proposed rulemaking of the State Board of Occupational Therapy Education and Licensure pertaining to orders. The committee voted to take no formal action until the final regulation is promulgated. The committee submits the following comment:

1. The committee notes that there is an inconsistency in the use of terminology relating to the individual who orders the services of an occupational therapist. Section 42.25(b)(1) refers to this individual as the “responsible” licensed physician, licensed optometrist or licensed podiatrist. Section 42.25(b)(3) refers to this individual as a “practitioner.” Finally, both Sections 42.25(b)(3) and (b)(4) refer to this individual as the “ordering practitioner.” For purposes of clarification and consistency, the committee recommends that the board use one term throughout the section.

Regulation 16A-6511 – Proposed rulemaking of the State Board of Physical Therapy pertaining to biennial renewal fees. The committee voted to take no formal action until the final regulation is promulgated. The committee submits the following comment:

1. The committee notes the board stated that this regulation is needed as there has been a marked increase in disciplinary cases and legal expenses. The increase in the number of opened disciplinary cases tripled between the years 2002 and 2005. The committee asks the board for specific information as to what types of disciplinary cases these are and the board’s determination for such escalation.

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

Sincerely,



Thomas P. Gannon, Chairman
House Professional Licensure Committee

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cc: The Honorable Pedro A Cortes, Secretary of the Commonwealth
Department of State
The Honorable Basil L. Merenda, Acting Deputy Secretary, Department of State, and
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
Samuel J. Denisco, Director of Legislative Affairs
Department of State
Ellen L. Kolodner, Chairperson
State Board of Occupational Therapy Education and Licensure
Jonathan W. McCullough, DC, Chairperson
State Board of Chiropractic
Thomas McGrath, D.V.M., Chairperson
State Board of Veterinary Medicine
Charles E. Meacci, PT, Chairperson
State Board of Physical Therapy