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Comments on State Board of Medicine Proposed Rulemaking amending 49 Pa. Code Chs. 16 & 18-
Qualifications of Behavior Specialists under Act 62 of 2008
Published 2/13/10 at 40 Pa.B. 884

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2010 MAR -5 PM 12: 20

INDEPENDENT REGULATORY
REVIEW COMMISSION

These comments address proposed §18.524- Criteria for certification as behavior specialist and §18.525- Renewal of certification

Need for additional clarity through substantive rule making

The proposed criteria for certification as behavior specialist- §18.524- merely repeat the language of Act 62. If it were the General Assembly's intent to preclude any further guidance or elaboration of the statutory requirements, there would have been no cause to require the State Board of Medicine to "promulgate regulations providing for the licensure or certification of behavior specialists." §635.2(g)(1) of the Insurance Company Act, 40 P.S. §764h(g)(1). However, the requirement to promulgate regulations evidences a legislative intent to have the statutory provisions regarding qualifications of behavior specialists fleshed out and clarified by the State Board. Rulemaking beyond a mere recitation of the language in the statute is necessary in order to provide clear guidance to applicants on the exact requirements they must meet in order to qualify as a behavior specialist and to ensure the public health, safety and welfare by promulgating regulatory interpretations that realize the statute's goal of well trained, competent providers. As this category of professional is entirely new having been created by this Act, there is no common usage or practice or non-governmental accreditation to which to turn for guidance. The full responsibility to provide guidance regarding this new category of professional falls upon the State Board. The proposed regulations fail to provide adequate guidance and as such fail to meet the Regulatory Review Act's requirement as to clarity and lack of ambiguity.

While the statute must serve as the basis for any regulatory guidance, it is clear that the statute does not provide adequate guidance on its own. For example, there are several terms in the statute which are ambiguous and require further interpretation through regulation in order to provide needed guidance to applicants. In the provision regarding educational requirements, the statute lists various required fields of study and then includes "or another related field". §635.2(g)(2)(ii). This language is repeated in the proposed regulations with no hint as to what other fields might be considered "related" or how the Board might determine that. In §635.2(g)(2)(iv) the statute speaks about requiring "1000 hours of experience in a related field". This language is also repeated without further clarification of what other fields might be "related" or how the State Board will determine that. Finally, the statute requires completion of "relevant training programs, including..." and then lists several topics. §635.2(g)(2)(v). Clearly the use of the term "including" makes that list non-exclusive. However, the proposed regulations merely recite the statute and so fail to clarify what other training topics might be acceptable.

It appears that the State Board feels that it lacks legal authority to issue regulations that go any further than the exact language of the statute. However, the State Board clearly has that authority. Just last year, the PA Supreme Court in the case of *St. Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare*, 600 Pa. 131, 137 (Pa. 2009) reiterated the principle that "[s]ubstantive rule-making is a widely used administrative practice, and its use should be upheld whenever the statutory delegation can reasonably be construed to authorize it." quoting *Hospital Association of PA v. Macleod*, 410 A. 2d 731 (Pa. 1980) at 733 (quoting Bernard Schwartz, *Administrative Law* § 56 at 151 (1976)). We believe that the specific

qualifications found in §635.2(g)(2) are the floor of what the State Board must require, not the ceiling because the statute states that these provisions are only requirements as to what must be shown on the written application form. The statute does not require that anyone meeting those requirements must be granted certification except during a phase-in period that is 1 year from the date the regulations are promulgated. 635.2(l). Indeed, there would seem to be no need for the 1 year phase-in period if individuals were guaranteed certification by meeting the terms of the statute without regard to regulatory requirements.

Suggested additional provisions

Notices specifying related fields and relevant training topics-

As stated above, §18.524 of the regulations needs to clarify and specify what other fields of study will be considered “related”; what other fields of practice will be considered “related” and what other training topics will be considered “relevant”. We recommend that the regulations include a provision that the State Board, in consultation with the Dept of Public Welfare, the Behavior Analysis Certification Board and the PA Board of Psychology shall publish a Notice in the PA Bulletin specifying those other fields of study and practice that it will consider “related”. Furthermore, the Board, in consultation with the Dept of Public Welfare, the Behavior Analysis Certification Board and the PA Board of Psychology, shall publish a Notice in the PA Bulletin specifying those other training programs that it will consider “relevant”. This would give the State Board the flexibility of changing those fields of study, practice and training not explicitly mentioned in the Act as the field of autism treatment advances without the burden of going through the regulatory process.

1 year experience involving children-

§635.2(g)(2)(iii) requires at least “1 year experience involving functional behavior assessments....” In order to ensure the public health, safety and welfare, we urge the State Board to clarify that at least 1 year experience must involve functional behavior assessments etc. for persons under 21 because the statute only mandates coverage of services to persons under 21. Treatment experience with 40 year olds is not equivalent to treatment experience with 4 year olds.

Verification of 1000 hours-

§635.2(g)(2)(iv) requires 1000 hours in direct clinical experience. There are individuals in solo unlicensed private practices who are currently providing autism treatment services usually on a private pay basis. In order to expand the pool of qualified certified behavior specialists and to encourage those unlicensed individuals to obtain the necessary training and experience, it is important to provide those individuals with a clear path to obtaining certification if they meet all of the requirements. To that end, the State Board should provide guidance as to the types of verification that will be acceptable in proving that the individual has met the 1000 hour requirement. This could be done either in regulations or by reference in the regulations to a Notice to be published in the PA Bulletin. Whatever verification requirements the Board adopts should take into consideration that there may be some solo practitioners who don't have any “supervisor” who can attest to or verify the number of hours the individual has provided in direct clinical experience.

Completion of relevant training programs-

§635.2(g)(2)(v) requires completion of “relevant training programs” but contains no provisions regarding how the State Board will determine whether a specific training program will be accepted as adequate for the training requirement. The State Board needs to provide clarity on the standards it will use in making that determination. It is important

in ensuring the public health, safety and welfare that the training programs be competent and consistent with current evidence based practices. This is another area where the regulations could specify that the State Board, in consultation with the Dept of Public Welfare, the Behavior Analysis Certification Board and the PA Board of Psychology, would issue a Notice in the PA Bulletin as to the types of training programs or types of outside course accreditation that would be accepted to meet the training requirements. In the alternative, the State Board could create its own accreditation process by which training entities could obtain accreditation for specific training programs so that individuals seeking certification as a behavior specialist would know in advance whether a specific training program would meet the training requirement.

Continuing education for renewal-

§18.525 contains provisions regarding fees and forms for renewal of certification of behavior specialists. In the interests of ensuring the public health, safety and welfare, we recommend that the State Board add a continuing education requirement as exist for many other licensed or certified professionals. The assessment and treatment of children and youth with autism spectrum disorders are developing areas of practice with many new advances. It is critical that behavior specialists be aware of the latest research and findings and be trained in the latest evidence based practices. While it is true that the statute is silent in regards to continuing education, it is equally true that the statute is silent as to renewals of behavior specialist certifications generally, yet the State Board has proposed a section with several provisions regarding renewals. If the State Board has authority to require renewals and the statute requires completion of "relevant training programs", surely the State Board has authority to require completion of "relevant training programs" as a condition for renewal of behavior specialist certification.

Respectfully submitted,

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Cc: Schalles, Scott R.; Pohlman, Stephen J.
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Attachments: PHLP Comments on Proposed Rulemaking.doc

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Cc: Schalles, Scott R.
Subject: PHLP Comments on Proposed Rulemaking on behavior specialists.doc

<<PHLP Comments on Proposed Rulemaking.doc>> Attached please find the comments of the PA Health Law Project on the proposed regulations of the State Board of Medicine regarding the certification requirements for behavior specialists under the Autism Insurance Law, Act 62 of 2008 published 2/13/10 at 40 Pa. B. 884.

Thank you for your consideration of these comments.

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