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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

April 14, 2010

Ollice Bates, Jr., M.D., Chair
State Board of Medicine
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-4929 (IRRC #2820)
State Board of Medicine
Behavior Specialist

Dear Mr. Bates:

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.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Robert M. Tomlinson, Majority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Michael P. McGeehan, Majority Chairman, House Professional Licensure Committee
Honorable Jule Harhart, Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



State Board of Medicine Regulation #16A-4929 (IRRC #2820)

Behavior Specialist

April 14, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the February 13, 2010 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Medicine (Board) to respond to all comments received from us or any other source.

1. Section 18.521. Purpose. – Protection of public health, safety and welfare; Reasonableness; Conflict with existing regulations.

Subsection 635.2(g)(1) of Act 62 of 2008 (Act) (40 P.S. § 764h(g)(1)) requires the Board to promulgate regulations “providing for the licensure or certification of behavior specialists.” Several commentators believe the public would be better served if the Board required “licensure” instead of “certification.” They contend that certifying behavior specialists to treat under the coverage of the Act without first requiring them to be licensed will create a regulatory conflict for health plans. These commentators feel that certification is a lesser standard than licensure and will cause issues with the contracting of behavior specialists by insurance companies. Why did the Board decide to require certification of behavior specialists instead of licensure of behavior specialists?

2. Section 18.522. Definitions. – Clarity.

All of the defined terms are direct quotations from the Act, and each one provides an exact citation to the same definition in the Act. If the Board intends to use the exact definitions from the Act, they should cite the sections and not repeat the definitions in the regulation. If the Board intends to clarify the statutory definitions consistent with the language and intent of the Act, then a citation to the Act is not required.

Subsection 635.2(f)(15) of the Act (40 P.S. § 764h(f)(15)) defines the term “treatment plan.” The proposed regulation does not, even though the term is

used in the body of the regulation in Subsection 18.524(b). We recommend that this term be defined or cited as described above.

3. Section 18.523. Application for certification as behavior specialist. – Clarity.

Applicants under Subsection (a) will be required to submit “all necessary supporting documents.” This term is unclear. The list of the documentation that will be required should be included in the final-form regulation.

Under Subsection (b), after the Board receives an application, how long will it take to certify the application and notify the applicant of its findings? This timeframe should be included in the final-form regulation.

Subsection (d) is a partial paraphrase of the requirements of Subsection 635.2(g)(3) of the Act (40 P.S. § 764h(g)(3)). It does not include a provision from the statute that defines the term “convicted.” Since this term is used in the regulation, we suggest that the provision be included in the final-form rulemaking.

4. Section 18.524. Criteria for certification as behavior specialist. – Consistency with statute; Clarity.

This section establishes the criteria for certification as a behavior specialist. We have two general concerns with this section. First, Subsection 635.2(g)(2) of the Act (40 P.S. § 764h(g)(2)) lists five criteria to be used when evaluating an applicant’s qualifications for certification as a behavior specialist. This section of the regulation lists four of the five criteria. Why did the Board exclude the statutory criterion pertaining to good moral character?

Second, what documentation will the Board require to verify that all the requirements contained in this section have been met? The final-form regulation should specify the required documentation.

In Subsection (a), several commentators, including the House Professional Licensure Committee, asked for additional guidance on what major fields of study would be included in “another related field.” We suggest that the Board clarify what that means in the final-form regulation.

Subsection (b) and Subsection 635.2(g)(2)(iii) of the Act (40 P.S. § 764h(g)(2)(iii)) require at least “...one year experience involving functional behavior assessments.” A commentator suggests that the Board clarify that at least one year of experience must involve functional behavior assessments for persons under 21 because the statute only mandates coverage of services to persons under 21. The Board should consider clarifying the experience requirement as suggested by the commentator.

Subsection (c) and Subsection 635.2(g)(2)(iv) of the Act (40 P.S. § 764h(g)(2)(iv)) require 1,000 hours in direct clinical experience. How will this be verified? In addition, the House Professional Licensure Committee requests that the experience be “direct” experience and not obtained in “...passive approaches, i.e. only watching videotapes....” What criteria will the Board use to determine if a person’s experience is suitable? We suggest that the final-form rulemaking set forth what qualifies as “direct clinical experience.”

Subsection (d) and Subsection 635.2(g)(2)(v) of the Act (40 P.S. § 764h(g)(2)(v)) reference “relevant training programs.” Neither the number of hours nor the qualifications of the people giving the training is specified. To assist the regulatory community with complying with this regulation, we suggest that the Board provide the standards it will use in making the determination that an applicant has “completed relevant training programs” in the final-form regulation.

5. Section 18.525. Renewal of certification as behavior specialist. – Protection of public health, safety and welfare; Clarity.

Several commentators, including the House Professional Licensure Committee, have recommended that the Board add continuing education requirements to the certification renewal process. How can the Board ensure that the public health, safety and welfare are adequately protected without a continuing education requirement?

Subsection (c) includes the phrase “in a manner prescribed by the Board.” To improve clarity, we suggest that the regulation specify the manner in which certification must be renewed.

6. Section 18.526. Inactive status of certification as behavior specialist. – Statutory Authority; Protection of public health, safety and welfare.

Subsection (d) would allow a certificate holder to retroactively reactivate an expired certification. Several commentators have concerns with reactivating a certification retroactively. They believe that it would allow a behavior specialist with a lapsed certification to seek insurance reimbursement for services provided while the certificate was lapsed. They also believe a person with a lapsed certificate should not be allowed to practice because there is no authority to sanction a non-certified Board specialist. The Preamble to the proposed rulemaking explains why the Board has taken this approach to the reactivation of certifications. What is the Board’s statutory authority for this approach? How can the Board ensure that the health, safety and welfare of the public are adequately protected if the behavior specialists with lapsed certifications are allowed to practice?

7. Miscellaneous Clarity.

- Existing Subsection 16.11(c) has only 9 registrations listed and enumerated. However, the new category of Behavior Specialist is listed as (c)(12). For clarity, Behavior Specialists should be listed as (c)(10).
- The fees associated with certification of Behavior Specialists are found at proposed Subsection 16.13(k). Existing Subsections (a) through (h) pertain to fees for specific medical professionals, while Subsections (i) and (j) are general fees that apply to all medical professions listed in § 16.13. We suggest listing the fees at existing Subsection (i) and moving the text of Subsection (i) to (j) and Subsection (j) to the new (k).

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

To: Tom Blackburn
Cynthia Montgomery
Agency: Department of State
Licensing Boards and Commissions
Phone: 3-7200
3-3394 (Cynthia Montgomery)
Fax: 7-0251
Date: April 14, 2010
Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Board of Medicine's regulation #16A-4929 (IRRC #2820). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Barb Grandy **Date:** 4-14-10