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## INDEPENDENT REGULATORY REVIEW COMMISSION

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

July 7, 2010

Robert D. Janish, Chair  
State Board of Massage Therapy  
2601 North Third Street  
Harrisburg, PA 17110

Re: Regulation #16A-721 (IRRC #2843)  
State Board of Massage Therapy  
Massage Therapy

Dear Mr. Janish:

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](http://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 Julie Harhart, Minority Chairman, House Professional Licensure Committee  
Honorable Basil L. Merenda, Acting 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 Massage Therapy Regulation #16A-721 (IRRC #2843)

### Massage Therapy

July 7, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the May 8, 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 Massage Therapy (Board) to respond to all comments received from us or any other source.

#### **1. Section 20.1. Definitions. – Conflict with existing law; clarity.**

The following terms are used, but not defined, in the proposed regulation: “soft issue manifestations;” “therapeutic massage techniques;” “treatment;” and “treatment plan.” Both the Pennsylvania Physical Therapy Association (PPTA) and the Insurance Federation of Pennsylvania have expressed concern that the use of these terms without qualifying language which specifically relates them to the definition of “massage therapy” in the Massage Therapy Law, Act 45 of 2009 (Law), is confusing. We recommend that the Board define and clarify these terms in the final-form regulation.

#### *Sexual harassment*

This section defines this term as: “[d]eliberate or repeated comments, gestures or physical contacts of a sexual nature.”

This definition appears inconsistent with how the term is defined in both federal and state law. For example, the U.S. Equal Employment Opportunity Commission has defined sexual harassment, a violation of Title VII of the Civil Rights Act of 1964, as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's

employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

The PA Human Relations Commission defines the term in a similar fashion.

Both of these definitions refer to conduct that is “unwanted” or “unwelcome.” Why did the Board omit this term? In order to be consistent with existing law, the final-form regulation should include the phrase “unwelcome” or “unwanted” at the beginning of the definition.

## **2. Section 20.3. Fees. – Reasonableness.**

Subsections (a) and (b) list various types of fees charged for services provided by the Board. How did the Board determine the amounts listed are appropriate?

## **3. Section 20.11. Minimum hour requirements for massage therapy programs. – Reasonableness; Clarity.**

Subsection (a) requires massage therapy programs to provide at least 600 hours of in-class instruction, and lists various subjects and the minimum contact hours required for each. How did the Board determine the appropriate number of contact hours?

## **4. Section 20.13. Required knowledge base. – Clarity.**

Subsection (a) lists 12 areas that massage therapy education must provide students with knowledge of, including Subsection (a)(6) which requires knowledge of “legal requirements.” Which “legal requirements” does this refer to? It is also unclear what level of “knowledge” massage therapy education must provide in these subjects to students. These phrases are vague and lack clarity. We suggest that the final-form regulation include more precise standards that eliminate the ambiguity created by these phrases.

## **5. Section 20.14. Student practice. – Implementation procedures; Clarity.**

In Subsection (f), what is the basis for the three-year time period to maintain student records? The same concern applies to Section 20.42(a)(19). In addition, Section 20.42(a)(19) also states that the records would be at least three years “from the last date that services were provided to the client.” Did the Board intend for the same time period to apply to student records? We recommend the same language contained in Section 20.42(a)(19) be included in Subsection (f).

In Subsection (g), how does the Board intend for schools to clearly identify to clients students providing services as part of a clinical training program? Would students be required to wear badges? Would there be a sign notifying clients that students are working at that facility? The final-form regulation should include the means of complying with this provision.

**6. Section 20.21. Application for temporary practice permit, initial licensure and licensure by reciprocity. – Statutory authority; Reasonableness; Need; Clarity.**

This section describes various types of applications. We raise five issues.

First, the House Professional Licensure Committee (HPLC) indicates that Section 20.26(b) includes a cross-reference to Section 20.21, and this cross-reference is partly entitled “licensure by endorsement.” However, this type of application is not included in Section 20.21. Did the Board intend to include licensure by endorsement in this section? If so, then the final-form regulation should include a procedure for this type of licensure. If not, the phrase “licensure by endorsement” should be removed from Section 20.26(b) of the final-form regulation. We note that in the Preamble, the Board describes “licensure by endorsement” as being contained in Section 20.25, however, this section refers to “licensure by reciprocity.” To improve consistency, the Board should use one term.

Second, Subsection (b)(2) requires applicants for licensure to submit to the Board a Criminal History Record for every state the applicant has resided in for the past five years. How did the Board determine five years was an appropriate limit on the years of review?

Third, Subsection (d)(3) requires an applicant to submit an explanation to the Board of any arrests, charges, or convictions of a misdemeanor or felony in this Commonwealth or any other jurisdiction of the United States or a foreign country. However, the Law only prohibits those applicants from obtaining licensure who have been **convicted** of a felony (or of what would be considered a felony if committed in this Commonwealth) under The Controlled Substance, Drug, Device and Cosmetic Act. See 63 P.S. § 627.5(a)(6). Therefore, given this distinction, what is the Board’s statutory authority for requiring the explanations and relevant documentation in this subsection?

Fourth, Subsections (d)(4) and (5) refer to circumstances where an individual is unable to practice massage therapy “with a reasonable skill and safety” due to mental or physical conditions, and the use of alcohol, drugs, etc. Would a licensed professional make that determination? The final-form regulation should clarify who would decide in these instances whether a person is unable to practice. We also recommend that the final-form regulation require these

individuals to provide written verifications to the Board confirming their diagnoses and conclusions.

Additionally, how will these evaluators measure a massage therapist ability to practice “with a reasonable skill and safety?” The final-form regulation should define this standard. In Subsection (d)(4), an applicant may be unable to practice massage therapy due to the use of drugs, narcotics or “any other type of material.” This phrase is vague and should be explained further in the final-form regulation.

Finally, Subsection (g) requires the licensure applicant to submit to the Board any missing documentation “within 6 months from the date the application is executed.” What is the basis for the six-month time period?

#### **7. Section 20.22. Procedure for licensure denial. – Implementation procedures.**

Subsection (b) refers to an evaluation to determine if an applicant can safely practice. Who will conduct this evaluation? Will the applicant be notified of and have the opportunity to review the results? The final-form regulation should clarify the procedures for the evaluation and the means of notifying the applicant of the results of the evaluation.

In addition, the HPLC questions what the appeals process is for an applicant whose license has been refused. The final-form regulation should explain the appeals process. Has the Board considered including in the regulation a cross-reference to Section 627.9 (c) of the Law, which discusses actions of the Board being subject to the administrative agency law (and therefore the appropriate appeals process therein)?

#### **8. Section 20.23. Licensure examinations. – Reasonableness; Implementation procedures; Clarity.**

Subsections (b) and (c) require applicants to reapply if they are unable to take the required test within 90 days of being authorized by the Board to do so. What is the basis for the 90-day time frame?

Subsections (b) and (d) refer to the “FSBMT,” however Section 20.1 references the “FSMTB,” which the Federation of State Massage Therapy Boards points out in their comments is the correct term. The final-form regulation should correct this typographical error.

Subsection (e) establishes procedures requiring applicants who have failed licensure exams numerous times to obtain additional hours of instruction in massage therapy. Who will monitor these examination results and notify the

applicants of the requisite hours necessary to complete? The final-form regulation should clarify this issue.

**9. Section 20.24. Application requirements for existing practitioners. – Reasonableness; Clarity.**

Subsection (c) states that existing practitioners applying for licensure must demonstrate they have been in practice at least five years “immediately preceding October 9, 2010.” Why did the Board apply this date?

While this section refers to licensure requirements for existing practitioners, the American Massage Therapy Association (AMTA) suggests that “existing practitioners” should also include massage therapy students who would graduate before the passage of the final-form regulation. Has the Board considered “grandfathering” the licenses of these massage therapists?

Also, to improve clarity, we recommend the Board define the term “existing practitioners” in the final-form regulation.

**10. Section 20.26. Application requirements for temporary practice permits. – Clarity.**

Subsection (e) states that those therapists with a temporary practice permit may not “hold themselves out as a licensed massage therapist.” However, the PPTA notes that this subsection does not explain what services these permit holders can perform or how they are supervised. We agree and recommend that the final-form regulation clarify what specific services can be performed under a temporary practice permit and set forth the supervision requirements.

Subsection (e) also states that temporary permit holders may not “advertise their practice of massage therapy.” The PA Association of Private School Administrators is concerned that without advertising, these therapists may not be able to build a practice. Does Subsection (e) prohibit a person from advertising as a temporary permit holder? The final-form regulation should clarify this issue.

**11. Section 20.32. Continuing education hours, maintenance of certificates of completion. – Implementation procedures.**

Under Subsection (g), under what circumstances would the Board determine an audit of a licensee is necessary?

**12. Section 20.41. Scope of practice. – Statutory authority; Implementation procedures; Clarity.**

This section explains the scope of practice for massage therapists. However, as the AMTA points out, there are persons who hold dual licenses. While an act may be permitted within the context of a massage therapy license in Subsection (a), it may be prohibited under that same person's chiropractic license. For example, as PPTA states, the enumerated list of soft tissue manifestations in Subsection (a) contains items that are "impairments, illnesses, diseases or disabilities which are expressly excluded from the definition of massage therapy." How will the Board regulate these forms of overlapping licensure? Additionally, how will the Board address the situation where a treated item in Subsection (a) is also a symptom of an underlying disease or medical condition? Will this be set forth in the final-form regulation?

The Preamble to the final-form regulation should also explain what services those with dual licenses can perform and when they can perform them.

**13. Section 20.42. Standards of professional conduct. – Implementation procedures; Clarity.**

Subsection (a)(11) requires massage therapists to "act to safeguard clients from incompetent, abusive or illegal practices of other massage therapists or caregivers." How will a massage therapist comply with this subsection? Are there reporting requirements that would apply? If so, we recommend that these requirements be included in the final-form regulation.

RECEIVED

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INDEPENDENT REGULATORY  
REVIEW COMMISSION**Facsimile Cover Sheet**

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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
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Cynthia Montgomery  
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Licensing Boards and Commissions  
**Phone:** 3-7200  
3-3394 (Cynthia Montgomery)  
**Fax:** 7-0251  
**Date:** July 7, 2010  
**Pages:** 8

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the State Board of Massage Therapy's regulation #16A-721 (IRRC #2843). 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:

Date:

7/7/10