

Comments of the Independent Regulatory Review Commission



State Board of Physical Therapy Regulation #16A-6514 (IRRC #2910)

Act 38 of 2008 Amendments

November 16, 2011

We submit for your consideration the following comments on the proposed rulemaking published in the September 17, 2011 *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 Physical Therapy (Board) to respond to all comments received from us or any other source.

1. House Professional Licensure Committee Comments.

The House Professional Licensure Committee (HPLC), in a letter dated October 26, 2011, submitted the following comments:

- The HPLC brings to the Board's attention that proposed Regulation 16A-6514 was published in the *Pennsylvania Bulletin* on September 17, 2011, approximately 2 years and 11 months past the 90 days from the effective date of the Act of July 4, 2008, (P.L. 293, No. 38).
- The HPLC questions the Board's statutory authority to include physical therapy assistant students in §40.171(c) which relates to supervision ratio, since Act 38 of 2008 specifically limits the ratio to one physical therapist supervising no more than three physical therapist assistants.

We will review the Board's responses to these HPLC comments as part of our determination of whether the final-form regulation is in the public interest.

2. Economic Impact of the regulation.

In response to Regulatory Analysis Form (RAF) Question 17, the Board acknowledges that the regulated community will experience an increase in costs in relation to the requirements for continuing education and professional liability insurance. The Board also expects an increase in costs in approving additional continuing education programs and auditing in the response to RAF Question 19. We agree there will be costs associated with compliance.

However, the Board did not include any cost estimates associated with implementation and compliance in the response to RAF Questions 17, 19, 20 or 21. We recommend that the Board

amend these responses to provide dollar estimates so that we can fully evaluate whether the final-form regulation is in the public interest.

3. Continuing education as a condition of renewal. – Consistency with statute.

The statute states that “For each license renewal, a licensee shall complete within the immediately preceding two-year period at least 30 hours of continuing physical therapy education as approved by the board.” 63 P.S. § 1307.2. Similar requirements are found in 63 P.S. §§ 1309(c)(1) and 1309.1(j) relating to certificates of authorization and physical therapist assistants, respectively. We also note that 63 P.S. § 1303(a), in part, states that the Board may adopt rules and regulations “not inconsistent with law.”

Renewal is addressed in Sections 40.19. *Renewal of physical therapist license*; 40.63. *Continuing education for direct access certificate holder*; and 40.191. *Renewal of certification*. Subsection 40.63(b), relating to a direct access certificate holder, states that completion of continuing education is a condition of certificate renewal. We agree.

Our concern is that Sections 40.19 or 40.191 do not provide direct notice that if the continuing education requirement is not met, a license or certificate cannot be renewed. Direct and clear notice in the wording of the regulation will benefit both the Board and licensees in obtaining compliance. Clear notice can also avoid the expense of the Board taking actions against the licensee and the potential loss of income for the licensee. Therefore, while the intent and actions of the Board may be to not renew, we recommend that clear notice be provided in the regulation that the Board cannot renew a license or certificate if the licensee or certificate holder fails to complete the continuing education required by the statute.

4. Continuing competence. – Consistency with statute; Protection of the public health, safety and welfare; Fiscal impact; Need; Clarity.

The Board proposes to introduce “continuing competence” in Sections 40.68 and 40.193 which “may satisfy in part” continuing education requirements. In the Preamble, the Board explains:

Because sitting in lecture courses and other traditional methods to obtain information are not the only viable methods of assuring that licensees remain competent to practice, the Board is proposing to include what is often referred to as continuing competence in the array of methods for licensees to satisfy the continuing education requirement. This model is based upon the model currently being pursued by the FSBPT [Federation of State Boards of Physical Therapy].

Consistency with statute

Under 63 P.S. §1307.2, “30 hours of continuing physical therapy education as approved by the board” is required for each license renewal. Similar continuing education requirements are found in 63 P.S. §§ 1309(c)(1), 1309.1(j) relating to certificates of authorization and physical therapist assistants, respectively. These statutory provisions use the specific terms “continuing education” and impose a specific number of hours required.

The Board is empowered by statute to approve continuing education. Act 38 of 2008 did not include continuing competence. Therefore, it is not clear why the Board is including in regulation a separate category of continuing competence that the Board may approve to satisfy continuing education requirements. The Board should explain how the continuing competence provisions are consistent with the statute.

Alternatively, the Board should delete continuing competence from the regulation and consider adopting these activities as continuing education, provided the activity is valid as continuing education. We question, for example, whether activities such as submitting grant requests or holding a position in an organization would qualify as the equivalent of continuing education.

Need and protection of the public health, safety and welfare

In the Preamble, the Board states that lecture courses and other traditional methods to obtain information are not the only viable methods of assuring that licensees remain competent to practice. Recognizing that continuing education helps licensees remain competent to practice, in regard to continuing competence, the Board needs to demonstrate:

- Why continuing competence activities are needed in addition to traditional continuing education courses;
- Continuing competence activities in the regulation are a viable method of assuring licensees remain competent in practice; and
- How each continuing competence activity listed in the regulation will adequately protect the public health, safety and welfare if substituted for continuing education hours.

Clarity

A regulation establishes a binding norm between the agency and the regulated community. Sections 40.68 and 40.193 are extremely vague and present broad, idealistic concepts. For example, the opening subsections state that the “Board will be guided by the following principles,” however the guiding principles include statements such as “there is no single right way to demonstrate competence.” An approval process provision states “the design of the activity must support the achievement of the objectives.” We do not believe Sections 40.68 and 40.193 as presented in the proposed regulation establish binding norms. The Board should explain why it believes the continuing competence provisions rise to the level of regulation, how they would be enforced consistently and why they are in the public interest.

Fiscal impact

Sections 40.68 and 40.193 also state the Board will approve these activities. Given the broad context of the descriptions in Sections 40.68 and 40.193, the Board could conceivably receive many requests for approval of continuing competence activities. How much does the Board anticipate it will cost to review and approve continuing competence activities and how is the cost justifiable?

5. Section 40.11. Educational requirements for licensure by examination. – Clarity.

Subsection (a) requires an applicant to have graduated from a program “accredited by CAPTE or by another National organization recognized by the Board that accredits physical therapy programs.” It is not clear what other organizations an applicant could use to qualify. How can an applicant find the list of other National organizations recognized by the Board? The Board should consider maintaining a list on its website and referencing the website in the regulation.

6. Section 40.12. Application for licensure. – Clarity.

Subsection (b) requires the applicant to use forms supplied by the Board. Are these forms available online? If so, the regulation should include the web address where these forms can be found.

7. Section 40.17. Foreign-educated physical therapists applying to take the licensure examination and pursue clinical experience. – Consistency with statute; Clarity.

Documentation of authorization to practice

Under 63 P.S. § 1306(i)(2), an applicant for licensure who has been educated outside the United States is required to “provide proof of holding an unrestricted license in the country where the applicant was educated.” The Board is deleting Paragraph (3) which appears to reflect 63 P.S. § 1306(i)(2). Without Paragraph (3), how will the regulation adequately reflect the statutory requirement of 63 P.S. § 1306(i)(2)?

Substantial equivalency

Under 63 P.S. § 1306(i)(3), an applicant can provide satisfactory evidence in two ways. First, the applicant graduated outside the United States from a “program accredited by the same accrediting agency that the board approves for programs within the United States....” Second, in all other instances, the graduate meets the requirements in 63 P.S. §§ 1306(i)(3)(i) to (iv). The Board should review Section 40.17 for consistency with 63 P.S. § 1306(i)(3) and explain how the regulation adequately reflects the statute.

8. Section 40.20. Inactive status of physical therapist license. – Reasonableness; Clarity.

Subsection 40.191(j) specifies the disciplinary provisions in the statute that may be invoked for practicing on an expired certificate. We recommend adding a similar provision to Section 40.20.

9. Section 40.67. Continuing education for licensed physical therapist. – Feasibility; Clarity.

Written request for waiver

The second sentence of Paragraph (a)(4) is not clear. It states, in part, “A waiver or extension of time will not be granted unless a written request is submitted by the licensee; or...a physician..., **or both.**” (Emphasis added.) The regulation is not clear because it does not state what circumstances would require a written request by both a licensee and a physician. As a practical

matter, it would appear that all requests for a waiver would require an application by the licensee, except in the unique circumstance where the licensee is rendered incompetent by a disability or illness. It would also appear that a claim of disability or illness would require supporting documentation by a physician. We recommend that the Board clarify this provision. The same concern applies to Paragraph 40.192(a)(4).

Certificate of completion

Paragraph (b)(1) requires “a certificate of completion issued by the course or program provider.” A commentator states that not all continuing education providers give the participants certificates. In the commentator’s experience, an APTA conference did not issue certificates. The Board should review Paragraph (b)(1) and explain how this provision is feasible for all of the continuing education courses approved by the Board. Alternatively, the Board should consider amending the regulation to allow other methods of proving the person attended the course or program.

60 days

Paragraph (d)(2) requires the provider to apply for approval of a continuing education course or program at least 60 days prior to the date of the course or program. The provider may also request a waiver of the 60 days. While this may provide the Board with enough time to review the application, we question the practical effect of these provisions. Can a provider advertise the program pending Board approval? How will those signing up for the course be treated fairly if the approval of the program is pending with the Board? The same concerns apply to Section 40.192(d)(2).

10. Sections 40.68. Continuing competence for licensed physical therapist and 40.193. Continuing competence for certified physical therapist assistant. – Reasonableness.

In addition to general questions on continuing competence, we have three specific concerns.

First, Paragraphs 40.68(c)(4) and 40.193(c)(2) provide an extra five contact hours for passing a review tool exercise from FSBPT. A commentator suggests deleting this credit since the testing has not been subjected to validity testing. The Board should review these provisions and consider either deleting the five credit hours for passing the review tool or explaining why the five contact hours are appropriate.

Second, several commentators have suggested adding credit for clinical instruction. Why didn’t the Board include credit for clinical instruction in these sections?

Finally, the Board should review and explain each of the credits it will allow for the activities listed in the regulation and how these credits will specifically count toward continuing education hours.

11. Section 40.162. Application for certification. – Consistency with statute; Reasonableness; Clarity.

The statute states that to be eligible for certification a physical therapist assistant, “applicant must be at least 18 years of age unless otherwise determined by the board.” 63 P.S. § 1309.1(a). Paragraph (a)(1), as amended, states an applicant must be either “at least 20 years of age” or “at least 18 years of age and the Board has determined that the candidate has proved the capability to accept and handle the responsibilities appurtenant to certification.” We have three concerns.

First, why does the Board need to make a distinction in regulation between candidates that are 18 years old and 20 years old? Why don’t other provisions in training or requirements for certification adequately establish the qualifications of an 18 year old candidate?

Second, why did the Board maintain the 20 years of age provision in Subparagraph (i) and how is it consistent with the statute?

Finally, in regard to the 18 years of age provision in Subparagraph (ii), the regulation needs to specify what standard an applicant must meet to satisfy Subparagraph (ii).

12. Sections 40.165. Authorization to provide services as physical therapist assistant under indirect supervision and 40.166. Temporary certificate to provide services as physical therapist assistant. – Clarity.

Both of these sections include a list of requirements needed in order to be granted a certificate in Subsections (b). However, Paragraphs 40.165(b)(3) and 40.166(b)(5) state the vague requirement that a certificate will be granted to an applicant who “otherwise complies with this subchapter.” Under what circumstances would the other requirements in Subsections (b) be waived for an applicant who “otherwise complies with this subchapter”? We recommend deleting Paragraphs 40.165(b)(3) and 40.166(b)(5).

13. Section 40.191. Renewal of certification. – Reasonableness; Clarity.

Renewal application

Subsection 40.19(b) includes the caveat that “failure of the Board to send or of the licensee to receive a biennial renewal application does not relieve the licensee of the biennial renewal responsibility.” We recommend adding the same caveat to Subsection 40.191(b).

License, registration or certificate

Given what may be a broad range of titles, should Paragraph (c)(2) require disclosure of registrations and certificates in addition to licenses?

14. Miscellaneous clarity.

- Section 40.63(b) uses the date of January 1, 2011, which had already passed as of the date of publication of the proposed regulation in the *Pennsylvania Bulletin*. Should this date be changed or deleted?

- For consistency in Section 40.171, Subsection (c) should use the term “licensed” physical therapist.
- Subsection 40.191(c) refers to license renewal. Should this refer to certificate renewal?