

Comments of the Independent Regulatory Review Commission



Professional Standards and Practices Commission Regulation #6-340 (IRRC #3233)

Code of Professional Practice and Conduct for Educators

June 19, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the April 20, 2019 *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 Professional Standards and Practices Commission (PSPC) to respond to all comments received from us or any other source.

1. Whether the agency has the statutory authority to promulgate the regulation; Need for the regulation.

This proposed rulemaking amends Chapter 235 of PSPC's regulations. Chapter 235 is entitled "Code of Professional Practice and Conduct of Educators" (Code). It was promulgated in 1992 and has not been amended since that time. PSPC has cited Section 5(a)(10) of the Educator Discipline Act (Act) (24 P.S. § 2070.5(a)(10)) as its statutory authority for the rulemaking. Section 5 of the Act provides PSPC with certain powers and duties. Section 5(a)(10) provides PSPC with the following power:

To adopt and maintain a code for professional practice and conduct that shall be applicable to any educator as defined in this act, pursuant to the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law.

This language provides PSPC authority to adopt a code of conduct, but it does not provide the authority to promulgate that code as a regulation under the Regulatory Review Act. (71 P.S. §§ 745.1, et seq.) Section 1206 of the Commonwealth Documents Law (CDL) (45 P.S. § 1206) does provide PSPC authority to promulgate a code of conduct in a form and manner other than a regulation. Section 1206 of the CDL is entitled "Format of regulations and other documents" and includes the following language:

The agency text of all regulations and other documents, required or authorized to be deposited with the Legislative Reference Bureau by this act shall be prepared in such form and format as

may be prescribed by regulations promulgated by the joint committee. (Emphasis added.)

As explained below, we believe it is more appropriate to publish the Code as a Statement of Policy and not a regulation.

PSPC explains in Regulatory Analysis Form Question #10 that the Code identifies, “the ethical responsibilities of educators and lists what educators shall do, *should* do and *may* do, as well as the consequences for violating the Code.” (Emphasis added.) We acknowledge the value of the Code and the benefits associated with it. However, language found in the existing regulation and in proposed amendments is nonregulatory in nature. For example, § 235.3 relates to the purpose of the Code. A new subsection is being added that states the following: “The purpose of this chapter is to set expectations for educators; guide educational practice and inspire professional excellence.” Existing language found at § 235.4 (a) and (b) states that educators are “expected” to abide by numerous provisions of the section.

A regulation sets binding norms of general applicability and future effect. Regulations have the full force and effect of law and are enforceable mandates. A regulation is not the proper vehicle for setting expectations. A Statements of Policy (SOP) would be a more appropriate document for providing guidance or setting expectations. What is the need for codifying the Code as a regulation? As PSPC moves forward with amendments to the Code, we suggest it convert the Code from a regulation to a SOP.

If PSPC decides to move forward with the amendments to the Code as a regulation, we offer the following comments.

2. Possible conflict with or duplication of statutes or existing regulations.

The Pennsylvania Catholic Conference submitted a comment stating that the prohibitions found in proposed amendments to the Code, if applied to Catholic educators, would violate constitutionally-protected religious liberties and the Pennsylvania Religious Freedom Protection Act (PRFPA) (71 P.S. §§ 2401 - 2407). This assertion is based on their contention that some provisions may come into conflict with tenets of the Catholic faith. In the Preamble to the final-form regulation, we ask PSPC to explain why the amendments being proposed do not conflict with PRFPA.

3. Clarity and lack of ambiguity.

As stated in our first comment, provisions of the existing regulation, and proposed amendments to it, are not written in a regulatory format. For example, PSPC is proposing to add the following language to § 235.4 relating to professional practices:

Educators shall promote the health, safety and well-being of students by establishing and maintaining appropriate verbal, physical, emotional and social boundaries. Educators shall interact

with students with transparency, at appropriate times and in appropriate settings.

This new language is a goal that every educator should strive to meet. However, it would be difficult to measure if this mandate is actually being met.

Another example from § 235.4 is quoted below:

Educators should refrain from professional or personal activity, including activity online, which would reduce the educator’s effectiveness within the school community.

How would the effectiveness of an educator within the school community be measured? Both of these new provisions are ambiguous. They do not provide educators with a clear and precise standard for compliance. We recommend that the entire final-form regulation be amended to set standards that are clear, binding and enforceable.

4. Section 235.3a. Definitions. – Clarity.

The term “fiduciary relationship” is being defined as follows: “A fiduciary relationship is one in which a person justifiably places confidence in another whose aid, advice or protection is assumed.” What is the need for including the word “justifiably” in this definition? As used in this definition, what does that word mean? In the Preamble to the final-form regulation, we ask PSPC to explain the rationale for including this word in the definition. If the word is not needed, we suggest that it be deleted from the definition.

5. Section 235.4. Professional practices. – Clarity.

Subsection (b)(2) requires educators to be certified in the areas of assignment. It provides an exception for temporary, short-term, and emergency basis assignments. The term “short-term” is vague and does not establish a binding norm. To improve clarity, we suggest that PSPC define “short-term” in the final regulation.

6. Section 235.5a. Commitment to Students. – Clarity; Implementation procedures.

This section describes an educator’s obligation to serve students. Subsection (g) states that educators shall not be on school premises or at school-related activities while under the influence of “unauthorized drugs.” That term is also used in Subsection (h). Who determines if a drug is unauthorized? How is the regulated community notified of what is an unauthorized drug? We ask PSPC to define this term in the final-form regulation and also to explain how it will implement these subsections.

7. Miscellaneous clarity.

- Under § 235.3a, relating to definitions, we identified the following issues:

- The definitions of “dual or multiple relationships,” “electronic communications,” and “fiduciary relationship” include the terms that are being defined. Section 2.11 (h) of the *Pennsylvania Code & Bulletin Style Manual (Manual)* states that the term being defined may not be included as part of the definition. We recommend that the definitions be amended to comply with the *Manual*.
- The definitions of “school entity” and “sexual misconduct” under § 235.3a include an incorrect statutory citation to § 1.2 of the Act. The correct citation is § 1b of the Act.
- The phrase, “including, but not limited to” is being added to §§ 235.4(b)(4) and 235.5a(j). Section 6.16 of the *Manual* suggests that the term “includes” be used instead of “including, but not limited to.”
- § 235.5a(d) is new language that prohibits educators from engaging in sexual misconduct, “including sexual relationships, with students.” The quoted language should be deleted because “sexual relationship” is included in the defined term “sexual misconduct.”