

Comments of the Independent Regulatory Review Commission



State Board of Medicine Regulation #16A-4956 (IRRC #3332)

Acupuncturists and Practitioners of Oriental Medicine

April 13, 2022

We submit for your consideration the following comments on the proposed rulemaking published in the February 12, 2022 *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. Compliance with the RRA.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under Section 5(a) of the RRA (71 P.S. § 745.5(a)) in the Regulatory Analysis Form (RAF). Some of the information contained in the RAF submitted with this rulemaking is not sufficient to allow this Commission to determine if the regulation is in the public interest.

RAF question #22 asks the promulgating agency to submit, for each of the groups and entities identified in items (19)-(21), a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for the implementation of the regulation. RAF question #22(b) requires the agency to attach copies of the forms, or if it uses electronic forms, to provide links to each form or a detailed description of the information required to be reported.

The Board states that it has “[a]ttached the application checklists for initial licensure as an acupuncturist and as a practitioner of Oriental medicine detailing the information required, which reflect the required professional liability insurance.” The checklists, submitted as part of the regulatory package, also provide instruction to applicants regarding education verification, educational transcripts, and exam results that are necessary for compliance under this rulemaking. For instance, under the block labeled “Malpractice Insurance,” the applicant is instructed to upload proof of professional liability insurance coverage. It further details that the proof must include the name of the applicant and indicate that they are covered under the policy

while performing “acupuncture services” in the Commonwealth of Pennsylvania. This term is not defined in the proposal (please refer to our comments in Issue #4). Additionally, the instructions (under this block) for the Practitioner of Oriental Medicine checklist should specify that professional liability insurance must cover claims related to acupuncture and herbal therapy. (Section 18.20(d))

Likewise, all of the methods available to an applicant to demonstrate English language proficiency should be detailed in the “Exam Results” box. (Section 18.13(a)(2)) We ask the Board, when it submits the final version of this rulemaking, to make certain that the terminology in the checklists is consistent with the regulatory language in the Annex.

2. Section 18.11. Definitions. – Clarity.

“Acupuncture examination” and “East Asian herbology examination”

The definition of “*Acupuncture examination*” states the Board recognizes NCAAOM component examinations in acupuncture and sterilization procedures as the examination for licensure as an acupuncturist. Similarly, the definition of “*East Asian herbology examination*” states the Board recognizes NCAAOM examination component in Chinese herbology and the NCAAQM examination for Oriental medicine as the examinations for licensure as a practitioner of Oriental medicine.” Do these provisions preclude all other examinations that may come along in the future? The Board should clarify its intent in the final-form regulation.

The Board’s recognition of the National Certification Commission for Acupuncture and Oriental Medicine examinations for licensure as an acupuncturist and practitioner of Oriental medicine are substantive provisions and may not be used in a definitions section. Section 2.11(e) of the Pennsylvania Code & Bulletin Style Manual states that substantive provisions may not be contained in a definition section. For clarity, we recommend moving the Board’s recognition of these examinations to the body of the regulations.

“Occupational English Test”

In proposed Section 18.13(a)(2)(iii) (relating to Requirements for licensure as an acupuncturist) the “Occupational English Test” for any of the health-related professions is listed as a method that may be used by an applicant to demonstrate English language proficiency. This term and its definition should be included in the Definitions section of the final-form rulemaking.

3. Section 18.13. Requirements for licensure as an acupuncturist. –Clarity and lack of ambiguity; Need for the regulation; and Economic and fiscal impacts of the regulation.

The Board proposes to amend §18.13(a) to update the list of acceptable methods for demonstrating English language proficiency for an applicant who did not take the acupuncture examination in English but which examination is otherwise acceptable and a passing score was secured. The Board will accept the examination result if the applicant has also demonstrated English language proficiency by either demonstrating that (1) their acupuncture educational program was conducted in English; or, (2) they have achieved a scaled score of at least 83, or a

similar score acceptable to the Board, on the Test of English as a Foreign Language (TOEFL); or, (3) they have achieved a score of at least 350 on each of the four sub-tests of the Occupational English Test for any of the health-related professions; or, (4) achieved a passing score on a substantially equivalent English language proficiency examination, as approved by the Board.

The Board explains, in the Preamble, that it is providing for the possibility of “a similar score acceptable to the Board” because there is a second version of the TOEFL which is rarely given and is a paper-delivered test. It contains only three of the four sections of the internet-based version examination and is not given a total scaled score but individual scores on each portion completed. The Board also explains that in the event the scoring system for the TOEFL is altered in the future, it would not need to immediately revise its regulations but could accept a comparable score.

We have three concerns with this approach. First, it does not account for the TOEFL test variants, as described by the Board in the Preamble and Regulatory Analysis Form (RAF). Second, it uses non-regulatory language. Regulations have the full force and effect of law and establish a binding norm that is applicable to all that fall under its jurisdiction. They must be clear and unambiguous. The phrase “or similar score acceptable to the Board,” does not set a binding norm that could be predicted by the regulated community. Finally, in order to change a regulatory requirement, such as a test score, a new rulemaking is needed. Otherwise, permitting the Board to revise a requirement, by accepting a comparable score without notice, would create confusion for individuals applying for licensure as an acupuncturist under this subsection. We recommend the Board revise Section 18.13 (a)(2)(ii) to provide greater clarity and more regulatory certainty.

In Section 18.13(a)(2)(iv), the Board is proposing to expand the options for an applicant, whose acupuncture examination was not conducted in English, to demonstrate English proficiency by achieving a passing score on a substantially equivalent English language proficiency examination, as approved by the Board. What is the need for this subparagraph? How will applicants know which test scores have been approved, including the scores determined to be acceptable, by the Board? The Board should delete subparagraph (iv) or explain why it is needed in the Preamble to the final-form regulation.

The Board’s response to RAF question #17 notes that applicants will benefit from the expanded options for demonstrating English language proficiency but it does not discuss the financial impact on individuals. Likewise, the Board’s response to RAF question #19 does not provide a specific estimate of the costs and/or savings to the regulated community to comply with the English language proficiency provision in Section 18.13(a)(2). The Board should submit a revised RAF to the final-form regulation that considers the costs for these English language proficiency examinations.

Section 18.13 (a)(2)(i) provides the option for demonstrating that the applicant’s acupuncture educational program was conducted in English. The checklists for initial licensure as an acupuncturist and practitioner of Oriental medicine state under “Education Verification” that all documents must be in English or an official translation must be submitted to the Board from an

official translation agency or professor of the language. The Board should account for these costs in a revised RAF to the final-form regulation.

4. Section 18.15. Practice responsibilities of acupuncturist and practitioner of Oriental medicine who is not a physician; practice responsibilities of an acupuncturist who is licensed as a medical doctor. – Clarity.

Subsection (c)

This subsection sets forth the practice responsibilities to the patient and the public for an acupuncturist who is also licensed as a medical doctor by the Board. Under this subsection, a medical doctor who is also a licensed acupuncturist must include in the patient’s medical records evidence of having performed an acupuncture evaluation and development of a treatment plan for patients considered for, or who receive “acupuncture services.” It also clarifies the duty of a medical doctor to comply with sterilization standards when providing “acupuncture services.”

The Board’s existing regulations define “Acupuncture” and “Supplemental techniques” which are part of “acupuncture.” Do “acupuncture services” encompass something different than “acupuncture?” If so, the Board should define and include “acupuncture services” in the Definitions section of the final-form regulation. If not, it should revise this subsection by removing “acupuncture services” and replacing it with “acupuncture.”

5. Section 18.18. Disciplinary and corrective measures. – Clarity.

Section 3.2(c) of the Acupuncture Licensure Act (Act) (63 P.S. §§ 1801-1806.1) requires a licensee to notify the Board within 30 days of the licensee's failure to be covered by the required insurance. Failure to notify the Board is actionable under sections 3 (relating to Regulation of the practice of acupuncture) and 5 (relating to Penalties) of the Act. The license to practice will automatically be suspended upon failure to be covered by the required license and will not be restored until submission to the Board of satisfactory evidence that the licensee has the required professional liability insurance coverage. (63 P.S. § 1803.2(c)) This statutory provision is not carried over in the Board’s proposal. We believe it would be beneficial to the regulated community if they could rely primarily on one document, the Board’s regulation, to assist in their understanding of and compliance with the liability insurance requirements. To improve the overall clarity of this section, we ask the Board to incorporate the noncompliance provisions in Section 3.2 (c) of the Act into the final version of this rulemaking.