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

August 13, 2008

Michael J. DeStefano, Chairman
State Board of Social Workers, Marriage/Family Therapists and Professional Counselors
2601 North Third Street
Harrisburg, PA 17110

Re: Regulation #16A-6911 (IRRC #2701)
State Board of Social Workers, Marriage/Family Therapists and Professional Counselors
Code of Ethical Practice and Standards of Professional Conduct

Dear Chairman DeStefano:

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, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable P. Michael Sturla, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

Comments of the Independent Regulatory Review Commission



State Board of Social Workers, Marriage and Family Therapists and Professional Counselors #16A-6911 (IRRC #2701)

Code of Ethical Practice and Standards of Professional Conduct

August 13, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the June 14, 2008 *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 Social Workers, Marriage and Family Therapists and Professional Counselors (Board) to respond to all comments received from us or any other source.

Sections 47.71, 48.71, and 49.71. Code of ethical practice and professional conduct. - Fiscal impact; Public health and safety; Reasonableness; Feasibility; Implementation procedure; Clarity.

Format

This proposed regulation consists of one new section which is added to each of the three separate chapters (49 Pa. Code Chapters 47, 48 and 49) governing the three different professions licensed by the Board. The new section is practically identical in each of the three chapters. In each chapter, the new section contains ten subsections. Some of the subsections are lengthy and contain a variety of topics. It is unclear why all these topics and provisions are grouped together into one section. To improve clarity and ease implementation, some subject areas should be set forth separately. The following paragraphs provide examples.

The first example is Subsection (b)(4), relating to confidentiality and privacy. It should be placed in a separate section since these subjects involve licensees following the requirements of pertinent statutes and related regulations and is not limited to professional codes of conduct and practice. Hence, it would be an ideal provision as a separate section that stands alone and is not lost or obscured within a larger group of provisions.

A second area that could be moved to a separate section or an existing section is Subsection (b)(6), relating to sexual harassment. All three chapters already contain provisions related to sexual misconduct (Sections 47.61-47.65, 48.21-48.25 and 49.21-49.25). These existing provisions prohibit “sexual intimacies” between a licensee and a client/patient or an immediate family member of a client/patient. Two commentators stated that such a prohibition should be added to this proposed regulation. This is unnecessary since it is addressed in the existing regulations. However, the comments demonstrate the confusion generated by separating sexual misconduct and harassment into separate and unrelated sections.

A third area that would benefit from separate treatment is Subsection (g), relating to recordkeeping. Examples of similar provisions that other boards promulgated as separate sections include 49 Pa. Code §§ 16.95, 23.71, 27.405, 31.22 and 32.209.

A fourth example is Subsection (j), relating to advertising. Other boards have similar provisions in separate sections. The Board should review the existing regulations at 49 Pa. Code §§ 11.33, 23.31, 25.212 and 29.31.

If Board opts to retain the “single section” approach, it should explain why provisions involving such variety and length need to be set forth in one section.

Nonregulatory language

Another problem with the proposed regulation is the use of the word “should” in different provisions. This word is found in Subsections (b)(4)(ii) and (b)(4)(iii), (c)(1) and (c)(2), (f)(4), (g)(5) and (g)(7). The use of “should” is inappropriate because it is nonregulatory language that indicates that the provisions are optional. Regulations establish binding norms of general applicability and future effect. If the Board decides that it will retain the word “should” and the provisions are to remain optional, then these provisions need to be deleted from this regulation and placed in a policy statement or guidance document.

The use of the word “should” in Subsection (g)(5) is especially troublesome because it allows the protection of client/patient privacy and confidentiality to become discretionary. This provision needs to be revised to replace the term “should” with “shall.” The Board should also include references to applicable federal and state laws and regulations.

Subsection (a) Application.

Subsection (a)(3) appears to be one of the few provisions that is unique in each of the three chapters. Each chapter contains references to the codes of ethics and conduct of various organizations for the different professions. The Pennsylvania Association for Marriage and Family Therapy (PAMFT) does not

see the need for the extensive list of organizations in Section 48.71(a)(3). In its comments, PAMFT contended that the only group that should be listed is the code of the American Association for Marriage and Family Therapy. The other groups are professional counseling groups, and the PAMFT requests that these other groups be deleted from this section. The Board needs to explain the need for the other organizations being included or delete them from Section 48.71 in the final-form regulation.

In its comments, the Pennsylvania Counseling Association (PCA) suggests the addition of the “Code of Ethics of the American Counseling Association” to Section 49.71(a)(3). The Board should consider this suggestion in the final-form regulation or explain why this national code is not included with the others already listed in the regulation.

Subsection (b) Responsibility to clients/patients.

Subsection (b)(1)(i) reads:

Licensees may not misrepresent directly, indirectly or by implication their professional qualifications such as education, specialized training, experience or area or areas of competence.

Similar language is also found in Subsection (j)(2), which includes a requirement that licensees “accurately represent their competencies, education, training and experience....” The Board should combine these directives to avoid duplication in the final-form regulation.

Subsection (b)(1)(iii) refers to “appropriate standards of care.” It reads:

The appropriate standard of care is defined as what an ordinary, reasonable professional with similar training would have done in a similar circumstance.

One commentator referred to this language as “weak” and stated that it “permits quite a bit of latitude.” The House Professional Licensure Committee (House Committee), in its comments dated June 25, 2008, also expressed concerns with this language. The PCA notes that there is nothing in the proposed regulation that addresses whether a licensee provided “effective” care, therapy or treatment. Should the definition of the “appropriate standard of care” also involve a review of the effectiveness of the care or treatment and the licensee’s effort to ascertain an effective strategy? In addition, we note that in its existing regulations at 49 Pa. Code § 41.61. Principle 2, relating to competency, the State Board of Psychology includes the following statement:

In areas in which recognized standards do not yet exist, psychologists take whatever precautions are necessary to protect the welfare of their clients. They maintain knowledge of current scientific and professional information related to the services they render.

How will this proposed regulation address situations or areas when recognized standards may not apply?

A related concern is the term “reasonable professional” in describing “appropriate standard of care.” The Board includes two public members who are not licensees. Both the Pennsylvania Chapter of the National Association of Social Workers and Pennsylvania Society for Clinical Social Work (PSCSW) expressed concerns with the review of violations of this section by unlicensed individuals who have not been trained in the same code of ethical practice and professional conduct. In determining whether a violation has occurred, who will make the determination regarding what a “reasonable professional” would have done in similar circumstances?

In its comments, the House Committee expressed concern with the phrase “in a timely manner” in Subsection (b)(1)(iv). We agree that it is ambiguous. The Board needs to provide licensees with a specific rule for a minimum time period for referrals in the final-form regulation.

Subsection (b)(2) Informed consent.

The House Committee questioned the practicality of the disclosure requirement in Subsection (b)(2)(i). Both Subsections (b)(2)(i) and (ii) contain substantive requirements for disclosures to patients/clients. In order to provide for consistent implementation of the disclosure requirements, the Board should consider providing a written disclosure form for licensees to use in discussing services and other issues with the patient/client. To document that the discussion occurred, the licensee could have the patient/client sign or initial the form. This form could also include a statement, as suggested by PSCSW, informing the patient/client that a collection agency may be used in cases of nonpayment for services rendered.

This subsection also includes the words: “client/patient’s parent, guardian or court-appointed representative.” What about a spouse, domestic partner or adult child? Could one of these people be a legal representative if the client/patient is unable to read or understand a document or is receiving services involuntarily?

Subsection (b)(4) Confidentiality and privacy.

We identified four concerns in this subsection.

First, the House Committee requested that the Board specifically cite the “other laws” mentioned in this Subsection (b)(4)(i). We agree. For example, does the Health Insurance Portability and Accountability Act apply to these licensees and their patients/clients?

Second, PCA mentioned the confidentiality protections in federal regulations at 42 CFR Part 2 (§§ 2.1-2.67), relating to confidentiality of alcohol and drug abuse patient records. The Board should review the pertinent statutes and regulations and identify specific requirements that will protect patient/client privacy and confidentiality.

The third issue is the use of the term “legally authorized person” or “person legally authorized.” In Subsections (b)(2)(iii) and (iv), the proposed regulation refers to the “client/patient’s parent, guardian or court-appointed representative” when discussing issues related to someone giving consent for the client/patient. However, the term “legally authorized person” is used for a similar purpose in Subsections (b)(4) and (e)(2)(v). The final-form regulation should be consistent in how it describes who may represent the client/patient. The Board should consider developing a definition for this term and be consistent in its use in the final-form regulation.

Fourth, PAMFT noted a concern with counseling families and protecting confidentiality. It asked for specific language requiring written authorization from each member of the family group before a therapist could disclose information outside the treatment situation. The Board should amend the regulation to ensure that each family member’s confidentiality is protected.

Subsection (b)(5) Termination.

There are two concerns with this subsection.

First, PCA suggested that licensees should be allowed to terminate or discharge a patient/client for nonpayment of fees. This issue does not appear to be addressed in this subsection or Subsection (f), relating to payment for services. The Board should address this concern in the final-form regulation.

Second, this subsection includes a reference to “appropriate referral for continued services” and “reasonable notification” but includes no directive regarding what constitutes “reasonable notification.” To assist with continuity of care, the Board should consider establishing a specific minimum time period, such as 30 days, for advance notice of termination to provide time for referrals and the search for a new provider.

Subsection (b)(6) Sexual harassment.

Subsection (b)(6)(iii) of this proposed regulation states: “Sexual harassment includes unwanted sexual advances, sexual solicitation, requests for sexual favors and other verbal, visual or physical conduct of a sexual nature.” These are broad terms. The term “sexual intimacies” is defined in the existing “definitions” section of each chapter. This existing definition includes specific language describing this type of conduct. The Board should consider using a reference to this existing definition in its provisions prohibiting sexual

harassment. The Board should also include a definition of “sexual harassment” in the existing “definitions” sections of each chapter (Sections 47.1, 48.1 and 49.1).

Subsection (b)(7) Discrimination.

There are numerous state and federal laws barring discrimination. The Board should reference existing anti-discrimination laws and regulations rather than designing a new anti-discrimination rule. If the Board opts to proceed with this provision as proposed, it should explain why existing laws and regulations are insufficient.

Subsection (c) Dual or multiple relationships affecting the licensee’s judgment.

We agree with the House Committee’s concerns about terms and phrases in this subsection that it described as vague or ambiguous. In addition to amending the subsection in response to the points raised by the House Committee, the Board needs to provide specific examples of the situations that this provision seeks to address.

Subsection (e) Research and publication.

Subsection (e)(1) refers to “Federal and State laws.” The Board needs to cite the pertinent federal and state laws. In addition, the House Committee raised several questions and points of clarification about implementation and enforcement of this subsection. The Board should address these concerns with the final-form regulation.

Facsimile Cover Sheet

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To: Tom Blackburn
Cynthia Montgomery
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Licensing Boards and Commissions
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3-3394 (Cynthia Montgomery)
Fax: 7-0251
Date: August 13, 2008
Pages: 8

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Board of Social Workers, Marriage and Family Therapists and Professional Counselors' regulation #16A-6911 (IRRC #2701). 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: Cynthia K. Montgomery Date: 8/13/08