Testimony of Physician Health Services, Inc. (PHS)

Proposed Regulations of the Board of Registration in Medicine

as Revised December 2016

243 CMR 1.00

Physician Health Services, Inc. (PHS) is a subsidiary corporation of the Massachusetts Medical Society designed to provide identification, support and monitoring services to medical students and physicians in Massachusetts who are at risk for or are experiencing a variety of health related problems. Many of the physicians who utilize our services will interact with the Board of Registration in Medicine (BRM), either with respect to oversight of an active health condition or with respect to license status.

PHS greatly appreciates the opportunity to provide testimony to the Board of Registration in Medicine on the proposed regulations, as carefully considered regulations are essential to creating a regulatory scheme that will be fair, afford due process to all physicians, and effectively govern the profession into the future.

PHS submits testimony on the following provisions:

243 CMR 1.00: DISCIPLINARY PROCEEDINGS FOR PHYSICIANS

1.01:   Scope and Construction

(2)   Definitions

Complaint means a communication or a document from any source which alleges physician misconduct, malfeasance or any violation of law or regulation pertaining to the practice of medicine or good and accepted medical practice. A Statutory Report is not a Complaint.

The BRM has added a general malpractice standard (“good and accepted medical practice”) to the definition of “complaint,” which has traditionally been intended to address instances of *misconduct* or malfeasance, not mere negligence. There is an extensive and well developed tort system in place to address instances of malpractice *separate* from the disciplinary function of the licensing board. Complaints should only encompass actions that knowingly violate tenets of practice. Discipline should not be imposed on physicians who have engaged in honest errors or mere negligence.

Disciplinary Action means an action adversely affecting a licensee which simultaneously meets the descriptions in 243 CMR 1.01(2)(a) through (c), and which is limited as described in 243 CMR 1.01(2)(d) and (e).

(a) Disciplinary action means an action of an entity including, but not limited to, a governmental authority, a health care facility, an employer, or a professional medical association (international, national, or local).

(b)   A disciplinary action is:

1.   formal or informal, or

2.   oral or written.

3.   An oral reprimand is not a Disciplinary Action. However, the fact that conduct resulted in an oral reprimand does not relieve any obligation to report under M.G.L. c. 112, § 5F.

(c)   A disciplinary action includes any of the following actions or their substantial equivalents, whether voluntary or involuntary:

15. Remediation.

16. Probation, including academic probation.

PHS is very concerned about any definition of discipline that includes remediation. PHS, which addresses health concerns ranging from extremely mild symptoms of distress to severe manifestations of significant disease, aims to *encourage* remediation, whenever possible, at all levels. If at any point along the continuum PHS is able to become involved to support a physician with health challenges, we will encourage prompt remediation of any identified symptoms. This remediation can range from the most intensive of inpatient hospitalizations, to short term educational programs or longer term coaching. PHS has made substantial headway in recent years in encouraging physicians to self-refer to PHS for guidance on quickly obtaining remedial resources to address problems at their earliest stages. Hospitals and other entities contemplated in the definition of discipline have also embraced remedial efforts at the earliest stages. It would be a substantial setback if physicians become reluctant to proceed with remediation for fear that doing so could create grounds for discipline with the licensing board. This provision creates valid trepidation with respect to taking quick and positive remedial steps toward addressing potentially more significant situations absent such remediation.

PHS also works with students and trainees, and encourages careful oversight of these novice providers in the context of their training. This oversight, for trainees, *should* include the important resource of a probationary status to help concentrate additional attention on those individuals who need more focus or guidance at certain times or in certain areas before promoting them on to the next stage of training or practice. However, if trainees are going to be disciplined for having received this supportive attention or guidance, it will be rarely used in the helpful manner for which it was intended. Probation is not intended to be a discipline, but to be a time of added scrutiny, oversight, support and guidance. The goal should be to encourage, not discourage, the use of this concept, especially in an academic setting.

1.03:   Disposition of Complaints and Statutory Reports

(5)   Grounds for Complaint.

(a)   Specific Grounds for Complaints Against Physicians. A complaint against a physician must allege that a licensee is practicing medicine in violation of law, regulations, or good and accepted medical practice and may be founded on any of the following:

3.   Conduct which places into question the physician's competence to practice medicine, including but not limited to gross misconduct in the practice of medicine, or practicing medicine fraudulently, or beyond its authorized scope, or with gross incompetence, or with negligence;

4.   Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability or mental condition;

8.   Practicing medicine deceitfully, or engaging in conduct which has the capacity to deceive or defraud or conduct which is in violation of the ethical standards of the profession;

PHS reiterates its concerns highlighted above with respect to imposing discipline upon physicians for mere negligence.

PHS applauds the BRM for recognizing that it should not discipline a physician for having a health condition; rather, discipline should only be imposed when a physician *practices medicine* while the ability to do so is impaired as a result of a health condition.

PHS is concerned that the BRM has added, as grounds for discipline, the violation of “ethical standards,” without providing the document or parameters that will be used as a measure for such “ethical standards.” As we know, that which is considered highly ethical by one interest group might well be considered fully unethical by another. As it is the duty of the BRM to treat all licensees consistently and with fairness, it will be essential that any imposition of a standard that can be so widely interpreted as an “ethical standard” have documented parameters for guidance and due process.

(10)  Disposition by the Board. The Board shall review each recommendation which the Committee forwards to it within a reasonable time, and may issue a Statement of Allegations if it determines that there is reason to believe that the acts alleged occurred and constitute a violation of any provision of 243 CMR 1.03(5) or M.G.L. c. 112, § 5. The Board may take such action as it deems a complaint warrants.

This provision raises many concerns. First, “reasonable time” is not defined. As it is essential for purposes of consistency and due process that all licensees be treated equally, the time frame within which the BRM will review recommendations of the committee should be defined so that it will be consistent for all licensees. This will also allow for clarity of expectations as to what time frame is considered to be reasonable.

The section also suggests that the BRM shall “review” each recommendation within a reasonable time, but does not clarify that the BRM must take action one way or another. The regulation should clarify that the BRM will not just review, but will *act upon* recommendations of the committee within a defined time frame.

Finally, there is undue discretion in a provision that states that the BRM may take any *such action as it deems warranted*. This statement lacks parameters to provide either fair notice to potentially affected licensees as to what types of complaints warrant what types of action, or safeguards against arbitrary application of this amorphous provision. Without defined parameters for the scope of action that the BRM may take, there is not only risk but great likelihood that similarly situated licensees may be treated differently. What one BRM member feels is warranted on a given day may vary from what another BRM member deems warranted on another day, even for similarly situated licensees or complaints. As the purpose of creating a body of regulations is to set forth a structure by which governing agencies will act, a provision that states that they governing body can take any action they deem is warranted defeats the purpose of this essential structure.

Ability of a Licensee to Review a Complaint

These regulations do not clarify that the subject of a complaint is entitled to see the entirety of the complaint that has been lodged against him or her. Both transparency in process and principles of fairness dictate that this should be an essential element of the regulatory structure. The BRM clarifies in the regulatory scheme its own right to investigation, inquiry and conference, but has failed to articulate the concurrent right of an accused licensee to review a complaint in advance of responding to the investigation, inquiry or conference. It challenges principles of fairness and due process to require a licensee to appear for inquiry, without unfettered access to the allegations made against him. This imbalance sets up a dynamic that is contrary to the Board’s mandate to be remedial in its meting out of discipline, rather than punitive. The regulations that clarify the rights of the BRM to investigate a licensee should be balanced with a provision for full access by the licensee to the complaint that has been filed against him and all information gathered in support of that complaint.

PHS thanks the Board of Registration in Medicine for the opportunity to share input on the proposed regulations. We remain available for further discussion and/or response to any questions that the Board may have regarding the PHS perspective on any of these provisions.

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Steven A. Adelman, M.D. Date

Director, PHS