



## Policy or Rule: Delegate and Litigate



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Social work licensing boards are legislatively created and delegated with the authority to regulate the profession by enforcing the practice act to protect the health, safety, and welfare of the public. This legislative mandate and synopsis of why regulatory boards exist should be known to and recited by social work board members and staff on a regular basis.

Central to the legislative delegation of authority is the need for and reliance on populating regulatory boards with “experts”—generally licensees in the profession. As the Association of Social Work Boards (ASWB) emphasizes in its meetings and board training sessions, such licensees must separate professional promotion from public protection.

In another form of delegation, social work boards also may choose to rely on other entities for programs and services where expertise may be needed. For example, the ASWB examination program provides its member boards with a uniform, legally defensible mechanism to assess entry-level competence of applicants seeking licensure. Not only does the use of a uniform exam program create significant economic benefits to state boards, it promotes uniformity, thereby enhancing the mobility and

portability opportunities for boards, practitioners, and consumers. Of course, ASWB is an organization whose membership is composed of the boards that use such programs, ensuring direct participation in the development, deployment, and maintenance of these essential services.

Relevant law also requires applicants for licensure to meet certain education criteria. The use of “outside” accrediting entities to recognize academic programs as satisfying an education component in law may also provide benefits and economies of scale. However, when dealing with organizations where no state board membership and direct participation is involved, the legal issues can be complex. Recognition of programs and services should be implemented through the promulgation of regulations. Failure to do so may create legal challenges. Consider the following.

In 2008, the General Assembly of Pennsylvania adopted amendments to the Insurance Company Law addressing insurance coverage for the diagnosis and treatment of individuals under the age of 21 who are or may be on the autism spectrum. Through this legislative enactment, the Commonwealth of Pennsylvania imposed licensure requirements on “behavior specialists.”

In order to qualify for licensure as a behavior specialist, applicants must demonstrate that they have “received a master’s or higher degree from a board-approved, accredited college or university...” that included a major course of study in counseling psychology.

Through the insurance law, the legislature expressly authorized the State Board of Medicine (Board) to “promulgate regulations providing for the licensure or certification of behavior specialists.” The Board, consistent with the legislation, promulgated regulations that applicants for licensure as a behavior specialist shall demonstrate that they have “received a master’s or higher degree from a Board-approved, accredited college or university.”

However, the Board did not promulgate any regulation that identified or defined what is an approved or accredited college or university or how it would determine who would be deemed to have satisfied this criterion. Rather than promulgating regulations addressing the education issues, the Board issued informal statements of policy in letters denying licensure to applicants that “Board approved, accredited” schools were only those colleges and universities recognized by the Council for Higher Education Accreditation (CHEA) and the United States Department of Education (USDOE).

In March 2013, an applicant (Applicant) filed an application with the Board for licensure as a behavior specialist. The Board provisionally denied the application. The application was then assigned to a Hearing Examiner, who convened a hearing. After the

hearing, the examiner evaluated the evidence and found that the Applicant held a Bachelor of Science degree in counseling from Carolina Christian University and a Master of Science degree from Emmanuel Baptist University. The examiner also found that the Board on October 21, 2013, denied the application for licensure based on the Applicant not having obtained a master’s degree or higher from a Board-approved, accredited college or university.

Specifically, the examiner found that the noncertified transcripts from Emmanuel Baptist indicated that the university was accredited by the Southern Association of Christian Schools, the American Association of Theological Institutions, and the American Accrediting Education Association of Christian Schools. He further noted that the Emanuel Baptist School was closed and no longer in existence. Thus, the Applicant could not prove graduation from a Board-approved, accredited school at the time she completed her degree.

The record also established that the Applicant was employed and had excelled at her job as a behavior specialist from 2005 through 2013, worked with autistic children, and exhibited expertise in working with autistic children through employment and raising an autistic child.

From the above facts, the Hearing Examiner held that the Applicant failed to sustain her burden of proving that she obtained the relevant education degrees from Board-approved, accredited schools. Consequently, the examiner recommended denial of the application. The Board accepted the recommendation and entered

an order of licensure denial on November 18, 2015. The Applicant appealed the decision to the Commonwealth Court.

On appeal, the Applicant argued that the Board’s policy of recognizing only CHEA and USDOE schools violated her substantive due process rights because these measures were arbitrary and lacked a rational relationship to a legitimate government purpose. She also argued that the application of the law violated additional constitutional rights as it was applied retroactively against her rights. Finally, the Applicant argued that the Board’s requirement of CHEA and USDOE recognition of an educational program was applied with force of law but without being duly promulgated as a regulation and as required by applicable administrative procedures.

The standard by which the court reviews such appeals involves determining whether the decision is arbitrary and capricious. Administrative decisions are arbitrary and capricious if they are unsupported on any rational basis because there is no evidence upon which the action may be logically based. The court then engaged in an analysis of previous licensure cases involving chiropractic and engineering applicants for licensure. In both such cases, the relevant courts found the actions in denying licensure as arbitrary and capricious.

Applying such analyses to the current facts, the court sided with the Applicant. It noted that in all three cases, the legislature granted the boards the authority to determine the merits of particular educational programs. With such statutory authority, the Board in the current case chose to rely

exclusively on a designated institutional body to determine which school would be accredited. The Board had an opportunity to examine the accrediting bodies that recognized the Applicant's education. It also had the opportunity to assess the transcripts and coursework completed by the Applicant. However, the Board did neither.

Even more troubling to the court was the manner in which the Board chose to recognize CHEA and USDOE. Instead of promulgating regulations addressing the education criteria, the Board used a statement of policy. It also applied such policy with force of law and used it to form the basis of licensure denial. Distinguishing between regulations and policy, the court cited a relevant Pennsylvania Supreme Court opinion. In addition, the court noted the administrative procedures necessary to duly promulgate regulations that will be used with the force of law.

The Board did not follow such procedures that are designed to provide opportunities for notice, input, hearings and discussions prior to promulgation as a means to protect the process and sustain decision-making. Finally, the court noted that substance applies over form and that referencing a board process as a policy does not bind the court to such a conclusion. Indeed, the conclusion of whether a policy is actually an unpromulgated regulation is a question of law to be determined by the court.

The court held that the Board provided no basis for recognizing only CHEA and USDOE as Board approved, accredited schools and that such lack of justification was fatal to their exclusive recognition. Thus the court held that the Board policy was an unpromulgated regulation that could not be enforced against the Applicant. Under an arbitrary and capricious analysis, the court held that no reasonable set of facts could support the Board decision. Accordingly, the court reversed the Board decision and remanded the matter to the Board with instructions to issue the license to the Applicant.

Social work boards must understand the legal processes used if they rely on outside entities to determine a mandatory criterion of eligibility for licensure. Accredited education is a shining example of reliance on an outside entity over which the boards have little or no participatory rights. To provide legal sustainability to this type of reliance, differentiating between policy and regulation is essential. Further, when promulgating regulations, boards must adhere to the administrative procedures.

***Cary v. Bureau of Professional & Occupational Affairs, State Board of Medicine***, 2017 Pa. Comm. LEXIS 14, 153 A. 3d 1205 (Comm. Ct 2017)