



## MEMORANDUM

**TO:** Brittany McAllister, Board for Certification of Nutrition Specialists

**FROM:** Emily Kaylor, Director of Regulatory Policy

**DATE:** October 15, 2018

**RE:** CSI Referral – Medical Board, Dietetics Advisory Council Rules

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On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) § 107.56, this memo represents CSI's comments to the Board for Certification of Nutrition Specialists regarding the CSI Referral - *Medical Board, Dietetics Advisory Council Rules*.

### **Determination**

The referral entitled "*Medical Board, Dietetics Advisory Council Rules*" received on February 1, 2018, consists of an ongoing action that is "consistent with a clearly articulated state policy as expressed in the...statutes and rules setting forth the board's or commission's powers, authority, and duties." *See* ORC 107.56(D).

ORC 4759 clearly limits licensure to registered dietitians, by relying solely on dietetic-specific professional organizations to set standards for licensure. The statute explicitly states that no person "shall use any other title, designation, words, letters, abbreviation, or insignia or combination of any title, designation, words, letters, abbreviation, or insignia tending to indicate that the person is practicing dietetics." ORC 4759.02(B)(2). Because nutritionists engage in activities that are defined as dietetics by the State of Ohio, they need to obtain a license to practice lawfully. ORC 4759 names the Academy of Nutrition and Dietetics, the Commission on Dietetic Registration, and the Ohio Academy of Nutrition and Dietetics as the entities the State Medical Board must defer to when promulgating the rules governing dietetics licensing. *See* ORC 4759.01. None of these entities recognize Nutrition Specialists as a dietetic credential, and as a result Nutrition Specialists are ineligible for licensure by the State Medical Board.

Because the State Medical Board has not exceeded its legislative authority, this Office does not

find that the Board’s action is “merely a pretext by which the board or commission enables the members of an occupation or industry the board or commission regulates to engage in anticompetitive conduct that could be subject to state or federal antitrust law...[.]” *See* ORC 107.56(D). Here, the Board has aligned its rules with the authorizing state statute. Because the action is consistent with a clearly articulated state policy, and there is no pretext for anticompetitive conduct, the CSI Office must approve the action.

## **I. The action is consistent with a clearly articulated state policy**

The State Medical Board’s (Board) ongoing implementation of dietetics licensing rules is consistent with a clearly articulated state policy. The U.S. Supreme Court has held that a clearly articulated policy exists “where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.”<sup>1</sup> Here, ORC 4759 sets forth the guidelines for licensing individuals practicing dietetics. The statutory language limits licensure to registered dietitians, and the statute relies solely on dietetic-specific professional organizations to set standards for licensure. Because of these factors, licensure of only registered dietitians by the Board is the ordinary result of the exercise of its authority delegated by the state legislature.

### **a. The statutory language limits licensure to registered dietitians**

The statute defines the practice of dietetics as “nutritional assessment to determine nutritional needs and to recommend appropriate nutritional intake, including enteral and parenteral nutrition; nutritional counseling or education as components of preventive, curative, and restorative health care; [and] development, administration, evaluation, and consultation regarding nutritional care standards.”<sup>2</sup> This definition appears to encompass the scope of practice for nutrition specialists. The Board for Certification of Nutrition Specialists (BCNS) describes their professionals as engaged in nutrition therapy, research, and education;<sup>3</sup> the referral also notes that nutrition specialists are trained to provide nutrition therapy and preventative nutrition care. Because of the overlap in the scope of practice for dietitians and nutrition specialists, a nutrition specialist would need to obtain a license to practice dietetics in order to maintain lawful nutrition-related employment in Ohio. This is in direct conflict with the nutrition specialist credential, because it is considered a non-dietetic certification.<sup>4</sup>

The statutory language makes it clear that “no person shall practice, offer to practice, or hold self forth to practice dietetics unless the person has been licensed[.]”<sup>5</sup> Further, it states that no person

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<sup>1</sup> *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 229 (2013)

<sup>2</sup> ORC § 4759(A)(1)(2)(3)

<sup>3</sup> “The Certified Nutrition Specialist (CNS) Credential.” 2018, [nutritionspecialists.org/cns/certified-nutrition-specialist@-cns@-credential](https://nutritionspecialists.org/cns/certified-nutrition-specialist@-cns@-credential).

<sup>4</sup> “The Certified Nutrition Specialist (CNS) Credential.” 2018, [nutritionspecialists.org/cns/certified-nutrition-specialist@-cns@-credential](https://nutritionspecialists.org/cns/certified-nutrition-specialist@-cns@-credential).

<sup>5</sup> ORC § 4759.02(A)

except one licensed under Title XLVII of the Revised Code “shall use any other title, designation, words, letters, abbreviation, or insignia or combination of any title, designation, words, letters, abbreviation, or insignia tending to indicate that the person is practicing dietetics.”<sup>6</sup> Here, the nutrition specialists would be required to obtain a license to practice dietetics because the activity they engage in is considered dietetics in the State of Ohio. Even if they could get a license, it would be misleading for a nutritionist specialist to hold themselves out as a licensed dietitian given that nutrition specialist is a non-dietetic credential. Additionally, they would not be able to hold themselves out as nutrition specialists as that is not a licensed occupation under Title XLVII.

- b. The statute relies solely on dietetic-specific professional organizations to set standards for licensure

The statute names the Academy of Nutrition and Dietetics, the Commission on Dietetic Registration (CDR), and the Ohio Academy of Nutrition and Dietetics as the authoritative professional organizations for dietetics licensing standards. With the enrollment of House Bill 49 of the 132nd General Assembly, the State has delegated licensing duties to the State Medical Board.<sup>7</sup> The statute requires the Board to select and govern specific requirements for licensure: a dietitian licensure examination offered by the CDR or an equivalent, pre-professional dietetic experience at least equivalent to requirements adopted by the CDR, and continuing education requirements for license renewal which are consistent with those adopted by the CDR.<sup>8</sup>

As noted in the referral, the certification examination for nutrition specialists is significantly different than the CDR-approved registration examination for dietitians. The BCNS provided an Examination Domain Comparison chart detailing the subject matter differences. Of the three major areas tested on both examinations, the topic of nutrition science is weighted twice as heavily on the nutrition specialist exam; the topic of food service and food systems is weighted seven times greater on the dietitian exam. Because of these major differences, the two examinations cannot be considered equivalent. Moreover, nutrition specialists are not eligible to sit for the CDR’s registration examination for dietitians because they have not completed an accredited “Didactic Program in Dietetics.”<sup>9</sup>

Nutrition specialists are also unable to complete equivalent pre-professional experience and continuing education. State law requires applicants to complete pre-professional experience that is approved by the Academy of Nutrition and Dietetics or CDR.<sup>10</sup> The Certified Nutrition Specialist Supervised Experience Program is not recognized by either organization. With regard to continuing education, the state requires that the Board implement requirements consistent with

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<sup>6</sup> ORC § 4759.02(B)(2)

<sup>7</sup> ORC § 4759.05(A)

<sup>8</sup> ORC § 4759.05(A)(1)(3)(5)

<sup>9</sup> “About Accredited Programs.” *Eat Right PRO*, Academy of Nutrition and Dietetics, 2018, [www.eatrightpro.org/acend/accredited-programs/about-accredited-programs](http://www.eatrightpro.org/acend/accredited-programs/about-accredited-programs).

<sup>10</sup> ORC § 4759.05(3)

those adopted by the CDR. The CDR requires an individual be a registered dietitian or registered nutrition and dietetics technician to maintain certification.<sup>11</sup> This means that nutrition specialists cannot complete equivalent continuing education requirements because they hold a credential status that is not recognized by the CDR.

The General Assembly prescribed with detail the standards for licensure as a dietitian. The practical implication of those standards is the exclusion of non-dietitians for licensure. Because the displacement of nutrition specialists is the ordinary result of the Board exercising its delegated authority, the ongoing action of implementing licensing rules is consistent with a clearly articulated state policy.

## **II. The state policy is not merely a pretext for anticompetitive conduct that could be subject to state or federal antitrust law**

Because the State Medical Board has not deviated from the scope of its legislative authority, the Board's actions are not a pretext for anticompetitive conduct that could be subject to state or federal antitrust law. The U.S. Supreme Court has held that "any action that qualifies as state action is *ipso facto*...exempt from the operation of the antitrust laws."<sup>12</sup> The Court declined to allow plaintiffs to "look behind the actions of state sovereigns to base their claims on perceived conspiracies to restrain trade."<sup>13</sup> The Court has also suggested that a state actor may not be shielded from antitrust liability when a board has gone beyond the scope of its legislative authority.<sup>14</sup>

Here the Board has not exceeded the scope of its authority. The dietetics licensing rules enforced by the Board closely mirror the state statute and are not substantively different from ORC 4759. Because the administrative rules are aligned with state law, the Board's implementation of the rules cannot be a pretext for anticompetitive conduct subject to state or federal antitrust law.

## **III. Conclusion**

The standards the BCNS takes issue with were set forth in state law, and the administrative rules mirror state requirements. The Board has not exceeded the scope of its authority by implementing the rules in question, and it is therefore not using state policy as a pretext for anticompetitive conduct.

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<sup>11</sup> "How to Maintain Certification." *CDRnet*, Commission on Dietetic Registration, 2018, [www.cdrnet.org/how-to-maintain-certification](http://www.cdrnet.org/how-to-maintain-certification).

<sup>12</sup> *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379 (1991)

<sup>13</sup> *Id.* (citing *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984))

<sup>14</sup> *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015)