



Antitrust Referral Analysis Submission by Person Affected by Board or Commission Action

Contact Name: Jonathan Posey

Company (if applicable): Council of Holistic Health Educators

Date: Council of Holistic Health Educators

Referral Topic: Ohio State Medical Board arbitrarily limits the practice of nutrition to a single modality

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. The CSI office was codified by ORC 107.52 for agency rule review. Additional scope was added in 2017 under ORC 107.56 which describes actions to be reviewed by the CSI office for determination of approval or disapproval.

Please note: When submitting this analysis form to the CSI Office, evidence must be provided that a copy of this completed form was also transmitted to the subject board or commission, as required by ORC 107.56 (C)(2).

Referral Information

1. Name of board or commission taking or proposing to take action:

State Medical Board of Ohio

2. Does this action/proposed action deny an application for licensure?

No

3. Does this referral pertain to a disciplinary action by the licensing board or commission taken against you or your company?

No

4. What is the action/proposed action being taken?

Ongoing operations of the State Medical Board with regard to Chapter 4759, the practice of Dietetics.

5. Please describe the relevant factual background you wish to include in this referral (e.g., history, context).

Since its passage in 1988, Chapter 4759 of the Ohio Revised Code and subsequent regulations and enforcement of the state's Dietetics law, has been a pretext for anticompetitive behavior to benefit a single private trade association. All actions of the Board of Dietetics since passage, and those going forward by the State Medical Board, are anticompetitive. The law and regulation have worked as an anticompetitive mechanism limiting speech about nutrition to a single practice modality, with a single license, using a single credential, educational requirement, examination, and supervisory practice, all for the benefit of a private trade group. This has had the effect of limiting others from the marketplace, such as holistic practitioners who do not seek licensure, but want to apply their education to provide advice on healthy eating and lifestyle choices.

Nutrition state regulation generally follows three paradigms:

- Certification/None: Many states do not require any license or requirement to provide nutrition information, guidance, assessment, and goal setting. However many do offer the opportunity to be certified to provide this, should a practitioner choose to do so. Twelve states have such laws, while five states have no law what so ever.
- Title Protection/Licensure Without Exclusive Scope: Seventeen states have laws that protect certain titles, and require a license if you wish to use those protected titles, such as "Registered Dietician" or "Licensed Nutritionist." However they all have some type of exemption for unlicensed practice, or have no further restrictions.
- Licensure with Exclusive Scope: The most restrictive law, eighteen states (including Ohio) have highly restrictive laws on who can provide nutrition information, guidance, assessment, and goal setting. This law defines a specific scope, education, exam, and supervisory practice requirements, and typically narrows to a single profession or modality of nutrition practice. It severely limits speech on food, nutrition, and lifestyle choices, criminalizing the very idea of talking with a person about what they're eating.

Fun Fact: Dietitians are a single nutrition profession. There many different types of nutritionists, and nutrition professionals.

The law and regulations have created a monopoly for Dietitians, excluding use of the title nutritionist by highly qualified professionals to only those who possess a license. Yet therein lies the problem: A license to provide information, advice, and guidance on healthy eating choices to individuals creates a monopoly.

Under Ohio law and regulation a Dietitian only needs a Bachelor's degree in Dietetics to become licensed and thus allowed to talk about food. A Nutritionist with a PhD in molecular biology and food science is excluded. A holistic professional with a Master's degree in food and nutrition is excluded. A wellness coach with specialized training in food and lifestyle coaching is excluded. Thus competitors cannot offer their services, nor may they advertise the fact that they do, without running afoul of the law and related regulations, including penalties that can result in fines and even jail.

Chapter 4759.01 defines what it means to practice "dietetics" but this definition unfairly encompasses all avenues of providing advice, guidance, or discussion of food and lifestyle choices with individuals. It does this by limiting adjectives to only those who possess a license, such as: assessment, counseling, education, development, administration, evaluation, and consultation.

The law and regulation then forbid these activities in 4759.02 to only those who hold a license by the state. The first anticompetitive issue arises here on the limitation of whom may apply for said license. While this submission is **not** a request for licensure, nor is licensure desired by holistic professionals, it will demonstrate how the law needlessly limited competition at the behest of a private trade group: the Academy of Nutrition and Dietetics (AND).

Board of Dietetics

From inception, the Ohio Board of Dietetics has been made up almost exclusively of Dietitians. In fact, until its dissolution in House Bill 49 (2017) the Board acted as a monopoly, excluding other nutrition professionals, including holistic providers, and nutritionists with Masters and PhD education, in favor of lesser qualified and educated providers for the sole aim at limiting competition. Chapter 4759.03 reads in part:

“Three members of the board shall be dietitians who have been actively engaged in the practice of **dietetics** in the state for at least five years immediately preceding their appointment; one member shall be an educator with a doctoral degree who holds a regular faculty appointment in a program that prepares students to meet the requirements of division (A)(5) of section 4759.06 [limiting to only someone who teaches Dietetics in preparation for licensure under the anticompetitive law] of the Revised Code; **and one member shall be a member of the general public** who is not and never has been a dietitian, is not a member of the immediate family of a dietitian, does not have a financial interest in the provision of goods or services to

dietitians, and is not engaged in any activity related to the practice of dietetics.”

The law set forth a monopoly. Out of five members of the Board of Dietetics, the majority must be Dietitians, thereby guaranteeing a sustained monopoly. In fact, this **anticompetitive makeup continues** through the Dietetics Advisory Council Members. The Advisory Council has seven members: Six dietitians and a lawyer. This composition excludes all other voices, modalities, philosophies, and nutrition practice professionals.

By Design the Law is Anticompetitive

The law and regulations limit who may apply for licensure. Under “4759.06 License qualifications” only those who have completed an education program approved by a private organization, the Academy of Nutrition and Dietetics, may apply for licensure.

Only those who have passed an examination, approved by the AND, may apply for licensure. Only someone who has completed a supervisory practice under a state licensed dietitian, approved by the Academy of Nutrition and Dietetics and the State Medical Board, may be licensed and thus practice Dietetics. This excludes potential competitors from the occupation, limits the supply of nutrition advice to only Dietitians, and in the process harms the public health.

The law and regulations have had the effect of silencing and criminalizing anyone who is not a Dietitian, and not approved by a private special interest group. In short, the law usurps the state’s mission of protecting the public health by abdicating its responsibility to a private special interest group, which then used that law to expand and entrench an anticompetitive monopoly.

Exemptions in Name Only

Chapter 4759.10 sought to create exemptions to the licensure requirement to practice Dietetics, but in practice it has been little more than a farce. Nutrition and food advice is ubiquitous, and our understanding of food and nutrition has changed vastly since the law’s passage in 1988. For example:

If a holistic practitioner were to discuss healthy eating choices with an individual client, this would be illegal under Chapter 4759. If a practitioner designed a meal plan with food recipes for an individual client, based on that person’s food preferences, this would be illegal. If a holistic practitioner were to advertise that they will work with individuals to research, discuss, and choose healthy eating choices, without any attempt or purpose to diagnose, treat, or cure a medical condition, this would still be illegal.

Ohio’s Restrictions Show No Evidence They Protect the Public.

It is important to note that **there is no evidence that the practice of nutrition and guidance on healthy eating from unlicensed people has caused harm to anyone,**

anywhere in Ohio. Yet, The law severely restricts who can provide nutrition services so much that it has created a de-facto monopoly for a single profession, with a single credential, using the exam of one association, and enforcing this monopoly through a Board of Dietetics controlled by a single profession and modality. Nutrition is not one-size-fits-all, and it should not be restricted to a single education, professional, modality, or philosophy.

Neighboring states such as Indiana, Michigan, West Virginia, Kentucky, Pennsylvania, and New York **do not limit** the practice of nutrition to only those who hold a license. Why should Ohio? Many more states have rescinded their nutrition laws, or created broad exemptions which have allowed practitioners to practice up to the level of their education and training, leaving in place protected titles and credentials, all the while creating greater competition, employment opportunities, and the health of State citizens. In the process there has been no harm to consumers.

Critically, there is no evidence whatsoever that an open and competitive market for nutrition services endangers the public safety and health. But do dietetics boards improve the public health? Let's look at a public health issue that is the sine qua non of nutrition professionals: obesity. Five of the ten most obese state (MS, LA, WV, AL, MI, OK, AR, IN, SC, KY) have RD monopoly laws. Nine of the ten least obese states (AZ, CT, NV, NY, UT, CA, NJ, MA, HI, CO) do not. It would seem that restrictive dietetics boards are not having a positive impact on public health, and may be having quite the opposite effect.

Unintended Consequences

In 2017, the state of Ohio had 11.66 million citizens. According to a 2017 report by the Legislative Service Commission, "Approximately 4,200 licenses and limited permits issued by the Board are currently active." That's 2,619 Ohioans for each Dietitian. The effect of licensure has had the unintended consequence of making access to food and nutrition services harder for citizens, not easier, and it unfairly limits that access to **only** one modality. Each new licensed Dietitian is a further continuing and sustaining of the monopoly, but not everyone needs a dietitian, and not everyone wants to seek out a licensed medical provider simply to talk about food and develop strategies to eat healthier.

Request for CSI Analysis and Relief

We ask the Common Sense Initiative to examine the state's dietetics law and regulations to determine if it is anticompetitive, and consider if the legislature should review said law. We also ask that while this examination is conducted that the CSI use its authority to:

- Cease the issuance of new licenses for Dietetics practice;
- Cease the promulgation of all new regulations, and issuance of disciplinary actions by the State Medical Board for the practice of Dietetics;

- Recommend to the legislature that Chapter 4759 be rescinded, or at the very least, amended to include a broad exemption in 4759.10 that allows for anyone to practice Dietetics, as defined in 4759.01(A) so long as they do not use protected titles, or attempt to diagnose, treat, or cure a medical condition or disease. For example, the Council recommends the following exemption in 4759.10

“(L) Anyone may provide wellness and lifestyle recommendations, nutritional guidance, counseling, analysis, or education, so long as such person does not use any title, designation, words, letters, abbreviation, or insignia, or any combination thereof, to indicate that the person is a registered dietitian or licensed dietitian.”

This exemption would allow for anyone to discuss food and nutrition choices, without a license, but would still allow the Dietitians to keep their license, and titles. This exemption will allow greater competition, increased state revenue, and enhance employment opportunities, providing better choices and outcomes for Ohioans.

The law and regulations from their inception on July 27th, 1987, has been anticompetitive, all actions and regulations to include R.C. [119.032](#) have been anticompetitive, and the existence of the Dietetics Council is anticompetitive by its very makeup. This law is as an anticompetitive shield for a private trade group with a financial incentive to limit competition, without any evidence that nutrition advice not provided by a Licensed Dietitian is a cause of harm.

6. Please check all of the following that apply as reasons the action/proposed action is subject to review? (ORC 107.56(B)(1))?

- Fixes prices or limits price competition;
- Divides, allocates or assigns customers or potential customers or geographic markets in this state among members of the occupation regulated by the boards;
- Excludes present or potential competitors from the occupation regulated by the board;
- Limits output or supply in this state of any good or service provided by the members of the regulated occupation;
- Prohibits offering a particular quality-level of a product or service;
- Restricts advertising or makes it more expensive or less effective;
- Substantially reduces the number of firms or providers that can serve a particular set of customers; or

Any other activity that could be subject to state or federal antitrust law if undertaken by private persons.

7. In a brief statement, explain why you believe the board or commission does not have the statutory or other legal authority to take the action/proposed action?

The State Medical Board lacks the authority to take any further actions, legal or otherwise, on the subject of Dietetics as the law on its face is anticompetitive, harms the public health through restricting actual competition and alternative modalities, shielded by an anticompetitive law that empowers a private special interest group whose only claim to such exceptional privilege is the law

8. How is the action/proposed action consistent or inconsistent with state or federal antitrust law and how does it impact competitiveness?

The ongoing actions of the State Medical Board in the enforcement of the Dietetics licensure requirement is anticompetitive. In *FTC v. NC Dental Examiners*, the Supreme Court found that a state board or commission is immune from civil antitrust suit if its members have active market supervision. While the dissolution of the Board of Dietetics is certainly a step in that direction, the formation of the Dietetics Advisory Council smacks of deception and anticompetitive bias in its packing the Council with a single modality and credential. While the SMB may claim that they provide clear, active supervision, the law continues to shield the anticompetitive behavior, and all decisions made since its passage have built upon that shield.

Ohio state law and regulation has had a detrimental impact on the competitiveness of dietetics. By limiting who can talk about food - something the First Amendment should protect – it has allowed a single private interest group, the Academy of Nutrition and Dietetics, to decide that no one but their members, their exam, their education, their credential, and their license as the only criteria that can talk about nutrition.

There are over 3,000 highly qualified nutritionists, health coaches, and holistic nutrition professionals in Ohio that are unable to practice up to the level of their education and training. They cannot advertise, see individual clients, and talk about food choices such as meal planning and recipe creation, without running afoul of the Dietetics law. They are forbidden from helping people obtain accurate information on food – something many of us do on our own through friends, family, books, articles, television, and the internet – and this activity continues to cause *more harm* to the public than an imaginary foreboding that the unlicensed practice of dietetics might cause harm to the public, when no such harm has been found anywhere.

*Send this form, a complete copy of the action or proposed action, and evidence that this form was transmitted to the board or commission taking or proposing the action, and any other documentation deemed appropriate for evaluation to the CSI Office at CSIFerrals@governor.ohio.gov.