What's Happening in Cases that Matter to Boards

This article is based on a presentation at the 2014 FSBPT annual meeting by Jennifer Ancona Semko, JD, Partner at Baker & McKenzie LLP.

Some of these cases may still be active; readers are encouraged to search for updated information on cases that interest them.

The following top recent legal cases that impact licensing boards will be covered in this article.

- ADA (Americans with Disabilities Act) Accommodations:
    - LSAT settlement re: transcript notations
    - Tenth Circuit on restricted nursing licenses
- Washington state dry needling litigation
- *In re Sergio Garcia:* attempt to obtain licensure by an undocumented immigrant
- Supreme Court of Connecticut: what burden of proof does the state have to satisfy in a disciplinary proceeding involving a licensed professional
- Antitrust Case in the U.S. Supreme Court: Update on *North Carolina State Dental Board* case

LSAT (Law School Admissions Test) Settlement

In May 2014, a consent decree was entered and is essentially a settlement between LSAC (Law School Admissions Council), DOJ (Department of Justice), California Department of Fair Employment & Housing (DFEH), and certain individual test takers. It resolves a 2012 California federal lawsuit alleging discrimination against individuals with disabilities who take/seek to take LSAT (with no liability admitted).

DOJ concerns were procedures for approving accommodations and "flagging" of test scores achieved with extended time. The allegation was that these test takers were put at a disadvantage by telling the law schools that these people had extra time. Also, this included a complaint that the procedure to receive accommodations for such test takers was too complicated.

After two years of litigation, LSAC agreed to the consent decree with these key terms:

1. No more score transcript annotations

- Prior to the lawsuit, U.S. government and California DFEH had not issued a regulation or technical assistance publication explicitly addressing the practice of score annotation.
- LSAC disputed that annotation was improper.
- Plaintiffs argued that flagging led law schools to believe test scores were questionable, which violates the ADA.
- Permanent injunction.

2. Civil Penalty of $55,000 paid by LSAC to the U.S. Treasury for violation of the ADA

3. $7.675 million in damages, plus attorney's fees
   - $585,000 to California DFEH
   - $225,000 to the United States
   - $135,000 to the three individuals who brought the lawsuit
   - $6.73 million settlement fund for individuals who requested testing accommodations between January 2009 and May 20, 2014
   - $1 million in attorney's fees

4. Comply with the ADA using "best ensure" standard that the test taker has an equal opportunity to perform on the exam
   - Consistent with existing Ninth Circuit precedent (Enyart) where California is situated

5. Changes to accommodation request procedures
   - For candidates who received accommodation on a prior examination (SAT, GRE, etc.), can only require proof of prior approval and self-certification of continued disability.
   - For other requests, documentation request shall be reasonable and limited to need for the accommodation requested.
   - Cannot reject based solely on IQ or academic success or lack of prior history of receiving the accommodation.
   - Must diversify expert consultants and their areas of expertise.

6. LSAC must create and pay a panel of experts to define best practices
   - Five experts (two appointed by LSAC, two appointed by the government, one appointed by the four panel members)
   - Publish a public report of best practices within six months of panel formation.
   - The report will address diversification of consultants, appropriate documentation requests, request review procedures.

7. LSAC must track accommodation data
   - Details of every accommodation request, complaints/lawsuits
   - Dedicated email address for complaints

8. ADA monitor and reporting
   - Report after each LSAT administration and have regular audits.

Restricted Nursing Licenses

Federal Court Upholds Restricted License: Turner v. National Council of State Boards of Nursing, Inc., No. 13-3088 (10th Circuit, April 2, 2014)

A Kansas nursing candidate suffering from dyslexia failed NCLEX-RN (National Council Licensure Examination – Registered Nursing) in 2009. The individual had not sought an ADA accommodation (extra time, private room, reader) because he was told by someone at the Kansas Board that if the accommodation were requested, and the exam passed, the license issued would be "restricted and limited."

The candidate sued the board and its members, as well as NCSBN (National Council of State Boards of Nursing) asserting claims under the ADA. The Kansas Board moved to dismiss the case based on sovereign immunity (11th Amendment) and the Kansas Board won and the case was dismissed.

Immunity stands unless the state's conduct violated the 14th Amendment (Due Process or Equal Protection violations). The ADA represents an effort by Congress to respond to a documented history of discrimination; seeking prospective injunctive relief. The first two analyses primarily turn on whether there was a rational basis for the state's actions.

Rational Basis for State Action

- "States are not required by the 14th Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Garret*, 531 U.S. 356, 367 (2001)
    - Tenth Circuit agreed with the lower court in that "restrictions on a nursing license earned by testing with accommodations could meet legitimate public safety and health concerns." The burden was on the candidate to negate this.
- There was no claim against NCSBN because no ADA violation related to alleged glitches in the testing software and there was a lack of an appeal right.

Washington Dry Needling Litigation

State of Washington ex rel. South Sound Acupuncture Association (SSAA)

SSAA is a Washington non-profit "dedicated to the enhancement and protection of the practice of acupuncture in the South Sound area" – alleging that a workshop was planned to teach PTs and other non-acupuncturists to do dry needling who are not licensed to do so.

SSAA filed suit in October 2013 on behalf of the State of Washington to enjoin the practice of acupuncture without a license in either East Asian Medicine or in Medicine to do it. The defendants are a Colorado company that conducts dry needling workshops for PTs; its owner and instructor; local host PT clinic and "John and Jane Doe" attendees.

The plaintiff's argument was that the State of Washington prohibits the practice of acupuncture by anyone not licensed to practice Medicine or East Asian Medicine. Dry needling involves insertion of acupuncture needles into a patient's skin for the purpose of providing therapeutic

relief that may also include passage of electric current. PTs (and chiropractors and naturopaths) are not authorized to practice acupuncture.

Plaintiff compares a three-day dry needling workshop of 27 hours to the 2,000 hours of training required by Washington acupuncture schools. Washington regulations also require 500 hours of supervised clinical training.

The plaintiff argued the Washington physical therapy practice act does not authorize PTs to practice acupuncture or to penetrate human tissues with acupuncture needles.

The defendants argued that the scope of practice for PTs should be determined by the Washington Physical Therapy Board, not the court. The Washington Board has not yet taken a formal position.

On Friday, October 10, 2014 the Superior Court for King County issued a ruling stating, among other findings:

- "A person that 'penetrates the tissues of human beings' with an acupuncture needle or any other needle for purpose of 'dry needling' or any similar named act ('dry needling') is practicing medicine under the statutory definition provided at RCW 18.71.011(3) and is prohibited absent a physicians license as required by RCW 18.71.021 or other statutory authority."

- "The penetration of human tissue with an acupuncture needle or any similar needle used for dry needling is outside the plain text of the authorized scope of practice for physical therapy as adopted by the Washington Legislature in RCW 18.74.010(8)."

The Court issued an injunction against Salmon Bay Physical Therapy, one of the named defendants in the case, enjoining them "from inserting acupuncture needles or any similar needles for the purpose of dry needling in the State of Washington."

The Court further enjoined the other named defendant, Edo Zylstra and his company, Kinetacore – the Colorado company that taught the dry needling course in Washington that the Salmon Bay PTs attended – from "holding any workshops, classes or similar trainings in the State of Washington that involve conducting penetration of human tissue with acupuncture needles or similar needles by physical therapists that lack the legal authority to penetrate human tissue pursuant to the findings above."

In re Sergio Garcia

In this case, Sergio Garcia is an undocumented immigrant from Mexico who came to the U.S. as an infant and returned to Mexico when he was eight. He returned to the U.S. at 17 without documentation, but his father had obtained permanent resident status. His father applied for an immigrant visa for Sergio in 1994 and the application was approved in 1995, but the visa was never granted because of a backlog.

Sergio went to law school and passed the California Bar exam in 2009. He was sworn into the bar and received a notice of "error" a few weeks later stating that he should not have been sworn in. The issue was put to the California Supreme Court: Shall California allow the obtaining of professional licenses by undocumented immigrants?

January 2014 Ruling

A federal statute (8 USC 1621) generally restricts undocumented immigrant's eligibility to obtain a professional license. But states are authorized to render eligibility through enactment of a state law meeting certain requirements.

Shortly after oral argument, the California legislature enacted a statute intended to satisfy this exception for law licenses only (took effect Jan. 1, 2014).

The Court concluded that Sergio Garcia should be admitted because a new law removed any potential statutory obstacle. Therefore, there was no basis to disagree with legislature and the Governor's conclusion that admission is consistent with public policy.

Dr. Jones v. Connecticut Medical Examining Board

The Connecticut Board found Dr. Jones to have violated the standard of care with respect to his treatment of two children. The Board ordered a reprimand, a $10,000 fine and two-year probation.

The reasons were: (1) He prescribed an antibiotic to a patient he did not know and had never examined; (2) he prescribed antibiotics for nearly one year with no monitoring; (3) he diagnosed chronic Lyme Disease when the risk was low, lab tests were negative, etc.

Dr. Jones filed an administrative appeal with the Superior Court which reversed the board's first finding (prescription to patient he did not know/had not examined); but affirmed the other findings. The appellate court agreed.

The Connecticut Supreme Court agreed to consider the question: Was the Department of Public Health required to prove its case in the proceedings before the board by a "preponderance of the evidence" or "clear and convincing evidence?"

"Preponderance of Evidence" says that more than 50% of the evidence supports the issue; just enough to make it more likely than not; it is the ordinary standard of proof. The U.S. Supreme Court has found this standard applicable to administrative cases in the absence of legislative directive to the contrary.

"Clear and Convincing Evidence" says the evidence shows the conclusion is highly probable.

The Connecticut Supreme Court found:

- The medical examining board is an administrative agency under the Uniform Administrative Procedure Act (UAPA).

- There is no explicit standard of proof in the UAPA but "preponderance of the evidence" standard established in prior ruling (and no indication legislature intended a higher standard).
- Dr. Jones argued that prior case law was inapplicable because of the importance of the interests at stake.
- The court rejected the doctor's argument that use of the lower standard constitutes a due process violation. The majority of sister states had reached the same conclusion in physical discipline cases with some exceptions, California, Washington, and Wyoming. This is different than attorney discipline cases that are not governed by the UAPA but by the courts.

The court looked at the due process consideration

1. Private interest affected
   - Majority of sister states
   - Deprivation of license dos not rise to the level of those interests that U.S. Supreme Court says warrant higher standard (civil commitment, termination of parental rights)
   - No fundamental constitutional liberty at stake
2. Procedures adequately protected against error.
3. Government's interest: heightened standards makes it more difficult to protect public

It was found that "Preponderance of Evidence" was appropriate.

North Carolina State Dental Board (antitrust case)

The North Carolina Board reviewed its dental practice act and concluded that the act permitted only dentists to whiten teeth, thus sending cease-and-desist letters to non-dentists and their suppliers/landlords. The teeth-whitening industry complained.

The Federal Trade Commission opened an investigation in 2008 and in June 2010, FTC concluded NC Board's actions were anticompetitive and brought an administrative complaint. The FTC lawsuit alleged that the NC Board violated antitrust laws that prohibit "unfair competition."

The NC Board moved to dismiss and argued that its actions are exempt from federal antitrust laws and authorized by the state and protected by state-action immunity.

The FTC argued that the NC Board is a "private actor" and must therefore meet the highest standard (clear articulation and active supervision). The primary reason for designating it a "private actor" was because it is "a regulatory body that is controlled by participants (dentists) in the very industry it purports to regulate."

- Is the NC Board a "private actor" or is it entitled to immunity as a state entity?
- If the NC Board is not immune, were its actions anti-competitive?

May 2013 Fourth Circuit Ruling

The Fourth Circuit supports the FTC position with an emphasis on the Board being composed of a "decisive coalition" of participants in the regulated market chosen by and accountable to

fellow market participants, thus a private actor and active supervision required.

The concurring judge noted that, had the Board members been appointed by the Governor, it would be a state entity…and active supervision requirement would not apply.

What has happened since 2013?

- U.S. Supreme Court agreed to hear the case.
- FSBPT joined 15 other regulatory/professional organizations in submitting *amicus curiae* briefs in support of the NC Board.
- Oral argument was heard by the U.S. Supreme Court October 2014.

Amicus Arguments

1. Fourth Circuit's decision threatens to undermine states' ability to delegate functions to their regulatory boards. This decision might discourage people from joining boards because of a possibility of being sued on antitrust issues.

2. State regulatory boards like the NC Dental Board are clearly state entities.

3. Fourth Circuit improperly presumed that state regulatory boards do not act in the public interest. The mere presence of a majority of licensed professionals does not make that board a private actor.

4. Fourth Circuit's test of how board members were selected improperly looks behind state action to inquire into the private motives of state boards members.

Why Should this Matter to You?

- This is a broader issue of "state action" relevant to all regulatory boards.
- Many boards include practitioner members.
- The amount of interface with the state may vary.
- FTC strongly disfavors state action defense; FTC seeks a high bar for "active supervision."

Jennifer Ancona Semko is a partner in the Washington, D.C., office of the global law firm Baker & McKenzie, which has 70 offices in 43 countries around the globe. Ms. Semko focuses her practice on complex commercial litigation, helping domestic and international companies resolve disputes arising from their business activities in the United States and abroad. She also advises test developers on legal strategic issues and is a frequent speaker on topics related to exam security and the rights and responsibilities of licensing and certification exam programs. Ms. Semko received her law degree, magna cum laude, from Tulane Law School and is a former law clerk to the Chief Justice of the Louisiana Supreme Court. She received her B.S.F.S., cum laude, from Georgetown University. In 2013, she was named a "Washington, D.C., Rising Star" by Super Lawyers.