

Kernan Manion, M.D.
Diplomate
American Board of Psychiatry and Neurology

Thursday, February 2, 2017 6:15am PST

re: HB 2329
Public Comment: AGAINST

House Committee on Healthcare
900 Court St NE, Salem, OR 97301
For Hearing February 3, 2017 8:00 AM
On: HB 2329
Public Comment: My Position: AGAINST

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In reference to House Bill 2329, "Relating to Assessment of Disciplinary Costs by State Board of Psychologist Examiners," I wish to offer the following public comment:

As a physician who is board-certified in Adult Psychiatry and who has been subjected to profound denial of due process by both the North Carolina Physicians Health Program and the North Carolina Medical Board¹, I am deeply concerned about this proposed bill.

My concerns pertain to the wrongfulness of shifting the burden of financial responsibility for disciplinary action (presumably including investigation costs, litigation costs, etc.) onto the alleged licensee who has been charged. I believe such is intrinsically unfair.

Firstly, as an alleged state agency, this state board is presumably well financed to conduct its operations. Its budget likely includes paying for investigative and legal staff as well as specialist consultants to review all relevant licensee records. This is in fact a core component of the state action for which this agency is presumably already empowered and funded. Therefore, it makes no sense to assess the alleged violator when these costs have already been budgeted. This

¹ See Manion v. NC Medical Board et al. Case# 5:16-cv-00063-BO in 4th District Federal Court; and Manion v. NC Medical Board et al. 4th Circuit Court of Appeals Docket # 16-2075.

is about as sensible as charging a public citizen complainant who may or may not have been a patient of the licensee the cost of all investigation and litigation in the event that the investigation proved that no wrongdoing had been committed. How do you think the public would react to that?

Secondly, the purpose of this does not seem to be reimbursement of extraordinary board expenses but rather punitive, so much so that the charged psychologist licensee will be subject to unreasonable burden over and above that imposed by one's own legal defense and the costs of interruption of one's clinical practice.

Thirdly, there is no apparent means by which to ensure that the allegations made, the investigation conducted, and the discipline meted out are in fact conducted in a fair manner, observing all due process.

In fact, the North Carolina Auditor, in her [Performance Audit](#) of the North Carolina Physicians Health Program (NCPHP) in 2014 revealed that NCPHP had violated the due process rights of over 1,140 physicians over the preceding decade at the very minimum by denying each physician access to their diagnostic evaluation which compelled them to be sent, wrongfully I allege, to pre-selected out-of-state interest-conflicted "preferred" programs for further "evaluation" and "treatment." Clearly this constituted not only a profound violation of due process but also wrongful search and seizure, unlawful detention, and civil rights violations. It also had elements of either a profound antitrust violation (in terms of their compulsory referral to interest-conflicted "preferred programs") or even state sponsored racketeering influenced criminal organization ("RICO") activity.

It was further determined by the NC Auditor that NCPHP was entirely lacking requisite oversight by both the North Carolina Medical Board as well as the North Carolina Medical Society, both of which were contractually obligated to conduct oversight.

In an immediately ensuing audit, the [NC Auditor](#) documented profound lack of oversight of ALL licensing boards in NC, essentially finding that they operated untethered from any governmental oversight, such oversight being a necessary condition for claim of sovereign immunity.

I strongly suspect that the same conditions may exist here. Is there a possibility that psychologist licensees might be deprived of their due process rights? Is there a possibility that wrongful allegations might have been entered? Is there adequate access to a grievance process for charged licensees? (There wasn't, and remains none, in North Carolina.) Is there adequate oversight of the State Board of Psychologist Examiners? If not, and especially in light of the SCOTUS decision *FTC v. NC Dental*, the State Board of Psychologist Examiners would

seem to be treading on very thin ice and exposing either themselves or the state to extraordinary jeopardy in the event that it is found that they have violated the fundamental principles of that ruling.

In the event that this legislature insists on approving this proposal, then I would suggest the following addition: in the event that an investigation has been conducted into a psychologist licensee, and it has been determined that no illegal act has been committed, namely no misdemeanor or greater, and that it has been found by a jury of one's peers that no professional guidelines have been violated in a significantly grievous way that has been detrimental to patient care, that all costs incurred by the licensee including legal costs, lost income from practice revenue, as well as pain-and-suffering caused by unnecessary investigation be assessed fully to the Board, accompanied by punitive damages for abuse of discretion. Further, if upon monitoring of this Board by an appropriate state overseer (as required under NC Dental v. FTC), three wrongful prosecutions have been entered into, this Board be subject to investigation and, if guilty of misfeasance or malfeasance, immediately held in rebuke and its members held personally liable for false prosecution and abuse of its discretionary powers. If one goes with the former proposal, this would certainly seem to be a fair provision to balance out the risk.

I and many others remain deeply concerned about the unchecked expansion of powers of professional licensing boards, here in particular the Oregon Board of Psychologist Examiners. This particular overreach, especially in the absence of active governmental oversight, full legal accountability and fully guaranteed due process, imposes a pall over the practices of suitably trained and licensed professionals. It seems to serve little purpose other than to further empower those serving in bureaucratic licensing functions. It adds nothing to the correct role of overseeing the appropriate practice of psychology. It seems little more than self-aggrandizement and ill-conceived punishment.

Given that state licensing boards are generally prohibited from lobbying for any form of legislation pertaining to their function, it would certainly be worth investigating the origin of this legislative initiative. In the event that it originated from the Board itself or any of its hired staff including its attorneys, it would seem appropriate that the legislature should discipline this body immediately for wrongful initiation of such legislation against established parameters.

In the event that it is found that due process within the Oregon Board of Psychologist Examiners disciplinary proceedings is in fact wanting, and there is lack of oversight or accountability to this Board, allowing this legislation to proceed without requisite oversight and accountability will definitely result in severe harm not only to those psychologist licensees who are falsely charged

and then burdened with the costs of such an assessment, but to their patients who rely upon them for ethical psychological care.

In the event that any legislator considering this bill would like further information from me pertaining to documented grossly deficient practices of a similar body in North Carolina, I will be happy to make myself available at a day and time convenient for you.

In conclusion, I most strongly urge you to reject this proposal and further recommend that you engage the OR State Auditor to promptly undertake a comprehensive Performance Audit of this Board, especially to ascertain its claim of sovereign immunity.

A handwritten signature in black ink that reads "Kernan Manion". The signature is written in a cursive, flowing style.

Kernan Manion, MD

Date: 2 Feb, 2017