OPINION NO. 2005-010

Syllabus:

1. The State Board of Cosmetology has no statutory authority to promulgate a rule that denies educational and training credit to adult students who attend a licensed career-technical school of cosmetology on the basis that the school is located within a certain proximity to a licensed proprietary school of cosmetology, or that denies licensure to a career-technical school on that basis.
2. A rule adopted by the State Board of Cosmetology that would deny education and training credit to adult students who attend a licensed career-technical school of cosmetology on the basis that the school is located within a certain proximity to a proprietary school of cosmetology, or deny licensure to a career-technical school on that basis, would violate R.C. 4743.03(A) and (B).

To: James R. Rough, Executive Director, State Board of Cosmetology, Columbus, Ohio

By: Jim Petro, Attorney General, March 31, 2005

You have asked whether the State Board of Cosmetology has the authority to promulgate a rule that would deny educational and training credit to adult students who attend a school of cosmetology that is operated by a public school district as part of its career-technical program, if the career-technical school is located within a fifty-mile radius of a

licensed proprietary school of cosmetology.[1] We conclude that the Board may not promulgate such a rule for two reasons: first, the Board has no statutory authority to do so, and second, such a rule would contravene R.C. 4743.03. In order to provide the context for our analysis of your question, we will begin with a brief summary of the statutory scheme governing the practice of cosmetology, and the legislative purpose served generally by the regulation of occupations, professions, and trades.

R.C. Chapter 4713—The Practice of Cosmetology

The State Board of Cosmetology is responsible for regulating the practice of cosmetology in Ohio. Its major responsibilities include the licensure of cosmetologists and other practitioners,[2] salons, and schools of cosmetology. No person may practice cosmetology without an appropriate, currently valid license issued by the Board. R.C. 4713.14(C). *See* R.C. 4713.99 (criminal penalties for violation of R.C. 4713.14). In order to secure licensure, a person must meet certain statutory qualifications, such as being at least sixteen years of age, having the equivalent of a tenth grade education, and passing an examination

[1] "Career-technical" education was formerly known as "vocational" education. R.C. 3303.01. Each school district is required to provide career-technical education "adequate to prepare a pupil enrolled therein for an occupation," and each career-technical program must meet standards established by the State Board of Education (BOE). R.C. 3313.90(A). *See also* R.C. 3313.901. (One way in which a school district may meet its obligation to provide career-technical education is to contract with a school that is licensed by a state agency and that operates its courses under standards comparable to those prescribed by BOE. R.C. 3313.90(A).)

A board of education may permit adults to participate in the district's career-technical programs—in some cases, without tuition. *See* R.C. 3313.645; 5 Ohio Admin. Code 3301-42-01 (criteria for enrolling adults in public secondary education programs). *See generally* http://www.ode.state.oh.us/ctae/adult/full—service—guidelines.asp (one principle of BOE's "Philosophy of Adult Workforce Education" is that, "adult workforce education is a locally based, integral part of public education").

For a thorough discussion of the Board's ability to regulate cosmetology schools operated by public school districts, see 2002 Op. Att'y Gen. No. 2002-007. *See also* note , *infra.*

[2] The practice of cosmetology is divided into several branches: cosmetology, esthetics, hair design, manicuring, and natural hair styling. R.C. 4713.01. A person must receive a "practicing license" for each branch he wishes to practice. *Id.* The "practice of cosmetology" means "the practice of all branches of cosmetology," and a "cosmetologist" is "a person authorized to engage in all branches of cosmetology." *Id. See also* R.C. 4713.35. A licensee also may be eligible to obtain a managing license or instructor license for the branch of cosmetology in which he is licensed to practice if he meets additional conditions, including either a specified number of hours of practice, or managing or instructor training at a licensed school of cosmetology. R.C. 4713.30; R.C. 4713.31; R.C. 4713.35. For ease of discussion, our references to cosmetologists or the practice of cosmetology will include these other practitioners and branches as appropriate.

conducted by the Board. R.C. 4713.28. *See also* R.C. 4713.20; R.C. 4713.24. An applicant also must complete statutorily prescribed educational and training requirements prior to taking the examination. R.C. 4713.28. For example, an applicant for an initial cosmetologist license must successfully complete "at least fifteen hundred hours of board-approved cosmetology training in a school of cosmetology licensed in this state."[3] R.C. 4713.28(F). Applicants for licensure to practice other branches of cosmetology also must complete successfully a minimum number of hours of board-approved training in a "school of cosmetology licensed in this state." R.C. 4713.28.

As suggested by the foregoing, schools of cosmetology also must be licensed by the Board in order to operate, and like practitioners, must meet various statutory requirements in order to secure licensure.[4] R.C. 4713.14(M); R.C. 4713.44. For example, schools must provide instruction and training that qualify their students for admission to the Board examination, maintain necessary training apparatus and equipment, and employ only licensed instructors "to teach the theory and practice of the branches of cosmetology." R.C. 4713.44. Private schools must also demonstrate financial stability by filing a sufficient surety bond that is "conditioned upon the school's continued instruction in the theory and practice of the branches of cosmetology." R.C. 4713.44(H). A student must earn his hours of training and education at a school licensed by the Board in order to have those hours credited towards his own licensure. R.C. 4713.28.

Police Power

These statutory qualifications and requirements for licensure are enacted pursuant to the State's police power, being designed to protect the public welfare by ensuring that practitioners of cosmetology are competent and can carry out their occupation safely and skillfully. *See Garono v. State Board of Landscape Architect Examiners,* 35 Ohio St. 2d 44, 46, 298 N.E.2d 565 (1973) ("[o]ccupational licensing is not new in this state," and the General Assembly has imposed regulations "on the practice of a wide variety of occupational activities, administered by a proliferation of licensing authorities ... pursuant to the right of the state under its police power to regulate or prohibit an occupation if necessary for the public welfare" (footnotes omitted)); *State v. Gardner,* 58 Ohio St. 599, 51 N.E. 136 (1898) (syllabus, paragraph one) (where the pursuit of a trade "concerns, in a direct manner, the public health and welfare, and is of such a character as to require a special course of study or training, or experience, to qualify one to pursue such occupation with safety to the public

[3] The Board is authorized to adopt rules establishing "standards for board approval of, and the granting of credits for, training in branches of cosmetology at schools of cosmetology licensed in this state." R.C. 4713.08(A)(13) (discussed more fully, *infra*). *See, e.g.,* 11A Ohio Admin. Code 4713-5-02 and 4713-5-03. *See also* 1960 Op. Att'y Gen. No. 1206, p. 171, 175-76 (the Cosmetology Board "is authorized to adopt rules prescribing certain standards of study and instruction which shall govern such schools).

[4] A "school of cosmetology" is "any premises, building, or part of a building in which students are instructed in the theories and practices of one or more branches of cosmetology." R.C. 4713.01. A "student" is a "person, other than an apprentice instructor, who is engaged in learning or acquiring knowledge of the practice of a branch of cosmetology at a school of cosmetology." *Id. See also* notes and , *supra.*

interests, it is within the competency of the general assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance''); *Midwestern College of Massotherapy v. Ohio Medical Board*, 102 Ohio App. 3d 17, 656 N.E.2d 963 (Franklin County 1995). In order to be a proper exercise of the State's police power, however, ''legislation must directly promote the general health, safety, welfare or morals and must be reasonable, the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, must have a real and substantial relation to such purpose and must not interfere with private rights beyond the necessities of the situation.'' *Teegardin v. Foley,* 166 Ohio St. 449, 143 N.E.2d 824 (1957) (syllabus, paragraph one). A prerequisite for occupational licensure must ''reasonably tend to accomplish the object'' of determining fitness to practice, and be ''appropriate to that end.'' *State v. Gardner,* 58 Ohio St. at 608. If a condition is intended to ensure that an applicant ''understands the principles governing his trade, and is sufficiently skillful to be able to produce good results, that would seem to satisfy the scope of [a licensing] act.'' *Id.,* 58 Ohio St. at 609.

Board's Rule-Making Authority

We turn now to the scope of the Board's statutory authority to engage in rule-making. We find that the proposed rule would (1) impermissibly conflict with the statutory scheme by adding a non-statutory qualification for licensure, and (2) impose a qualification for licensure that bears no relation to the state's police power or the intent of the General Assembly in enacting R.C. Chapter 4713.

Conflict with Statutory Scheme

As an administrative agency, the Board may exercise only those powers that are granted by statute, and may not expand its statutory authority through rule-making or otherwise. *See D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶38 (''[i]t is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency''); *Central Ohio Joint Vocational School District Bd. of Education v. Ohio Bureau of Employment Services*, 21 Ohio St. 3d 5, 10, 487 N.E.2d 288 (1986) (''[i]t is well established ... that administrative rules, in general, may not add to or subtract from ... the legislative enactment'' (emphasis omitted)). R.C. 4713.08 sets forth the Board's authority to promulgate rules, specifying those matters the Board has a duty to regulate and administer. *See also* R.C. 4713.09 (adoption of rules to establish a continuing education requirement). Nothing in R.C. 4713.08 or elsewhere expressly authorizes the Board to adopt a rule denying credit to adult students who attend a public school district's school of cosmetology based on the school's location relative to a proprietary school of cosmetology.

It has been suggested that the power to adopt such a rule may be implied from R.C. 4713.08(A)(19), which authorizes the Board to adopt rules regarding ''[a]nything else necessary to implement'' R.C. Chapter 4713. Although the grant of authority is broadly worded, it does not give the Board discretion to promulgate rules without limitation. First, the modifier, ''necessary,'' is not meaningless—to the contrary, the Ohio Supreme Court has narrowly construed the term in a context similar to this one. In *Amoco Oil Company v. Petroleum Underground Storage Tank Release Compensation Board,* 89 Ohio St. 3d 477, 484, 733

N.E.2d 592 (2000), the court explained that a rule that was "necessary" to the implementation of a statutory scheme was one that was "essential" to that purpose—an obviously rigorous standard that would exclude anything optional, excessive, or gratuitous. There is nothing in R.C. Chapter 4713, however, that would make such a rule essential to its implementation.

Second, a statutory grant of power to regulate may be either express or implied, but "'the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.'" *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, at ¶39 (citation omitted). As noted above, there is no express authority for the Board to deny credit towards licensure for a student's training program based upon the geographical location of the program, and it is difficult to perceive of any other express provision in R.C. Chapter 4713 from which that authority could be implied.

Third, principles of statutory construction dictate that statutory language, even language that is as broadly written as R.C. 4713.08(A)(19), cannot be read "in a vacuum" nor "disassociated" from the rest of the statutory scheme, for "[t]his would be contrary to the basic tenets of statutory construction requiring that intent be derived from the four corners of the statute." *Cullen v. Milligan,* 61 Ohio St. 3d 352, 358-59, 575 N.E.2d 123 (1991) (interpreting the statutory phrase, "any matter"). Courts will not interpret literally seemingly open-ended statutory language where to do so would violate or be inconsistent with the statutory scheme as a whole. *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health,* at ¶18, 22 ("the natural meaning of words is not always conclusive as to the construction of statutes," and a statute authorizing a board of health to "make such orders and regulations as are necessary" for the public health did not evidence a legislative intent "to vest local boards of health with unlimited authority to adopt regulations addressing all public-health concerns"). An administrative rule must be consistent with, and promote, the General Assembly's purpose for enacting the statutory scheme, and may not be incompatible with or violative thereof. *See Smith v. Haney*, 61 Ohio St. 2d 46, 48, 398 N.E.2d 797 (1980) ("[r]egulations, however, should not be read in a vacuum but must be read with reference to the enabling statute under which they were enacted"); *Midwestern College of Massotherapy v. Ohio Medical Board*, 102 Ohio App. 3d at 23 (a "rule which is unreasonable, arbitrary, discriminatory, or in conflict with law is invalid and unconstitutional because it surpasses administrative powers and constitutes a legislative function").

More specifically, courts have found to be invalid rules imposing on applicants qualifications or requirements that are not imposed by statute—in other words, rules that would disqualify for licensure an applicant who meets all statutory requirements. In *State ex rel. Homan v. Board of Embalmers and Funeral Directors,* 135 Ohio St. 321, 21 N.E.2d 102 (1939), for example, the court found that language appearing to grant virtually unlimited discretion to a licensing board was insufficient authority for the board to impose on an applicant qualifications or conditions not required by statute. Before the court was statutory language similar to R.C. 4713.08(A)(19), defining the scope of rule-making authority for the

Board of Embalmers and Funeral Directors.[5] The issue was whether this language provided authority for the board to adopt a rule requiring applicants for licensure as a funeral director to complete a two-year apprenticeship before they could qualify for the board examination necessary for licensure, where there was no statutory apprenticeship requirement. The court noted that, "[i]t is clear from the [statute] that the Legislature vested in the board a large amount of discretion with respect to the promulgation, adoption and enforcement of rules governing the licensing of embalmers and funeral directors. However, the exercise of this discretion must be sound and not 'arbitrary, tyrannical or unreasonable.'" *Id.* at 326. *See also Central Ohio Joint Vocational School District Bd. of Education v. Ohio Bureau of Employment Services* (rule allowing only one renewal of a one-year teaching certificate found to be in conflict with the statute authorizing three renewals, and invalid); *Franklin Iron & Metal Corp. v. Ohio Petroleum Underground Storage Tank Release Compensation Board,* 117 Ohio App. 3d 509, 690 N.E.2d 1310 (Montgomery County 1996) (holding board's rule to be invalid because it impermissibly added to the statutory criteria conditions for issuing certificates of coverage); *State ex rel. Schumacher v. State Teachers Retirement Board*, 65 Ohio App. 3d 623, 626, 584 N.E.2d 1294 (Franklin County 1989) (although the board had the statutory authority to adopt rules for determining what payments constituted "compensation," its rule excluding certain earnings that were included in the statutory definition was invalid—the grant of authority "was not a mandate to adopt a rule for placing limits on the legislature's own definition of compensation").[6]

Applying these principles, we conclude that, if a cosmetology student attends and

[5] Indeed, the language before the court in *State ex rel. Homan v. Board of Embalmers and Funeral Directors* gave the board broader discretion than R.C. 4713.08(A)(19). G.C. 1335-3 read in pertinent part: "Said board shall have the power ... to adopt and promulgate and enforce such rules and regulations for the transaction of its business and the management of its affairs, the betterment and promotion of the educational standards of the profession of embalming and the standards of service and practice to be followed in the profession of embalming and funeral directing in the state of Ohio *as it may deem expedient and consistent with the laws of the state* of Ohio" (emphasis added). While "necessary" is defined as "essential," the adjective "expedient" describes something that is merely "useful." *Webster's New World Dictionary* 493 (2nd college ed. 1984). (R.C. 4717.04(A) now authorizes the Board of Embalmers and Funeral Directors to adopt rules "for the government, transaction of the business, and the management of the affairs of the board ... and for the administration and enforcement of this chapter.")

[6] *Cf. Amoco Oil Company v. Petroleum Underground Storage Tank Release Compensation Board,* 89 Ohio St. 3d 477, 484, 733 N.E.2d 592 (2000) (upholding a rule that added a one-year time limitation on the submission of applications, even though there was no such statutory time limitation, stating, "an administrative rule placing a time limit within which a party must act is procedural and within the agency's rule-making authority"); *Wright v. Leggett & Platt*, 2004-Ohio-6736, 2004 Ohio App. LEXIS 6262, at ¶10 (Lorain County) ("[a]dministrative agencies cannot legislate by adding substantive requirements to statutes that already are in effect, but they may add procedural requirements in order to administer existing law").

satisfactorily completes the requisite number of hours of Board-approved training in a school of cosmetology that is licensed by the Board, then the Board has no authority to deny educational credit to the student based on the school's proximity to a proprietary school. Such a rule would clearly conflict with R.C. 4713.28,[7] and exceed the Board's statutory authority by disqualifying for licensure a student who would qualify under the statutory scheme. *See State ex rel. Schumacher v. State Teachers Retirement Board*, 65 Ohio App. 3d at 626 (a rule may not "encroach[] upon the legislature's authority by amending a statutory right"). The Board may not, through its rule-making authority, limit the General Assembly's own determination of who is qualified for licensure.

No Relation to Police Power or R.C. Chapter 4713

Furthermore, a "proximity" limitation would not advance the General Assembly's purpose in enacting R.C. Chapter 4713—to protect the public health, safety, and welfare—nor otherwise emanate from the State's police power. It has no relationship to the quality of education and training provided to students by schools, and in no way promotes or enhances the State's interest in protecting the public from incompetent practitioners. *See State ex rel. Homan v. Board of Embalmers and Funeral Directors,* 135 Ohio St. at 326-27 (a board's adoption of a rule denying an applicant permission to take the licensure examination, unless he met a non-statutory requirement imposed "without reference to the question of qualification" of the applicant, would be a "gross abuse of discretion"). No "real and substantial relation" exists between the proposed rule and a determination of fitness to practice, nor would the rule ensure that an applicant for licensure "understands the principles governing his trade, and is sufficiently skillful to be able to produce good results." *Teegardin v. Foley; State v. Gardner. Cf. Midwestern College of Massotherapy v. Ohio Medical Board*, 102 Ohio App. 3d at 24 (Medical Board rule delineating the scope of practice of massage therapy to exclude the use of certain modalities was valid because it addressed "the medical board's duty to promote the public health and welfare by ensuring that people licensed to practice medicine are competent, properly trained and educated, and experienced. The rule identifies what the board has determined that a person qualified to be a practitioner of massage may safely do and not do").

Schools of Cosmetology

The same holds true with regard to any attempt by the Board to deny licensure to a career-technical school of cosmetology based on its proximity to a proprietary school. Although you have not specifically asked about the licensure of schools, we will address the issue in the interest of completeness.

As discussed above, a school of cosmetology may not operate without a license from the Board, and must meet various statutory requirements in order to secure licensure. R.C. 4713.14(M); R.C. 4713.44. These requirements are designed to ensure that students receive the education and training necessary to be competent practitioners, and in the case of proprietary schools, to ensure that the schools are financially viable. They exist for the protection of the public and the schools' students.

For the same reasons discussed above, however, a rule denying licensure to career-

[7] Such a rule also would conflict with R.C. 4743.03, as discussed in greater detail, *infra.*

technical schools of cosmetology based on their proximity to a proprietary school, is not necessary or "essential" to the implementation of R.C. Chapter 4713 for purposes of R.C. 4713.08(A)(19), and would conflict with R.C. Chapter 4713 by denying licensure to schools that qualified for licensure under the statutory scheme. The rule would bear no relationship to the quality of education and training provided by schools or otherwise promote the State's interest in protecting both the public from incompetent, ill-trained practitioners, and students from being harmed financially by a school unable to meet its obligations.

R.C. 4713.08(A)(13)—Board Approval of Training Programs

It has also been suggested that R.C. 4713.08(A)(13), which requires the Board to "[e]stablish standards for board approval of, and the granting of credits for, training in branches of cosmetology at schools of cosmetology licensed in this state," provides the necessary authority for the proposed rule. Interpreting the predecessor to R.C. 4713.08(A)(13), 1960 Op. Att'y Gen. No. 1206, p. 171, 175-76 observed that, "the board is authorized to adopt rules prescribing certain standards of study and instruction which shall govern such schools, *which is not the same thing* as making rules governing recognition of such schools" (emphasis added).[8] The opinion concluded, accordingly, that this rule-making authority as to standards of study and instruction did not authorize the Board to require that schools furnish a surety bond as a condition of licensure (although this requirement was later added to statute by the General Assembly). *See also* 1940 Op. Att'y Gen. No. 2817, vol. II, p. 899, 903-04 (the Cosmetology Board "is required to adopt rules specifically setting forth the credits which will be given to the study of any branch of cosmetology taught in a school of cosmetology. The word 'credits,' when used in connection with a college curriculum or a course of study given in a school, is commonly understood to mean the credit toward the securing of a degree or toward admission to an institution of higher learning which is awarded for time given to the study of a certain subject").[9]

R.C. 4713.08(A)(13) thus relates to the Board's authority to approve the curriculum and coursework necessary for a student to earn credit towards the number of training hours required by statute. *See* R.C. 4713.28 (requiring applicants for a practicing license to successfully complete a minimum number of hours of *board-approved training* in a school of cosmetology licensed in this state). *See, e.g.,* rule 4713-5-02; rule 4713-5-03. While providing Board-approved training certainly is one aspect of a school's ability to acquire and maintain licensure, the authority of the Board to approve credits and training is not the same as the authority to license the school itself. This distinction is made evident by the language

[8] At the time 1960 Op. Att'y Gen. No. 1206, p. 171 was issued, the Board's rule-making authority was set forth in R.C. 4713.02, which read in pertinent part: "The board shall adopt rules ... governing the recognition of, and the credits to be given to, the study of cosmetology, or any branch thereof, in a school of cosmetology, licensed under the laws of this or another state or territory of the United States or the District of Columbia." 1955-1956 Ohio Laws 801-802 (Am. H.B. 424, eff. Oct. 5, 1955).

[9] 1940 Op. Att'y Gen. No. 2817, vol. II, p. 899 concluded that this rule-making authority did not authorize the Board to "make minimum requirements for the different branches of study, the aggregate number of hours of which would exceed [the statutory] limitation." *Id.* at 904.

used in R.C. 4713.28 that requires that training meet two conditions in order to be eligible as credit towards a student's licensure: the training itself must be approved by the Board *and* the school in which the training occurs must be licensed by the Board.

Regardless of whether R.C. 4713.08(A)(13) is interpreted as pertaining to the approval of training, or more broadly to include licensure of schools, it does not provide sufficient authority for the Board to deny licensure to a career-technical school, or credit to its students, based on the school's proximity to a proprietary school. As discussed above, the proposal has nothing to do with either the quality of training or any other statutory condition for licensure as a school or as a practitioner, and would be beyond the statutory authority of the Board to adopt.

R.C. 4743.03—Restricting Entry into an Occupation

Not only does the Board lack the statutory authority to promulgate a "proximity" rule, adoption of the rule would patently violate R.C. 4743.03, which prohibits any board created under Title 47 of the Revised Code from "restrict[ing] entry into any occupation, profession, or trade under its supervision or regulation" by doing any of the following:

> (A) Unreasonably restricting the number of schools or other institutions it certifies or accredits for the purpose of fulfilling educational or training requirements for such occupation, profession, or trade;
>
> (B) Denying certification or accreditation for the purpose of fulfilling such educational or training requirements to any school, college, or other educational institution that has been certified by the Ohio board of regents or the state board of career colleges and schools or to a high school for which the state board of education prescribes minimum standards under division (D) of section 3301.07 of the Revised Code, unless the educational or training program offered by such school, college, or institution is not in substantial compliance with applicable standards of the occupation, profession, or trade.
>
> ....
>
> Nothing in this section shall prohibit a board, commission, or agency from prescribing and enforcing educational and training requirements and standards for certification and accreditation of schools and other institutions that constitute reasonable bases for maintaining necessary standards of performance in any occupation, profession, or trade.

Division (B) prohibits the Board from denying licensure to a high school's cosmetology program if the State Board of Education (BOE) prescribes minimum standards for such programs. BOE does, in fact, provide minimum standards for schools of cosmetology operated as part of a school district's career-technical education program. BOE indicates that these standards have been designed to prepare students for licensure and "to comply with the requirements of the Ohio State Board of Cosmetology in conjunction with the standards of the Ohio Department of Education." www.ode.state.oh.us/ctae/teacher/fastrak/cosmetology/Overview.asp. Completion of the program is designed to "qualify completers for licensing examination and instructor licensed by the Ohio Board of Cosmetology."

www.ode.state.oh.us/ctae/ind__std__accreditation__apprenticeships/#__Toc14765708.[10] Therefore, the Board may not deny licensure to a career-technical school of cosmetology, so long as BOE continues to prescribe minimum standards for cosmetology programs.

Division (B) provides an exception for programs that are "not in substantial compliance with applicable standards of the occupation, profession, or trade." Certainly, if a particular program fails to meet the standards of R.C. 4713.44 or rules properly adopted to implement R.C. 4713.44, the Board could deny licensure to, or take action against the license of, a career-technical school, just as it could a proprietary school. Again, however, if it is a matter of noncompliance with a rule that is unrelated to the "applicable standards of the occupation, profession, or trade"—which the proposed rule would be—the exception would not be applicable.

Division (A) of R.C. 4743.03 prohibits the Board from unreasonably restricting the number of schools it accredits (or licenses) for the purpose of fulfilling educational or training requirements for licensure as a cosmetologist. Although the proposed rule would not impose a specific number or ceiling on the number of career-technical schools of cosmetology, it would, in effect, limit the number of schools by disqualifying career-technical schools from participating in the training of cosmetologists (in terms of either denying credit to students or denying licensure to schools) if they are located within a certain radius of a proprietary school. If a school's students are unable to earn credit towards licensure (either because of the denial of credit to them directly or the denial of a license to a school), the continuing viability of the school would be obviously impaired. Such a rule would ultimately have an impact on the number of schools it licenses—and it would be an "unreasonable" restriction for all of the reasons discussed above.

The last paragraph of R.C. 4743.03 provides that nothing in that section prohibits a board from "prescribing and enforcing educational and training requirements and standards for certification and accreditation of schools and other institutions that constitute reasonable bases for maintaining necessary standards of performance in any occupation, profession, or trade." Again, for the reasons set forth above, the proposed rule would not constitute a reasonable basis for maintaining the necessary standards of performance in the occupation of cosmetology.

Conclusion

As the court observed in *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health,* "[a]dministrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly." *Id.* at ¶41. *Accord Chambers v. St. Mary's School,* 82 Ohio St. 3d 563, 567, 697 N.E.2d 198 (1998) ("administrative rules do not dictate public policy, but rather expound upon public policy already

[10] The cosmetology standards, or "ITAC," can be found at http://www.ode.state.oh.us/ctae/teacher/fastrak/cosmetology/ITAC.asp. "ITAC" stands for "Integrated Technical and Academic Competencies," meaning "the curriculum model for the career clusters ... to be used as the basis for developing a course of study. The ITAC is framed around a continuum of skills ... thereby creating integrated and focused career, academic and skill training educational programs." www.ode.state.oh.us/employee/acronyms.asp.

established by the General Assembly in the Revised Code''). Policy-making requires the ''balancing of social, political, economic, and privacy concerns,'' and is ''legislative in nature''—where an administrative agency engages in that balancing process as part of its rule-making, it goes ''beyond administrative rule-making and usurp[s] power delegated to the General Assembly.'' *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, at ¶41. *See also Midwestern College of Massotherapy v. Ohio Medical Board*, 102 Ohio App. 3d at 23 (a ''rule that bears no reasonable relation to the legislative purposes of the authorizing statute improperly declares policy''). In this instance, a ''proximity'' rule would not only legislate policy, but contravene outright the General Assembly's policy evidenced in R.C. 4743.03.

In conclusion, it is my opinion, and you are advised that:

1. The State Board of Cosmetology has no statutory authority to promulgate a rule that denies educational and training credit to adult students who attend a licensed career-technical school of cosmetology on the basis that the school is located within a certain proximity to a licensed proprietary school of cosmetology, or that denies licensure to a career-technical school on that basis.

2. A rule adopted by the State Board of Cosmetology that would deny education and training credit to adult students who attend a licensed career-technical school of cosmetology on the basis that the school is located within a certain proximity to a proprietary school of cosmetology, or deny licensure to a career-technical school on that basis, would violate R.C. 4743.03(A) and (B).