April 24, 1995

OPINION NO. 95-009

Katherine Kelley Ohlrich, M.Ed.,
Chairperson
Ohio Board of Speech-Language
Pathology and Audiology
77 South High Street, 16th floor
Columbus, Ohio 43266

Dear Chairperson Ohlrich:

You have requested an opinion on the following questions:

1. Can the Board answer scope of practice questions asked by its licensees or others without violating [*Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. and Nurse Registration*, 44 Ohio St. 3d 73, 540 N.E.2d 1354 (1989)] or Chapter 119 of the Revised Code?

2. If the Board is authorized to answer scope of practice questions, must it do so only on an individual or case-by-case basis? Does such an approach prevent the Board from answering general scope of practice questions which are hypothetical or do not involve specific factual events?

3. If an individual or case-by-case approach is the Board's only alternative when dealing with scope of practice questions, how can the Board provide consistent guidance for its licensees? In addition, what effect would the Board's answers have on its licensees? Could the Board rely on previously answered scope of practice questions when addressing subsequently-asked scope of practice questions?

4. Because the Board's answer to a scope of practice question asked by one licensee is almost always relied upon by other licensees as the Board's pronouncement on a particular procedure or treatment method, does a case-by-case approach then violate Chapter 119 of the Revised Code?

5. Must the Board always promulgate a rule to include a specific procedure or treatment method in the practice of speech-language pathology or audiology if the procedure or treatment method is not specifically named in Section 4753.01 of the Revised Code? If so, how should the Board deal with scope of practice questions regarding that particular procedure or treatment method during the rule-making process?

Duties of Board of Speech-Language Pathology and Audiology

The Board of Speech-Language Pathology and Audiology is created by R.C. 4753.03 and has certain duties assigned to it by R.C. 4753.05, which states in pertinent part:

> (A) The board of speech-language pathology and audiology may make *reasonable rules necessary for the administration of this chapter*. The board shall adopt *rules to ensure ethical standards of practice* by speech-language pathologists and audiologists licensed pursuant to this chapter. *All rules adopted under this chapter shall be adopted in accordance with [R.C. Chapter 119]*.
> ....
> (C) The board shall publish and make available, upon request, the licensure standards prescribed by this chapter and rules adopted pursuant thereto.
> ....
> (E) The board shall *investigate all alleged irregularities in the practices of speech-language pathology and audiology* by persons licensed pursuant to this chapter and any violations of this chapter or rules adopted by the board. The board shall not investigate the practice of any person specifically exempted from licensure under this chapter by [R.C. 4753.12], as long as the person is practicing within the scope of his license or is carrying out responsibilities as described in [R.C. 4753.12(H) or (I)] and does not hold himself out to be a speech-language pathologist or audiologist. (Emphasis added.)

The Board also has duties concerning the examination and licensure of speech-language pathologists and audiologists, R.C. 4753.05(B); R.C. 4753.07, and their aides, R.C. 4753.072.

Among the provisions that the Board is required to administer is R.C. 4753.02, which states:

> No person shall practice, offer to practice, or aid and abet the practice of the profession of speech-language pathology or audiology, or use in connection with his name, or otherwise assume, use, or advertise any title or description tending to convey the impression that he is a speech-language pathologist or audiologist unless the person is licensed under this chapter.

R.C. 4753.10 authorizes the Board to take disciplinary action against licensees for certain prohibited conduct, including aiding or abetting unlicensed practice and engaging in illegal, incompetent, or habitually negligent practice. *See generally* R.C. 4753.12 (setting forth practices that are not prohibited or restricted by R.C. Chapter 4753).

The General Assembly has defined the "practice of speech-language pathology" as follows:

> planning, directing, supervising, and conducting habilitative or rehabilitative counseling programs for individuals or groups of individuals who have or are suspected of having disorders of communication, any service in speech-language pathology including prevention, identification, evaluation, consultation, habilitation or rehabilitation, instruction, and research.
>
> The practice of speech-language pathology may include pure-tone air conduction hearing screening, screening tympanometry, and acoustic reflex screening, limited to a pass-or-fail determination for the identification of individuals with other disorders of communication. The practice of speech-language pathology also may include aural habilitation or rehabilitation which means the provision of services and procedures for facilitating adequate auditory, speech, and language skills in individuals with hearing impairment. The practice of speech-language pathology does not include the practice of medicine and surgery or osteopathic medicine and surgery, or the performance of a task in the normal practice of medicine and surgery by a person to whom the task is delegated by a licensed physician.

R.C. 4753.01(C). The first paragraph of the definition sets forth a broad definition of the practice of speech-language pathology. The second paragraph sets forth examples of activities that are included within the definition of the practice of speech-language pathology and specifies those activities that are not included within the definition.

R.C. 4753.01(G), which is structured in a manner similar to the definition of the "practice of speech-language pathology," defines the "practice of audiology," as follows:

> the planning, directing, supervising, and conducting of habilitative or rehabilitative counseling programs for individuals or groups of individuals who have or are suspected of having disorders of hearing; any service in audiology, including prevention, identification, evaluation, consultation, habilitation or rehabilitation, instruction, and research; participating in hearing conservation, hearing aid and assistive listening device evaluation, selection, preparation, dispensing, and orientation; fabricating ear molds; providing auditory training and speech reading; and administering tests of vestibular function and tests for tinnitus in accordance with [R.C. 4753.14]. The "practice of audiology" includes speech and language screening limited to a pass-or-fail determination, for the purpose of identification of individuals with disorders of communication. The practice of audiology does not include the practice of medicine and surgery or osteopathic medicine and surgery, or the performance of a task in the normal practice of medicine and surgery or osteopathic medicine and surgery by a person to whom the task is delegated by a licensed physician.

Thus, with respect to the statutory definition of either practice, questions may arise as to whether

certain activities or procedures fall within the broad terms of the definition.

The authority of the Board of Speech-Language Pathology and Audiology to answer scope of practice questions appears to arise as a power implied from the Board's authority under R.C. Chapter 4753 to regulate the practices of speech-language pathology and audiology. *See State ex rel. Lakeland Anesthesia Group, Inc. v. Ohio State Medical Bd.*, 74 Ohio App. 3d 643, 600 N.E.2d 270 (Cuyahoga County 1991).

Rule Making by Administrative Agencies

R.C. 119.02 requires every "agency" authorized by law to adopt, amend, or rescind rules to comply with the procedure prescribed therefor by R.C. 119.01-.13. For purposes of R.C. 119.01-.13, "rule" means:

> any rule, regulation, or standard, having a *general and uniform operation, adopted, promulgated, and enforced by any agency* under the authority of the laws governing such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to [R.C. 3301.0714].

R.C. 119.01(C) (emphasis added). "Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule." R.C. 119.02. *See generally* R.C. 119.03 (procedure for adoption, amendment, or rescission of any "rule" by an "agency").

Pursuant to R.C. 4753.05(A), the Board of Speech-Language Pathology and Audiology is subject to the procedures of R.C. Chapter 119 in the adoption of any rules under R.C. Chapter 4753. *See also* R.C. 119.01(A) (defining "agency," for purposes of R.C. Chapter 119, as including "the functions of any administrative ... board ... of the government of the state specifically made subject to [R.C. 119.01-.13], and the licensing functions of any administrative ...board ... of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses"). As a general matter, therefore, when the Board of Speech-Language Pathology and Audiology adopts a "rule," as defined in R.C. 119.01(C), it must comply with the rule-making procedures set forth in R.C. Chapter 119.

Case Law Concerning Rule Making by Administrative Agencies

As mentioned in your opinion request, the Board of Speech-Language Pathology and Audiology often receives requests from licensees and others as to whether a particular procedure or method of treatment falls within the scope of the practice of speech-language pathology or audiology. Based upon the decision in *Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. and Nurse Registration*, 44 Ohio St. 3d 73, 540 N.E.2d 1354 (1989), you question whether the Board may simply issue position papers or statements addressing the question of whether a specific

procedure or treatment method is within the scope of the practice of speech-language pathology or audiology or whether such determinations must be established by rules adopted by the Board in accordance with R.C. Chapter 119.

In *Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. and Nurse Registration*, the court considered the effect of the issuance by the Ohio State Board of Nursing Education and Nurse Registration[1] of a "position paper" that purported to expand the authority of licensed practical nurses to administer intravenous fluids. Plaintiffs brought suit to prevent the Board from implementing the position paper on the basis that the paper "has the effect of permitting LPNs to perform certain nursing procedures for which there was no prior authority under statute or rule." *Id*. at 74, 540 N.E.2d at 1355. The Board argued that the position paper was merely advisory and was not required to be adopted as a rule under R.C. Chapter 119 "because there is nothing in the position paper that is capable of enforcement pursuant to R.C. 119.01(C)." *Id.* In concluding that the "position paper" should have been promulgated as a rule under R.C. Chapter 119, the court reasoned as follows:

> In adopting a "rule," an agency is required to comply with the promulgation procedure set forth in R.C. Chapter 119. See R.C. 119.02....
> Upon a careful review of the position paper ..., we find that it meets the foregoing statutory definition of "rule" as determined by the General Assembly. ...[T]he position paper *enlarges the scope of practice* for LPNs, and *regulates* those *LPNs* qualified to start IVs by requiring a post-licensure course of study. Additionally, it is readily apparent that the position paper is *intended to have a uniform application to all LPNs* in the state of Ohio. Therefore, we must reject the board's argument that its position paper merely represents the "professional belief" of the board and is incapable of enforcement, and therefore is not a "rule" under R.C. 119.01(C), because the terms of the position paper indicate that an opposite effect is intended.... [W]hen a regulatory body such as the board declares that it will permit those persons it regulates to perform certain procedures, the new standard is inherently "enforced" as soon as it is adopted.... [W]e reject the board's argument that the position paper is "unenforceable," because *the true effect of the position paper is that LPNs are now permitted to perform certain additional aspects of IV therapy without the threat of disciplinary action or other penalty levied by the board*.
> ....
> .... It is the *effect* of the position paper, not how the board chooses to characterize it, that is important. Regardless of whether the board characterizes its position paper as merely advisory, a clear reading thereof reveals that the paper does not purport merely to interpret an extant statute or rule, but rather to *establish a new rule, standard or regulation* regarding LPN practice. Therefore, we believe that R.C. 4723.05 mandates that the new standard be rule-filed pursuant to R.C. Chapter 119.

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[1] The Board of Nursing now regulates registered nurses and licensed practical nurses and the practice of nursing under R.C. Chapter 4723.

Id. at 75-76, 540 N.E.2d at 1355-56 (emphasis added).

The *Ohio Nurses Association* court thus found that the effect of the "position paper" was to regulate the practice of LPNs by enlarging the scope of such practice and requiring post-licensure study, and thus established a new rule, standard, or regulation regarding LPN practice. The court also found that the mere issuance of the letter effected the enforcement of the new standard, and that the Nursing Board intended the position paper to have uniform application to all LPNs throughout the state. The court, therefore, concluded that the "position paper" issued by the Nursing Board fell within the definition of a "rule," which should have been adopted in accordance with the procedures prescribed by R.C. Chapter 119. *See also Ohio Dental Hygienists Ass'n. v. Ohio State Dental Bd.*, 21 Ohio St. 3d 21, 487 N.E.2d 301 (1986) (an advisory opinion by the Dental Board that had the *effect* of permitting dentists to delegate intraoral procedures to basic qualified personnel without a Board rule specifying such procedures violated statute prohibiting assignment of dental procedures without an authorizing Dental Board rule).

More recently, in *Livisay v. Ohio Bd. of Dietetics*, 73 Ohio App. 3d 288, 596 N.E.2d 1129 (Franklin County 1991), the Franklin County Court of Appeals considered the effect of a "resolution" passed by the Dietetics Board. R.C. 4759.06, which set forth qualifications for licensure as a dietitian, contained a "grandfather" clause permitting the waiver of certain licensure requirements if the applicant possessed, among other things, a baccalaureate or higher degree in nutrition or in "another related field." Plaintiff, having a bachelor's degree in home economics, applied for licensure under the "grandfather" clause. Prior to deciding on Plaintiff's application, however, the Dietetics Board issued a resolution requiring such "grandfather" applicants, who did not possess a degree in nutrition, to have a college course in chemistry included in their transcripts. Because Plaintiff did not meet this requirement, the Board denied plaintiff licensure under the "grandfather" clause of the statute.

In considering the validity of the Board's adoption of the resolution, the *Livisay* court stated:

> The controlling issue is whether the "interpretation" by the board of R.C. 4759.06(D) to require a college course in chemistry in order for a degree to qualify as being in "another related field acceptable to the board" met the definition of a rule.
> The action of the board was not one where the board determined on a case-to-case basis that [plaintiff's] degree in home economics was not in a related field. Instead, *the board in the guise of interpretation passed a rule designed to have general and uniform application to any applicant for grandfather licensure* that did not have a degree in nutrition. Hence, the action of the board constituted a rule because it was to have a general and uniform application. (Emphasis added.)

Id. at 290-91, 596 N.E.2d at 1130. Because the Board undertook to establish a licensure requirement applicable to any person who did not have a degree in nutrition, rather than merely determining that the particular applicant's degree was not in a field related to nutrition, the court concluded that the Board's determination should have been made through adoption of a rule. *See also Jackson County Environmental Comm. v. Schregardus*, 95 Ohio App. 3d 527, 642 N.E.2d 1142 (Franklin County

1994) (an administrative agency's issuance to a company of "guidelines" that set standards for the application of sludge containing dioxins under certain specific conditions should have been promulgated as rules in accordance with R.C. Chapter 119).

The extent of an administrative agency's authority to provide advice by letter rather than through adoption of a rule was also addressed in *State ex rel. Lakeland Anesthesia Group, Inc. v. Ohio State Medical Bd.*, 74 Ohio App. 3d 643, 600 N.E.2d 270 (Cuyahoga County 1991), a case that arose out of a dispute between an insurance company and a professional corporation that employed certified registered nurse anesthetists (CRNAs). The insurance company questioned the propriety of paying claims submitted by the corporation for, among other things, the in-office administration of anesthetics performed by CRNAs under the direction of a licensed podiatrist. The Medical Board responded to the insurance company's inquiry by letter, which stated in part:

> "[I]f you are inquiring about _in-office_ use of general anesthe[tics], a podiatrist does not have the authority to either direct its administration by a CRNA, or to assume the role of the physician whose presence is required by Section 4731.35, Revised Code. To interpret otherwise, would allow a podiatrist to perform duties or assume responsibilities prohibited by statute merely by utilizing a CRNA."

Id. at 645, 600 N.E.2d at 272. Plaintiff challenged the authority of the board to issue such advisory letters in response to an inquiry by an insurance company.

The court found the Medical Board's issuance of the advisory letters to be within the Medical Board's statutory authority. Based upon the Medical Board's authority to license and discipline persons in the practice of medicine and the broad authority of the Board to further regulate the practice of medicine, the court concluded:

> The Medical Board is accorded such implied powers as are necessary to carry into effect its express powers and duties. We believe that the Medical Board's response to an inquiry from the CMIC in the form of two "opinion" letters was proper and the authority to so respond was reasonably implied from its express statutory authority to regulate the practice of medicine.
>
> Here, the Medical Board determined that a podiatrist must function within the scope of R.C. 4731.51, which includes limiting the use of general anesthetics to approved colleges of podiatric medicine or hospitals. Otherwise, a podiatrist would be practicing medicine illegally. *The Medical Board's letters constituted a reasonable method of enforcing R.C. Chapter 4731*. (Emphasis added; citations omitted.)

Id. at 648, 600 N.E.2d at 274. While the court in *State ex rel. Lakeland Anesthesia Group, Inc.* found the action of the Medical Board in advising an insurance company by letter concerning limitations on the practice of podiatry to be within the Board's statutory authority to regulate the practice of medicine, the question of whether the substance of such letters could have been enforced by the Board without adoption as a rule under R.C. Chapter 119 was not before the court, and, therefore, was not addressed.

Further guidance as to when an administrative agency must act through rule making is found in *Hamilton County Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild*, 46 Ohio St. 3d 147, 545 N.E.2d 1260 (1989), where the Supreme Court discussed the authority of administrative agencies to proceed by rule making or adjudication, stating in pertinent part:

> We have consistently held that the decision whether to proceed by rule making or adjudication to resolve a dispute lies primarily in the informed discretion of the administrative agency.
> *An administrative board has the authority to use either quasi-legislative promulgation of general rules designed to address a general issue or to use a quasi-judicial proceeding when a specific dispute arises as a case before the board.* [*National Labor Relations Bd. v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253, 257 (2d Cir. 1968)]. "To insist upon one form of action to the exclusion of the other is to exalt form over necessity." *Securities and Exchange Comm. v. Chenery Corp.* (1947), 332 U.S. 194, 202.
> ....
> SERB's decision to resolve, by adjudication, the issues presented by the parties in this case is an administrative judgment entitled to deference by appellate courts. The decision is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies and responsible treatment of the facts. It is the type of judgment which administrative agencies are best equipped to make and for which the administrative process is most appropriate.

Id. at 151, 545 N.E.2d at 1265-66 (emphasis added; various citations omitted). As recognized by the *Professionals Guild* court, the decision as to whether to proceed by rule making or on a case-by-case basis is a matter best determined by the administrative agency in the exercise of its expertise and discretion.

Determinations by Board of Speech-Language Pathology and Audiology Concerning Scope of Practice

Your first four questions involve the manner in which the Board of Speech-Language Pathology and Audiology must proceed in answering questions concerning the scope of practice of speech-language pathology or audiology in order to be in compliance with the principles set forth in *Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. and Nurse Registration*. Your primary concern is whether the Board may answer such questions on a case-by-case basis or whether the Board must adopt rules setting forth its determinations.

The cases discussed above set forth certain principles that the Board must bear in mind in determining whether to answer a scope of practice question by means of adopting a rule setting forth the answer or by some informal means. If, in answering a scope of practice question, the Board sets forth a new rule, regulation, or standard that is to have general and uniform operation, the answer provided by the Board should be adopted as a rule in accordance with the requirements of R.C. Chapter 119. *See generally* 1994 Op. Att'y Gen. No. 94-090 (discussing the meaning of "general

and uniform operation"). However, in situations where the Board, in answering a scope of practice question, is merely interpreting an existing statute or rule as applied to unique facts or circumstances such that the Board's determination will not have uniform and general operation, the Board need not make that determination through the adoption of a rule. Similarly, if the Board is merely interpreting an existing statute or rule, without setting forth a new rule, standard, or regulation that is to have general and uniform operation, the Board need not make its determination through the adoption of a rule. Thus, not only is the Board not required to answer scope of practice questions solely on a case-by-case basis, but if the Board's answer to a scope of practice question sets forth a new rule, regulation, or standard that is to have general and uniform operation, the Board *must* make that determination through the adoption of a rule.

Part of your concern is the effect of a determination by the Board in answering a scope of practice question without a rule addressing that determination. Pursuant to R.C. 119.02, if the Board makes a determination concerning the scope of practice of speech-language pathology or audiology and such determination fits within the definition of a rule, but the Board has not adopted the substance of that determination in accordance with the rule making procedures prescribed by R.C. Chapter 119, the determination is invalid and of no effect. *See Condee v. Lindley*, 12 Ohio St. 3d 90, 465 N.E.2d 450 (1984); *Hyde v. State Medical Bd.*, 33 Ohio App. 3d 309, 515 N.E.2d 1015 (Franklin County 1986).

Your final question asks:

> Must the Board always promulgate a rule to include a specific procedure or treatment method in the practice of speech-language pathology or audiology if the procedure or treatment method is not specifically named in [R.C. 4753.01]? If so, how should the Board deal with scope of practice questions regarding that particular procedure or treatment method during the rule-making process?

As discussed above, the definitions of the "practice of speech-language pathology," R.C. 4753.01(C), and the "practice of audiology," R.C. 4753.01(G), contain broad definitions of the types of activities that fall within each practice, as well as examples of activities that fall within the broad definitions. Thus, the fact that a particular procedure or treatment method is not specifically listed in either definition does not preclude its inclusion within the definition of that practice. If the Board's determination as to whether a specific procedure or treatment method constitutes the practice of either profession sets forth a new regulation, rule, or standard that will have a general and uniform operation upon the practice of that profession, the Board must make that determination by rule. Until the adoption of such rule, the Board is without authority to enforce the substance of that rule. *See Condee v. Lindley*; *Hyde v. State Medical Bd.*

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, if the Board of Speech-Language Pathology and Audiology, in making a determination as to the scope of practice of speech-language pathology or audiology, establishes a standard, rule, or regulation that is to have

general and uniform operation, such determination must be adopted as a rule in accordance with the requirements of R.C. Chapter 119.

Respectfully,

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Attorney General

April 24, 1995

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SYLLABUS: 95-009

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