May 13, 2004

Ronald R. Ross, Ph.D., CPM
Executive Director
State Board of Psychology
77 South High Street, Suite 1830
Columbus, Ohio 43215-6108

SYLLABUS: 2004-020

The State Board of Psychology has the authority to take disciplinary action against a school psychologist it has licensed, for misconduct that constitutes grounds for such action under R.C. 4732.17, where the licensee also holds a certificate or license from the State Board of Education and committed the misconduct while practicing within the scope of his license from the Board of Education.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3428
Telephone: (614) 752-6417
Facsimile: (614) 466-0013

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OPINION NO. 2004-020

Ronald R. Ross, Ph.D., CPM
Executive Director
State Board of Psychology
77 South High Street, Suite 1830
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Dear Dr. Ross:

You have asked whether the State Board of Psychology (Psychology Board) may take disciplinary action against a school psychologist it has licensed, where the licensee has committed misconduct while working in a position that requires licensure by the State Board of Education, but not the Psychology Board. In order to fully understand the issue you have raised, we begin with a brief examination of the respective statutory schemes established for licensure of school psychologists by the Psychology Board and the State Board of Education.

Licensure by the State Board of Psychology

As a general matter, no one may "offer or render services as a school psychologist or otherwise engage in the practice of school psychology for a compensation or other personal gain" unless licensed as a school psychologist or psychologist by the Psychology Board. R.C. 4732.21(B).[1] *See also* R.C. 4732.13 ("[a] current, valid school psychologist license shall entitle the holder to practice school psychology," and "shall remain in effect until suspended or revoked"); R.C. 4732.24 (the unlawful practice of school psychology may be enjoined by a court of common pleas); R.C. 4732.99 (criminal penalty for practicing school psychology without a license). In order to secure a license from the Psychology Board, a person must possess certain qualifications, meet the educational, training and experiential standards required by statute, and pass an examination conducted by the Board. R.C. 4732.10; R.C. 4732.12. *See also* R.C. 4732.14 (registration of licensees); R.C. 4732.15(A) (licensure of a school psychologist licensed or certified in another state or holding a diploma from the American Board of Psychology).

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[1] A "school psychologist" is defined to be "any person who holds self out to the public by any title or description of services incorporating the words 'school psychologist' or 'school psychology,' or who holds self out to be trained, experienced, or an expert in the practice of school psychology." R.C. 4732.01(D). The "practice of school psychology" is defined in R.C. 4732.01(E).

Although licensure by the Psychology Board is generally a prerequisite to the practice of school psychology, certain persons "are exempted from the licensing requirements" of R.C. Chapter 4732, including:

> A certificated school psychologist, while practicing school psychology within the scope of his employment by a board of education or by a private school meeting the standards prescribed by the state board of education under division (D) of section 3301.07 of the Revised Code, or while acting as a school psychologist within the scope of his employment in a program for trainable mentally retarded children established under Chapter 3323. or 5126. of the Revised Code. A person exempted under this division shall not offer psychological services to any other individual, organization, or group for remuneration, monetary or otherwise, unless he is licensed by the state board of psychology.

R.C. 4732.22(A). *See also* R.C. 4732.01(H) (defining a "certificated school psychologist" for purposes of R.C. 4732.22 as "an individual holding a current, valid school psychologist certificate issued under division (M) of section 3319.22 of the Revised Code");[2] 2003 Op. Att'y Gen. No. 2003-001 at 2-5 (discussing the phrase, "scope of employment," as used in R.C. 4732.22(A), and explaining that, "the activity exempted by R.C. 4732.22(A) from the prohibition in R.C. 4732.21(B) is the rendering of school psychological services or acting as a school psychologist, for compensation, for one of the entities specified in R.C. 4732.22(A)"). Thus, if a person holds a current, valid school psychologist license issued by the State Board of Education pursuant to R.C. 3319.22, he may practice school psychology within the scope of his employment with a board of education or other entity specified in R.C. 4732.22(A) without being required to hold a license from the Psychology Board.

Certification or Licensure by the State Board of Education

This brings us to a discussion of the statutory scheme established for the licensure of school psychologists by the State Board of Education. Pursuant to R.C. 3301.07(D), the State Board of Education is required to prescribe minimum standards for "the licensing of teachers, administrators, and other professional personnel and their assignment according to training and qualifications." More specifically, the State Board of Education is required to "adopt rules establishing the standards and requirements for obtaining temporary, associate, provisional, and professional educator licenses of any categories, types, and levels the board elects to provide."

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[2] The references in R.C. 4732.22(A) and R.C. 4732.01(H) to a "certificated" school psychologist, and to a "certificate issued under division (M) of section 3319.22" are out of date. As discussed in note 3, *infra,* in relation to the enactment of Am. Sub. S.B. 230 in 1996 by the 121st General Assembly, the State Board of Education now issues "educator licenses" pursuant to rules adopted under R.C. 3319.22(A), instead of "certificates."

R.C. 3319.22(A). *See* R.C. 3319.30 ("no person shall receive any compensation for the performance of duties as teacher in any school supported wholly or in part by the state or by federal funds who has not obtained a license of qualification for the position as provided for under section 3319.22 of the Revised Code"). In furtherance of this responsibility, the Board has set forth in rule the requirements for securing a five-year "professional pupil services license" as a school psychologist, 5 Ohio Admin. Code 3301-24-05(E)(1)(c) (2003-2004 Supp.), and for renewing the license, 5 Ohio Admin. Code 3301-24-08. *See also* R.C. 3319.23 (requiring the State Board of Education to "establish standards and courses of study for the preparation of teachers," to "provide for the inspection of institutions desiring to prepare teachers," and to "approve such institutions as maintain satisfactory training procedures"); 1954 Op. Att'y Gen. No. 4302, p. 491 (syllabus, paragraph two) (persons employed as school psychologists by a local board of education "must be qualified therefor by certification as provided in Section 3319.22, Revised Code, and in the standards, rules, and regulations established by the superintendent of public instruction [now the State Board of Education] under authority of Section 3319.23, Revised Code").[3]

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[3] In the interest of completeness, we note that the current licensure system is relatively new, having been enacted as part of Am. Sub. S.B. 230 in 1996. 1995-1996 Ohio Laws, Part VI, 10257 (Am. Sub. S.B. 230, eff. Oct. 29, 1996). This is relevant because certain school psychologists may, under the statutory grace period provided in Am. Sub. S.B. 230, still hold a "certificate" under the former system.

Under the law as it read prior to Am. Sub. S.B. 230, the State Board of Education administered a system under which teachers and other school professionals were "certificated." Former R.C. 3319.22(M) authorized the Board to issue teachers' certificates to "pupil-personnel workers, including school psychologists, valid for the conduct of all home-school-community relations incident to the adjustment of pupils to the facilities available for their education." 1987-1988 Ohio Laws, Part II, 3771, 3776 (Am. H.B. 439, eff. March 17, 1989). *See* 5 Ohio Admin. Code 3301-23-22 (renewal of a provisional certificate, conversion of a provisional certificate to a professional certificate, renewal of a professional certificate, and conversion of a professional certificate to a permanent certificate). Am. Sub. S.B. 230 replaced this certification system with a system of educator licenses, but provided for a period of transition, found in R.C. 3319.222. *See* 1999 Op. Att'y Gen. No. 99-010 at 2-74 (R.C. 3319.222 "gives the State Board of Education a grace period during which it may continue to issue certain categories of teachers' certificates in accordance with the statutory provisions otherwise repealed by Am. Sub. S.B. 230, and to recognize the validity of other categories of teachers' certificates previously issued in accordance with those repealed statutory provisions, until the transition period to the system of educator licenses is completed"). Thus, any reference in the Revised Code to educator licensing is considered to refer also to teacher certification as provided in R.C. 3319.222. R.C. 3319.222(E). In this opinion, we will use the term "license," as it relates to the State Board of Education, to include a "certificate" issued under former R.C. 3319.22(M) and currently valid pursuant to R.C. 3319.222.

In sum, a person who is rendering school psychological services or acting as a school psychologist for a board of education or other entity specified in R.C. 4732.22(A) must hold a license issued by the State Board of Education pursuant to R.C. 3319.22 and the administrative rules promulgated thereunder. He is not, however, required to hold a license issued by the State Board of Psychology pursuant to the exemption in R.C. 4732.22(A). *See* 2003 Op. Att'y Gen. No. 2003-001 at 2-5 ("[s]o long as a certificated school psychologist is engaged by one of the entities named in R.C. 4732.22(A) either to render school psychological services or to act as a school psychologist, that individual is exempt from the licensure requirements of R.C. 4732.21(B) in the performance of the duties for which he is so engaged and compensated"). *See also* 1975 Op. Att'y Gen. No. 75-047 at 2-184 ("a 'certificated school psychologist' is specifically exempted from the licensing requirements of Chapter 4732 by R.C. 4732.22, although when a 'licensed psychologist' or a 'licensed school psychologist' is employed by an educational system he must also be a 'certificated school psychologist' pursuant to R.C. 3319.22").

You have pointed out in your request for an opinion, however, that Division (C) of R.C. 4732.10 requires that, before an applicant may take the examination leading to a school psychologist license from the Psychology Board, he must furnish "proof of at least twenty-seven months, exclusive of internship, of full-time experience as a certificated school psychologist employed by a board of education or a private school meeting the standards prescribed by the state board of education, or of experience which the board deems equivalent." You have stated that, consequently, "virtually all of the approximately 370 school psychologists licensed by the State Board of Psychology are also 'certificated' as school psychologists by the Ohio Department of Education." You have also stated that, "[m]any of the State Board of Psychology's licensed school psychologists maintain full-time jobs in school districts, where they are employed based solely upon the Ohio Department of Education certificate/license," and you wish to know whether a school psychologist who works in a capacity falling within the exemption of R.C. 4732.22(A), but holds both types of licenses, may be disciplined by the Psychology Board if he commits misconduct while practicing school psychology within the scope of his license from the Board of Education.

Disciplinary Authority

Both the Psychology Board and the State Board of Education have the authority to discipline their license holders for misconduct. The Psychology Board is authorized to reprimand, or suspend or revoke the license of, a licensee for any of the reasons set forth in R.C. 4732.17(A). These grounds for discipline include conviction of a felony, using fraud to procure a license, practicing school psychology in a negligent manner, violating a rule of professional conduct promulgated by the Board,[4] and practicing in an area for which the licensee is untrained or incompetent. *Id.* *See also* R.C. 4732.17(B) (process the Board must follow for taking action

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[4] *See* 11 Ohio Admin. Code Chapter 4732-17 (Rules of Professional Conduct).

to suspend or revoke a license); R.C. 4732.171 (license suspension where there is an immediate threat to the public); R.C. 4732.172 (sanctions against a licensed school psychologist for engaging in sexual misconduct with a patient or client).

Similarly, the State Board of Education is authorized to suspend, revoke, or limit a license it has issued, based on one or more of the reasons set forth in R.C. 3319.31. These reasons include "[e]ngaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the ... person's position," and conviction of a felony and certain other offenses. *Id. See also* R.C. 3319.15 (authorizing the State Board of Education to suspend the license of a teacher who terminates his contract with his employing board of education in a manner other than as provided in that section); R.C. 3319.151 (authorizing the State Board of Education to suspend the license of a school employee who assists a pupil to cheat on a statewide proficiency test); R.C. 3319.311 (process the Board of Education must follow for taking action to suspend, revoke, or limit a license).

A comparison of the respective disciplinary grounds upon which the Psychology Board and the State Board of Education may act reveals that each board may discipline a licensee if he has been convicted of a felony, or practiced school psychology in a negligent or incompetent manner. Other types of conduct also could give rise to discipline by both the Board of Education and the Psychology Board, depending upon the specific circumstances of a case. For example, a school psychologist's use of drugs or alcohol could result in "conduct unbecoming" his position, which is subject to sanction by the State Board of Education, R.C. 3319.31(B)(1), and, under the same set of facts, be deemed to impair his ability to perform the work of a school psychologist "with safety to the public," which is subject to sanction by the Psychology Board, R.C. 4732.17(A)(6). If the misconduct constitutes grounds for discipline under R.C. 4732.17, nothing in R.C. Chapter 4732 or R.C. Chapter 3319 bars the Psychology Board from pursuing disciplinary action because the misconduct was committed while the school psychologist was working under a license issued by the Board of Education.[5]

It is readily apparent that the wrongdoing of a school psychologist who is employed under a license issued by the Board of Education could be deemed by the Psychology Board to reflect on his ability to practice school psychology in an honest and competent manner under the license it has issued. For example, if a school psychologist is convicted of a felony he

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[5] The Psychology Board must, of course, follow all pertinent statutory and administrative requirements in pursuing such disciplinary action. Before the Board may discipline a licensee, it must file written charges and hold an administrative hearing pursuant to R.C. Chapter 119, unless there is an immediate threat to the public. R.C. 4732.17(B); R.C. 4732.171; 11 Admin. Code 4732-17-03. Furthermore, the Psychology Board would be required in such a hearing to present evidence that the licensee's conduct constituted grounds for discipline under R.C. 4732.17, and could not rely merely on the State Board of Education's imposition of discipline under R.C. 3319.31.

committed within the scope of his employment with a board of education, the Psychology Board could reasonably determine that the conviction was relevant to his fitness to hold the license it issued, and R.C. 4732.17(A)(1) gives the Board the power to revoke or suspend the license based on that conviction. Similarly, a school psychologist's failure to satisfactorily perform his duties with a board of education could be determined to constitute the negligent or incompetent practice of school psychology by the Psychology Board as well as the Board of Education, and both would have the statutory authority to pursue disciplinary proceedings on that basis. Licensure of a school psychologist by the State Board of Education does not divest the Psychology Board of its authority to pursue discipline against a licensee under R.C. Chapter 4732. *Cf.* 1975 Op. Att'y Gen. No. 75-047 at 2-184 ("the privilege [between a school psychologist and his client] provided for in R.C. 4732.19 is not operative with respect to communications had with a 'certificated school psychologist' *unless also licensed*" by the Psychology Board (emphasis added)).

R.C. 4732.22 speaks in terms of a school psychologist's exemption from "the licensing requirements" of R.C. Chapter 4732. This means only that a school psychologist, who meets the terms of the exemption, may practice school psychology within the scope of his employment, without being licensed by the Psychology Board and subjected to legal action for doing so. If, however, a school psychologist meeting the exemption from licensure in R.C. 4732.22(A) does, in fact, have a license from the Psychology Board, as well as from the Board of Education, nothing in R.C. 4732.22 or elsewhere insulates his Psychology Board license from action by the Psychology Board nor excuses him from complying with the standards of practice required in R.C. Chapter 4732 and the rules adopted thereunder.[6] A school psychologist falling within R.C.

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[6] A question similar to yours involving the authority of the State Board of Speech Pathology and Audiology was considered in 1983 Op. Att'y Gen. No. 83-017. The opinion addressed whether the Board had the authority to license and regulate the practice of speech pathology and audiology by persons who served under contract with a board of education. At the time 1983 Op. Att'y Gen. No. 83-017 was issued, R.C. 4753.12 (B) stated that, "[n]othing in [R.C. Chapter 4753] shall be construed to …. [*p*]*revent or restrict the practice* of speech and hearing therapy … by a person who holds a valid and current license or certificate as a speech and hearing therapist issued by the state board of education," so long as "such persons are performing activities within the scope of their employment" (emphasis added). *Id.* at 2-65. The emphasized language was interpreted in the opinion as restricting both the licensure and regulatory functions of the Board of Speech Pathology and Audiology. *Id.* at 2-66. While noting that, a person who provides services to both a school system and the general public was subject to licensure and regulation by both the Board of Speech Pathology and Audiology and the State Board of Education, the opinion concluded that, "[p]ursuant to R.C. 4753.12(B), however, the Board of Speech Pathology and Audiology may not assume jurisdiction over the activities which such person performs pursuant to a contract with a board of education." *Id.*

The opinion is distinguishable because it was interpreting a broader exemption for the "practice" of the profession, while, in this instance, the statutory language provides only for

4732.22(A), but licensed by the Psychology Board, is not somehow free to engage in misconduct and remain unaccountable under R.C. Chapter 4732 merely because he holds a second license and the conduct occurred while working within the scope of that second license.

Indeed, if a licensee's misconduct falls within one of the grounds for discipline set forth in statute, the Psychology Board (as well as State Board of Education) may take disciplinary action even where his misconduct occurred outside of his employment with the board of education or the practice of psychology altogether. Although your question asks us to assume that the alleged misconduct occurred while the school psychologist was practicing within the scope of his employment with a board of education, certain grounds, such as a felony conviction, may be relied upon by both boards to take action regardless of the context in which the misconduct occurred. For example, in *Windom v. State Board of Education,* No. 95CA17, 1996 Ohio App. LEXIS 4673 (Meigs County 1996), a teacher was convicted of intent to defraud the federal Farmers Home Administration, a felony violation of federal law. The court of appeals upheld the revocation of his license by the Board of Education, noting that, the "language of [R.C. 3319.31] is clear and unambiguous. That section authorizes the Board to revoke a teaching certificate of any person who has pleaded guilty or has been convicted of *any felony.* There is no language in the statute requiring a nexus between [the teacher's] conduct and his ability to teach and administrate" (emphasis in original). *Id.* at *9. *Cf. Freisthler v. State Board of Education,* No. 1-02-36, 2002-Ohio-4941, 2002 Ohio App. LEXIS 4975 (Allen County) (discussing whether a teacher's misconduct must bear a nexus to his performance as a teacher in order for the Department of Education to sustain a "conduct unbecoming" charge for purposes of R.C. 3319.31(B)(1)); *Hoffman v. State Board of Education,* 145 Ohio App. 3d 392, 763 N.E.2d 210 (Cuyahoga County 2001) (same). Although there are no analogous cases involving licensees of the Psychology Board, the language of R.C. 4732.17(A)(1), like that of R.C. 3319.31(B)(2)(a), does not limit the type of felony for which a licensee may be sanctioned, and there is nothing to indicate that the Psychology Board, unlike the Board of Education, would be unable to discipline a licensee who was convicted of a felony committed outside the scope of his practice of school psychology.

Our conclusion is consistent with the purpose of statutory licensing schemes—protection of the public and those whom practitioners serve. *See Crumpler v. State Board of Education,* 71 Ohio App. 3d 526, 529, 594 N.E.2d 1071 (Franklin County 1991) (the "principal focus" must be

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exemption from "licensing requirements." Also, the law has been amended since the issuance of 1983 Op. Att'y Gen. No. 83-017. Am. Sub. S.B. 230 deleted the exemption altogether so that school speech-language pathologists and audiologists must now be licensed by [what is now called] the State Board of Speech-Language Pathology and Audiology. *See also* Am. Sub. S.B. 96, § 6 (122nd Gen. A., eff. June 11, 1997); 5 Ohio Admin. Code 3301-24-05(E)(1)(a)(ii) (2003-2004 Supp.) (a school audiologist must hold a current license from the Board of Speech-Language Pathology and Audiology); Rule 3301-24-05(E)(1)(e)(ii) (same for a school speech-language pathologist).

"on the welfare of the school community," rather than the effect that revocation of a teacher's certificate would have on her efforts to recover from drug addiction). *See also Williams v. Scudder,* 102 Ohio St. 305, 131 N.E. 481 (1921); *State v. Gardner*, 58 Ohio St. 599, 51 N.E. 136 (1898) (syllabus, paragraph one); *Ohio Board of Dietetics v. Brown,* 83 Ohio App. 3d 242, 614 N.E.2d 855 (Cuyahoga County 1993); *Roy v. Ohio State Medical Board,* 80 Ohio App. 3d 675, 610 N.E.2d 562 (Franklin County 1992); *Meister v. State Board of Pharmacy,* No. 43342, 1981 Ohio App. LEXIS 11686 (Cuyahoga County 1981). As the court noted in *In re Barnes,* 31 Ohio App. 3d 201, 206, 510 N.E.2d 392 (Franklin County 1986), the regulation of professions "is preventive justice rather than retributive justice." The Psychology Board's ability to investigate and discipline a licensee for one or more of the reasons set forth in R.C. 4732.17, regardless of the licensee's employer, and regardless of whether the licensee also holds a license or certificate from the State Board of Education, protects the public safety and welfare, and prevents future harm to those who might seek out the licensee's professional services.

It is, therefore, my opinion, and you are hereby advised that, the State Board of Psychology has the authority to take disciplinary action against a school psychologist it has licensed, for misconduct that constitutes grounds for such action under R.C. 4732.17, where the licensee also holds a certificate or license from the State Board of Education and committed the misconduct while practicing within the scope of his license from the Board of Education.

Respectfully,

JIM PETRO
Attorney General