



OHIO
OPTOMETRIC
ASSOCIATION

House Bill 49
Written Testimony of Keith Kerns
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Interested Party
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On behalf of the Ohio Optometric Association (OOA), which represents 70% of optometrists practicing in Ohio, I strongly urge you to oppose the proposed changes in House Bill 49 that would eliminate the Ohio State Board of Optometry and combine its operations with other unrelated licensing boards. Similar language was contained in two bills last session (House Bill 617 and Senate Bill 366) which were both rejected by the legislature. As was the case last session, these proposed changes are not needed.

Members of the Ohio General Assembly should reject these proposed changes for the following reasons:

- **Elimination and consolidation of the Board of Optometry is not necessary.** The Board functions properly, adequately protects the public, interacts well with licensees and stakeholders, and has worked at or under budget for over a decade. It is the proven, independent regulatory body that should be showcased to taxpayers as an effective and efficient arm of state government, rather than being targeted for elimination.
- **The proposed change is unlikely to save the state money.** The Board is funded exclusively by the payment of licensure fees and does not utilize taxpayer funds. Additionally, because the proposal does not call for a corresponding reduction in licensure fees, proponents must also recognize that cost savings are minimal at best.
- If adopted, **the changes potentially weaken the state's ability to protect the public.** The top priority of every licensing board is to protect the public. The Board of Optometry has and continues to do just that. The proposed Vision and Hearing Professionals Board would be ill-equipped to oversee the professions it is charged with regulating.
- **Optometry is the only profession with prescriptive authority, including the ability to prescribe opioids, which faces consolidation under the proposal.** This establishes a dangerous precedent by granting the new board, which has a majority of members who lack the expertise or legal authority to prescribe dangerous drugs, with the ability to regulate the issue.
- **Board consolidation is not required by the US Supreme Court decision in *North Carolina State Board of Dental Examiners v. FTC* or any other legal determination or precedent.** Any attempt to tie this Court decision to the consolidation proposal in HB 49 is misleading and false.

Further explanation of these critically important issues continues below.

I. Optometry Board Elimination and Consolidation is Not Necessary

The Board of Optometry is a good example of state government working properly. It is efficient and operates at a high level of quality and expertise. The Board works diligently to protect the public, is responsive to its licensed community and performs its duties under budget. In fact, the Board of Optometry has operated at or under budget for more than a decade. While other licensing boards may have experienced budgetary, legal or political difficulties in recent years, no problem exists with the State Board of Optometry. Any policy changes should focus on those areas of state government that need improvement, not those that represent positive examples of government activity like the Board of Optometry.

Additionally, it is important to note that a consolidation of boards is not likely to save the state or taxpayers money. All licensing boards, including the Board of Optometry, are funded entirely by licensure fees paid by the regulated community. This includes costs associated with staffing, information technology, communications, rent, office supplies, travel and other general office expenses. The Department of Administrative Services (DAS) also states that it expects “staffing needs and roles to remain largely unchanged” should this proposal pass - meaning there is no plan to reduce staffing for any state board as the result of consolidation. There is also no plan to reduce licensure fees for any regulated professional finding its board consolidated. This leads one to the conclusion that costs associated with any new consolidated board will mirror those of the boards today.

II. Optometry Board Elimination and Consolidation is Bad Public Policy

The newly proposed Vision and Hearing Professionals Board is ill-equipped to protect the public and regulate the professions it oversees. Audiologists and Speech-Language Pathologists are not qualified to make judgments on the profession of optometry just as optometrists are not qualified to regulate those professions. There is little to no connection between these respective professions, and creating a regulatory system as proposed in the bills is unprecedented nationally.

Furthermore, **optometry is the only profession with prescriptive authority, including the ability to prescribe opioids, which would face board elimination and consolidation under the legislation.** The legislation sets a dangerous precedent by providing individuals who lack the expertise or legal authority to prescribe with the ability to regulate a prescribing profession. This is especially troubling considering Ohio’s current opioid epidemic. While we trust that our members and the profession generally act prudently and with the best interest of the patient in mind, it is our belief that optometrists, as prescribers of opioids and other dangerous drugs, should remain self-regulated as part of the state’s licensing system.

III. Board Elimination and Consolidation is NOT Required by the US Supreme Court

Finally, some proponents have argued that a consolidation and reconfiguration of board composition is required for the state to avoid antitrust litigation as a result of a recent US Supreme Court case. This contention is false.

In February 2015, the Court issued a decision in the case *North Carolina State Board of Dental Examiners v. FTC* which involved an allegation of anti-competitive activity by the North Carolina Dental Board. In its decision, the Court held that in order to escape potential liability on issues of antitrust, states should actively supervise regulatory bodies that are comprised of a majority of active market participants. This supervision “need not entail day-to-day involvement in an agency’s operations...or decision,” but should assure that decisions are supporting state policy and not individual interests. The provisions of HB 49 which provide DAS oversight of certain decisions of the medical regulatory boards will meet the Court’s standard of “active state supervision” by itself. Standing alone, the reforms establishing DAS review are enough to defend the state against allegations of antitrust violations. Composition of licensing boards is largely irrelevant to this discussion.

At no point does the Court suggest that states consolidate or reconfigure licensing board composition to remove a majority of active marketplace participants. In fact, shortly after the decision, the Federal Trade Commission (FTC) issued guidance on the case for the states and as part of that guidance stated that even those regulatory boards that do not have a majority of active market participants could still be required to have “active supervision” by the state in order to receive protection.

The bottom line is: reconfiguration of the composition of Ohio’s licensing boards is not required by the US Supreme Court decision in *NC Dental Examiners*, the FTC or by any other governing decision or document. The proposed DAS review system alone is an adequate protection for the state and its regulatory boards. It meets the Court’s standard on “active supervision” and will offer the strongest protection against antitrust allegations. The OOA is supportive of these protections. However, reconfiguring the composition of the boards will not increase these protections further and those who claim consolidation and/or composition changes are required are incorrect.

Furthermore, if proponents of board consolidation and composition changes truly believed that reconfiguring the composition of the boards was necessary to comply with the Court’s decision and protect the state, one must ask why several medical licensing boards, including medical, dental, pharmacy, nursing and others are not changed by the legislation. These boards regulate a higher volume of licensees and generally govern a broader scope of activity making them even more susceptible to allegations of anti-competitive activity based on size and scope alone.

It is important to note that most other states have licensing boards similar to Ohio’s with majorities of active market participants regulating a profession. However, no state has

made wholesale changes to the composition of its regulatory boards following the Court's decision. If it were required, why has there been relatively little, if any, activity in this area by the other 49 states?

IV. Conclusion

In conclusion, the proposed changes to the Ohio State Board of Optometry contained within House Bill 49 as introduced are not required and unnecessary, will not result in cost savings for the state or taxpayers, and potentially weakens the state's ability to protect the public. On behalf of the OOA, I again urge you to reject these changes as proposed. Thank you for your consideration of this crucially important issue for our member optometrists and their patients. Please feel free to contact me at kkerns@ooa.org should you have any questions or require additional information.