Testimony on HB 49 for March 7, 2017
TO: Senate Finance Sub-Committee on State Government and Agency Review
FROM: Sue Ciarlariello ciarlariellos@childrensdayton.org
Legislative Chair, Ohio Society for Respiratory Care

I am here today before you to request that the Ohio Respiratory Care Board (ORCB) budget be restored to full funding for both FY 2018-2019 and that it remain an independent board so that it can continue to provide meaningful regulation of respiratory care professionals (RCP's) and protection of the public. HB 49 abolishes the ORCB and replaces it with an advisory council under the Ohio Medical Board. HB 49 would jeopardize RCP's and consumers in Ohio for the following reasons.

Advisory Council Structure, Member Qualifications - 4761.032 (lines 66112-66125)
Section 4761.02 ORC describing the current ORCB structure and professional qualifications has been repealed and replaced with inadequate language in HB 49 that could seriously weaken the effectiveness of RCP regulation.

This section only requires the Medical Board to appoint respiratory care advisory council and "to make initial appointments" of "not more than 7 individuals knowledgeable in the area of respiratory care" serving 3 year staggered terms. This appears to permit the Medical Board to unilaterally determine the actual number of members - and to change that number at will. There is also no requirement for the council to actually meet, and no mention of authority or responsibility to make re-appointments after the initial assignments - so it appears that the advisory council could disappear after the first 3 years of existence. It would make sense to transition current ORCB members into the role of advisory council members. They are already seated in staggered 3 year terms and have committed to serve.

The language requiring meaningful qualifications for education, training, or actual practice experience in pulmonary medicine or respiratory care for the proposed advisory council members has been removed. The nominating bodies familiar with the repiratory care profession have been eliminated. What does "knowledgeable" in respiratory care mean? It is up to the judgment of the appointing person. Although we have great respect for the Medical Board members and staff, they are not familiar with the actual practice of respiratory care, nor are they aware of the requirements for nationally accepted education, training and credentialing of RCP's. Our current law specifies that the board include five RCP's in active practice with at least five years experience and one physician with clinical training and experience in pulmonary disease. This expertise is necessary to understand the RCP scope of practice, evaluate RCP educational programs, investigate clinical complaints by applying current technical knowledge and evidence based practice standards. The OSRC feels strongly that members of any advisory council charged with giving advice on the practice of respiratory care should be appointed from amongst those licensed RCP's who are the subject of regulation.

The proposal has removed the voice and input of the public member that has been a component of our independent board. The current language in 4761.02 includes one public member nominated by the American lung association of Ohio. The consumer's voice is important to achieve balance and a consumer focus to support common sense regulation of respiratory care professionals.

The language indicating that the OSRC may nominate three of the RCP's for possible Board appointment and the Ohio state medical association may nominate the physician with training and experience in pulmonary disease for an open physician position has also been eliminated. HB 49 ignores the most reputable and easily available sources of professionals to recommend qualified candidates.

Lack of RCP's and Qualified Physician Members Hearing Cases

The Medical Board is made up exclusively of physicians and consumer members who will be hearing RCP disciplinary cases and deciding their outcome. The OSRC strongly feels that RCP licensees will be at a significant disadvantage when they appear before the board of doctors and public members who only have limited knowledge of the RCP's scope of practice, processes, education and training requirements.

As a member of the ORCB for 12 years, I witnessed many cases where technical expertise, for example, in mechanical ventilation or a specific ventilator's function was needed to determine the error that warranted a need for hearing and adjudication. RCP's perform a number of critical care procedures that are complex and technically difficult, such as various modes of mechanical ventilation, extra-corporeal membrance oxygenation, invasive and non-invasive blood gas analysis, tracheal intubation, hyperbaric oxygen administration, air and ground critical care transport. Inconsistent rulings and significant errors in conclusions can occur when less-qualified professionals attempt to assess the practice adequacy of RCP's during disciplinary hearings. Regulated professionals subject to discipline should and must be evaluated by their peers and their medical mentors who understand the science, art, and inherent dangers within their specific areas of practice.

Addition of Overly Burdensome Requirements for Physical and Mental Examination

Section 4761.09(D) has been added to the existing disciplinary section of the respiratory care law. In the first paragraph (lines 66408 – 66414) it requires that any RCP licensed under this chapter or who applies for a license is (automatically) deemed to have given consent to submit to a mental or physical examination when directed by the board to do so, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication. This is really broad language. Yet there is no requirement for the application to include affirmative notice to the applicant that they are automatically exposing themselves to the medical board's ability to demand private health and mental health information.

The next paragraph (lines 66415-66424) goes on to require that "if the board has reason to believe" the licensee or applicant is impaired that they are compelled to undertake an examination by a treatment provider or physician who is chosen by the medical board and the applicant/licensee must pay for the exam. Failure by an applicant to take a demanded examination (maybe because they just cannot afford it) constitutes an admission of the allegations and can result in a final order being entered without the taking of testimony or presentation of evidence.

We understand the intent of the requirement as it might apply to physicians, who have access to addictive prescription medications. However, the respiratory care profession has a fraction of such issues. Our cases usually are investigated and resolved without the cost of such a robust, expensive assessment and recovery program created for higher risk professionals.

We are very concerned about maintaining the privacy of confidential health information, and the potential for being pulled into this overly burdensome and expensive process. This requirement abandons our current board's ability to tailor its recommendations, treatment, and ongoing compliance requirements to suit the individual needs of RCP's – who again are at much lower risk of addiction and recidivism than doctors.

Reassignment of ORCB Staff –Section 515.34
We are concerned that the transferred ORCB staff can be assigned, reassigned, classified, reclassified, transferred, reduced, promoted or demoted by the Medical Board Executive Director with no regard for utilizing their expertise to regulate RCP's or to maintain the services, efficiency, effectiveness or activities that are currently provided by the independent ORCB. There is no clear articulation of intent to use current staff in roles related to RCP programs, but clear descriptions of the authority of the Medical Board to reassign or remove staff.

The timeliness of ORCB response to requests and licensing is currently excellent. Eligible students or new graduates seeking licensure to begin their first jobs can often obtain their license or limited permit within 2-3 weeks. This is helpful to both the employer and the new employee, especially as there are many openings in the State for RCP's. The OSRC is very concerned that merging the ORCB function under the Medical Board may reduce the efficiency of the ORCB staff in processing licenses, particularly without an Executive Director to specifically oversee and manage the ORCB operation.

HB 49 also eliminates the current ORCB function to make available a current register of every person licensed to practice in Ohio, with addresses upon request for the cost of printing and mailing. The OSRC would like to see this function restored.

New Transaction Fee - Page 3072 (lines 94712-94722)
HB 49 is appropriating over 4 million dollars to replace the professional licensing system used by the boards to issue licenses. It also authorizes the transfer of up to 14 million dollars from 4K90, 5C60 and 5HS0 funds for acquisition and development, and allows DAS to recover on-going maintenance costs by charging them back to the boards and agencies using the system. Our OSRC members may be concerned that DAS is now proposing to also assess a transaction fee of up to $3.50/transaction to individuals who must use the system to apply for or renew a license. They pay a fee for their license, a fee from their bank, and now a transactional fee as well.

DAS Review of Ohio Board Actions - Section 125.92 (lines 5876 – 6040)
This section proposes to somehow avoid potential anti-trust concerns created by 2015 U.S. Supreme Court case involving the North Carolina Dental Board. It creates a new layer of State review over board actions or proposed actions and has assigned this review to the Director of DAS. Antitrust analysis is fact-specific and content-dependent and will require the expertise of skilled anti-trust lawyers. There is no description of funding for such review within HB 49. No services from DAS come to the boards for free - and based on past history the boards should anticipate being charged back for this expensive review.

The requirement that DAS review actions taken by boards, or proposed to be taken will significantly slow board activity on open cases and regulatory issues resulting in increased time frames to resolution. This may disrupt the work of affected individuals and negatively affect businesses. The proposal invites those affected and those who deem themselves "likely to be affected" to interrupt cases before all of the facts are available for the board to review and before the subject of the matter has had an opportunity to present their side of the matter. These concerns are compounded for RCP's under HB 49 as there are no real requirements for meaningful RCP representation on the Medical Board.

Currently, ORCB board actions are reviewed by the Assistant Attorneys General assigned to the board. JCARR actively oversees promulgation of rules that are scrutinized by Common Sense Initiative, including both cost and business impact analysis. Rules require Public Hearings as part of the promulgation process. Board member appointments are supervised by the Governor's office of Boards and Commissions and are subject to the advice and consent of the Ohio Senate. Board budgets are scrutinized by both Houses of the Legislature. There have been no documented anti-trust challenges in Ohio to Board actions. Proposals to create more levels of bureaucracy to provide additional oversight seems more like an artificial fix. We do not see a reason for this anti-trust structure to go forward.

For the reasons stated, we feel that the Boards consolidation scheme, particularly as it affects the ORCB, is an ill-conceived, poorly executed attempt at unnecessary consolidation of allied medical professions for no justifiable purpose. It destroys any uniformity of approach to licensure for medical professionals in Ohio, and endangers the health of consumers who count on common sense regulation. The ORCB is fully funded by its licensee fees. Where is the value in this change when the costs are covered by the licensees and the effectiveness of professional regulation is diminished.

We ask that the proposal to abolish ORCB and move licensing functions to the Ohio State Medical Board be removed from HB 49, that full funding for the Ohio Respiratory Care Board be restored for FY 2018-2019 and that ORCB remain an independent licensure board.

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