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DIVISION OF CONSUMER AFFAIRS

N.J.A.C. 13:30-6.1

Notice of Final Action on Petition for Rulemaking

State Board of Dentistry

Petitioner: Frank R. Recker, DDS, JD, Frank R. Recker & Associates Co., L.P.A., on behalf of the American Board of Dental Specialties.

Authority: N.J.S.A. 45:1-15.1.

Take notice that on March 2, 2017, the State Board of Dentistry (Board) received a petition for rulemaking from Frank R. Recker, DDS, JD, Frank R. Recker & Associates Co., L.P.A., on behalf of the American Board of Dental Specialties (ABDS), requesting that the Board amend existing N.J.A.C. 13:30-6.1 to formally recognize the ABDS-recognized certifying boards/areas of practice as specialties, and any future ABDS-recognized specialties; thereby allowing diplomates of ABDS-recognized certifying boards to advertise as specialists in accordance with N.J.A.C. 13:30-6.1 and 6.2.

The petitioner notes that the ABDS was formed to offer a specialty-recognition process, similar to the American Board of Medical Specialties, that is not controlled by a private professional/trade association, such as the American Dental Association (ADA). ABDS' focus is on recognizing certifying boards as specialty boards. To be recognized by the ABDS, a certifying board seeking dental specialty recognition must require a minimum of two full-time, formal, advanced educational programs that are a minimum of two years in duration and are presented by recognized educational institutions; or require 400 didactic hours in the specific area and the equivalent of one year of clinical practice. A certifying board that is seeking membership in the ABDS must: 1) reflect a distinct and well-defined area of expertise in dental practice; 2) develop a rigorous standard of preparation and evaluation in the dental specialty area; 3) provide evidence of psychometric evaluation of the written and oral examination; 4) provide an effective mechanism to maintain certification; and 5) exist as an independent, self-governing entity whose main purpose is to evaluate candidates for board certification. The documentation and application requirements are numerous, and the ABDS maintains rigorous standards for recognition.

The petitioner states that N.J.A.C. 13:30-6.1 violates the rights of credentialed members of ABDS certifying boards by infringing on their First Amendment rights to free speech by banning truthful non-misleading commercial speech, and on their Fourteenth Amendment rights to equal protection and due process of law. The petitioner also states that N.J.A.C. 13:30-6.1 violates anti-trust law by suppressing competition in a recognizable market.

The petitioner states that the New Jersey regulation has effectively granted the ADA the

power to regulate the right to free speech of ABDS credentialed members by not allowing credentialed members in the ABDS certifying boards to advertise as specialists even though they are highly qualified to do so. The specialty regulation has a chilling effect on the lawful exercise of the right to engage in truthful, non-misleading commercial speech because, if these licensees were to advertise to the public as specialists, their licenses would be at risk and subject to monetary and licensure penalties imposed by the Board.

The petitioner also states that members of its certifying boards have protected property and liberty interests in their licenses to practice dentistry and to be rewarded for their industry, including reaping the rewards of earning a *bona fide* specialty credential in their respective areas of expertise. In addition, the petitioner states that its licensees are [page=3550] deprived of any neutral, state-sponsored mechanism to determine dental specialties, evaluate the credentials earned in areas of dentistry that are not recognized by the ADA as a specialty, and appeal the ADA's denial of recognition of any credentialing organization that issues *bona fide* credentials upon which credentialed members of the ABDS could declare themselves "specialists" in their respective fields.

The petitioner further states that the Board has delegated authority to the ADA to determine which areas of dental practice should receive specialty designation and, hence, which areas may be advertised by New Jersey dentists as specialties. In addition, the petitioner states that the regulations provide no mechanism for evaluating the accrediting organization or its credentials or for contesting the decisions of the ADA denying specialty recognition. The petitioner also states that the Board has no active, continuing, or meaningful supervision over the unfettered regulatory delegation afforded to the ADA to determine which areas of practice and which dental specialties may be advertised by New Jersey dentists as specialties. The petitioner states that Federal constitutional restraints do not allow the Board to delegate unguided and uncontrolled authority to a private organization to establish rules determining the lawfulness or unlawfulness of commercial speech.

In addition, the petitioner notes that the ADA recently revised its Code of Ethics to allow dentists to advertise a specialty not specifically recognized by the ADA.

The petitioner proposes that N.J.A.C. 13:30-6.1 be amended to read as follows:

(a)-(b) (No change.)

(c) The following special areas of dentistry may be announced as specialty dental practices:

1.-9. (No change.)

10. Oral implantology/implant dentistry;

11. Oral medicine;

12. Orofacial pain;

13. Dental anesthesiology; and

14. Any other area of dentistry recognized in the future by the American Dental Association and/or American Board of Dental Specialties as a specialty area of dentistry.

(d) The Board shall grant permission to announce a dental specialty or specialization of a dental practice to:

1. A licensed dentist who is certified or eligible for certification by a specialty board recognized by the American Dental Association **or American Board of Dental Specialties** appropriate to that area of dental practice listed in (c) above; or

2. A licensed dentist who successfully completes a post-doctoral education of two or more years in duration in one or more of the specialty areas listed in (c) above and which, at the time of completion, was accredited or provisionally accredited by the American Dental Association Council on Dental Education **and/or have comported with the relevant educational requirements of the American Board of Dental Specialties.**

(e)-(g) (No change.)

In addition, the petitioner urges the Board to provide a process that allows a dentist who does not qualify to advertise as a specialist pursuant to N.J.A.C. 13:30-6.1, as petitioned for amendment to, nevertheless, advertise dental specialties. The petitioner suggests that the Board provide a process for a non-qualifying dentist to advertise other areas of specialty, for example, upon a showing that the diplomate credentials are issued by: a bona fide, independent certifying board, based upon psychometric testing; a certifying board which is comprised of and operated by licensed dentists, and that only issues its diplomate certificates to licensed dentists; a board that has staff for its operations and has been issuing such diplomates for more than five years. The petitioner believes that such a provision would allow access to other licensees to potentially seek recognition of a specialty.

At its April 5, 2017 meeting, the Board referred this matter to its Rules and Regulations Committee for further deliberation in order to develop a better understanding of the implications this request would have for licensees and the public, and to allow the Board time to consider the comments to its pre-proposal concerning the Board's advertising rules. The notice of pre-proposal was published in the New Jersey Register on April 3, 2017, at 49 N.J.R. 631(a) and the comment period expired on June 2, 2017.

The Board and the petitioner subsequently agreed to an extension until October 10, 2017, for the Board to further deliberate on the petition for rulemaking, consistent with the requirements of N.J.A.C. 1:30-4.2(b). The notice acknowledging this extension was published in the New Jersey Register on July 3, 2017, at 49 N.J.R. 1948(a).

Take further notice that the Board considered the petition for rulemaking at the open public session of its October 4, 2017 meeting. The Board had previously examined its advertising rules during its current sunset review and sought comments on them in a pre-proposal. While that review was pending, the petitioner filed this petition for rulemaking. The Board agrees that its existing specialty advertising rules should be amended. The Board, however, does not agree that the petition as written will fully address the concerns raised by the petitioner. Accordingly, the Board has determined to deny the petition for rulemaking.

The Board believes that advertisements must provide the public with accurate information that is disseminated in a non-misleading manner and are consistent with the law. The Board believes that prior to initiating a rulemaking it needs more time to consider the comments to its pre-proposal and to seek additional input to develop the record to support an appropriate regulatory initiative.

The Board further determined and announced at the open public session of its October 4, 2017 meeting that, pending the adoption of revised advertising rules, the Board has placed a moratorium on the enforcement of the specialty advertising rules set forth at N.J.A.C. 13:30-6.1. During this moratorium, the Board will continue to enforce its professional advertising rules, other than those specifically related to specialty advertising, set forth at N.J.A.C. 13:30-6.2. In particular, the Board reminds licensees that no advertisement shall contain any statement or claim which is false, fraudulent, misleading, or deceptive. In addition, if a licensee advertises that he or she has obtained master, member, fellow, or diplomate status in any dental organization, the advertisement shall disclose the name of the dental organization.

A copy of this notice has been mailed to the petitioner pursuant to N.J.A.C. 1:30-4.2.