

Is Your State Board of Nursing an “Arm of the State”?

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State boards of nursing (BONs) establish criteria for approval and termination of nursing education programs. In Louisiana, an approved nursing education program must have a minimum pass rate of 80% or higher for candidates taking the National Council Licensure Examination-Registered Nurse, or NCLEX-RN, for the first time in any one calendar year. In 2015, the Louisiana BON terminated a state university school of nursing for failing to meet the pass rate for 3 consecutive years. A student in the program filed action against the state board, claiming violation of the antitrust acts and asserting that sole reliance on the pass rate for termination created an illegal restraint on trade. In response, the BON filed several motions, including a motion to dismiss for lack of subject matter, citing Eleventh Amendment immunity, barring lawsuits by private citizens against the state without the state’s permission. This article reviews the case with a focus on the court’s analysis and resolution of whether a BON should be considered an “arm of the state.”

Keywords: Arm of the state, boards of nursing and the Eleventh Amendment immunity, nursing program approval and termination criteria, NCLEX-RN pass rates

Each state’s board of nursing (BON) has established criteria for approving and terminating the status of nursing schools. In Louisiana, the approval criteria for nursing schools includes a minimum of an 80% passing rate for candidates taking the National Council Licensure Examination-Registered Nurse, or NCLEX-RN, for the first time in any calendar year (See Table 1, Louisiana Administrative Code). If a program fails to achieve an 80% pass rate, the school is put on conditional approval or probation. If the program’s graduates fail to meet this minimum pass rate for more than 3 consecutive years, the BON withdraws its approval, and the nursing program is prohibited from admitting any new students. In this case, Bachelor of Science in nursing (BSN) program at Grambling State University’s (GSU’s) nursing school had been placed on probation for failing to achieve the minimum 80% pass rate. In February 2015, the BON verified that the pass rate for the program fell below the required 80% threshold for the fourth consecutive year. The BON subsequently terminated the approval of the nursing program in June 2015. A nursing student enrolled in the program filed a complaint in federal court alleging that the BON’s basis for terminating the program established illegal restraint on trade and commerce (Kourtney S. Rodgers v. State of Louisiana Board of Nursing, 2015).

K.R. was a nursing student who had been enrolled in the nursing program since 2012 with the intention of securing a BSN. In August 2015, she filed a “Complaint for Equitable Relief/Damages” in federal court, alleging that the BON’s actions were in violation of the Sherman Antitrust Act (1890), and the Clayton Antitrust Act (1914). The Sherman Antitrust Act is a federal anti-monopoly and antitrust statute. It was amended by the Clayton Act, which prohibits activities that restrict interstate commerce

and competition in the marketplace. Specifically, K.R. alleged that the BON’s “singular reliance upon the eighty percent pass rate” as the basis for terminating the nursing program established an illegal restraint on trade and commerce with respect to the area of baccalaureate and professional nursing. K.R. also alleged problems with the BON’s decision that were not related to the antitrust laws, including that the decision (a) was in “opposition to ACEN’s findings and conclusions,” (b) directly impacted her and other students currently enrolled in the program, and (c) was arbitrary and capricious and could not be supported under the Higher Education Act of 1965. K.R. filed also a motion for a temporary restraining order (TRO), citing that the termination of the program by the BON without providing a “teach-out” option would cause K.R. and students currently enrolled in the program irreparable harm. A TRO is a court order of limited duration that may be issued to prohibit a person or entity from an action likely to cause irreparable harm or to maintain the status quo. Such an order is typically issued by the court only in exceptional circumstances and lasts only until a hearing for a preliminary or permanent injunction can be held.

Procedural History

After the initial filings, the case followed a complicated procedural route as the court sought to deal with the central allegations of the filings as well as the request for a TRO. In an effort to establish order to the proceedings, the court issued a briefing notice (Notice), which set deadlines and limited the size of all responsive pleadings. The Notice (a) required the BON’s

motion in opposition to the TRO as well as any other motions opposing the complaint to be filed within 10 days of the Notice, (b) required K.R. to file responses to the BON's motions within 10 days of the filing of its motions, and (c) limited all motions to 10 pages or less. The BON filed three responsive motions, including a motion to dismiss for lack of subject matter jurisdiction, citing Eleventh Amendment immunity. The other responsive motions filed by the BON were a motion to dismiss for failure to state a claim upon which relief can be granted and a motion to dismiss for failure to join a party. Subsequently, the court found that K.R.'s response to the BON's motions violated the Notice because it was untimely and exceeded the page limit. The court then granted the BON's motion to strike based on the failure to comply with the Notice and removed K.R.'s responses from the record. K.R. then filed a motion for reconsideration, asking the court to set aside the ruling and to reinstate her original opposition to the BON motion to dismiss. While the court granted the motion to strike K.R.'s responses, it proceeded to independently research and analyze the legal issues presented in the matter to the point of formulating arguments on behalf of K.R.

Central to the BON's position was that the court lacked subject matter jurisdiction because the Eleventh Amendment to the U.S. Constitution bars suits by private citizens against a state in federal court unless the state consents suit or Congress has validly set aside the state's sovereign immunity (U.S. Const. amend. XI). The immunity would also extend to any agency, board, or other entity that is determined to be an arm of the state. The Eleventh Amendment immunity provision, however, does not bar suits by private citizens in federal court if the agency, board, or other entity possesses an identity that is separate and distinct from the state. The focus of the court's analysis involved resolving the proposition of whether a regulatory agency established by state law should be considered an "arm of the state" that created it and thereby be covered by the immunity provided under the Eleventh Amendment.

Is the Louisiana BON an Arm of the State?

Although the essential question appears to be straightforward, the court found that the ultimate resolution was much more difficult. The court noted that no clear rule of thumb existed for making the determination. Rather, the analysis required a case-by-case review. Citing case law specific to its circuit, the court proceeded with analysis based on a framework consisting of six questions:

- Is the agency characterized as an arm of the state in its state statutes and case laws?
- What is the source of funds for the agency?
- What is the degree of local autonomy possessed by the agency?
- Is the agency concerned primarily with local or statewide issues?
- Does the agency have the authority to sue and be sued in its own name?
- Does the agency have the right to hold and use property?

TABLE 1

Louisiana Administrative Code: Relevant Procedure of Continuing Full Approval of Undergraduate Nursing Education Programs

- A. Undergraduate and/or graduate nursing education degree program(s) must present evidence of compliance with all standards and requirements contained in Louisiana Administrative Code.
- B. The undergraduate nursing education degree program shall have a pass rate of 80% or greater achieved by the candidates taking the licensure examination for the first time in any calendar year, or the program shall be placed on probation.
- K. Probationary status is not granted to an undergraduate and/or graduate nursing education degree program(s) for more than 3 calendar years in any 5-calendar year period
- L. At any time during the probationary period, the board may determine that the undergraduate and/or graduate nursing education degree program(s) must cease admission of students and begin involuntary termination.
- M. Failure to meet standards after graduation of all enrolled students will result in involuntary termination of the undergraduate and/or graduate nursing education degree program(s) (refer to §3531 of Louisiana Administrative Code).
- N. The right to appeal the board's decision is afforded any undergraduate and/or graduate nursing education degree program(s) in accordance with La. Stat. Ann 37:918 and the Administrative Procedure Act, La. Stat. Ann 49:965, appeals.

Not all the factors are equal to each other, with the source of funding being the most significant. However, each must be resolved individually and in the context of the totality of the circumstances.

Is the agency characterized as an arm of the state in its state statutes and case laws?

This first factor looks to the legislative intent as well as the practical treatment of the BON as an arm of the state. The court determined that Eleventh Amendment immunity is supported under this factor because the state of Louisiana clearly perceives the BON in both its statutes and jurisprudence an arm of the state.

What is the source of the funds for the agency?

Resolving this factor involves taking into account whether a judgment against the agency will be satisfied from state funds and what the state's ultimate liability for the debts and obligations is. The BON does not receive funds from the state treasury; rather, it is funded by licensing fees. Because the BON is financially independent from the state and funded solely by the fees it collects from nurses in the state, the court determined that this factor weighs against Eleventh Amendment immunity.

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