PACIFIC LEGAL FOUNDATION

February 11, 2016

Chair Garcia, Vice Chair Smith,
and Senators Abruzzo, Bean,
Benacquisto, Grimsley,
Richter, and Sobel
Appropriations Subcommittee on Health & Human Services
Florida Senate

RE: Consideration of CS/SB 204, Music Therapist Registration Bill

Achieving the "American Dream" would not be possible without the right to earn a living. For that reason, economic liberty is "the most precious liberty that man possesses."[1] Yet today, one-third of all U.S. workers must get some form of government permission before going to work–typically in the form of an occupational license.[2] These laws impose expensive and time-consuming requirements on people before they may go into a trade or start a business, and can include a combination of fees, education and training requirements, and examinations.

SB 204 would saddle Florida music therapists with all of these burdens with no resulting benefit to the public. The only beneficiaries are a select group of favored private parties: existing practitioners who would enjoy "recognition" of their profession. That is hardly a concept that justifies burdening entrepreneurs and restricting the choices of the public.

While proponents claim that occupational licensing laws like SB 204 exist to protect the public from unscrupulous or incompetent practitioners, the evidence shows that these laws are often wholly unrelated to public safety.[3] Instead, they are frequently used by existing practitioners to limit future competition and increase their own profits.[4] This is precisely what is happening today in Florida with SB 204, and exactly what makes it unconstitutional.

The significant costs of occupational licensing

Estimates suggest that licensing laws result in as many as 2.85 million fewer jobs nationally, and create an annual drag of $203 billion in added costs to consumers.[5] In fact, one recent study found Florida to have the fourth most burdensome licensing laws in the United States.[6]

Licensing is also associated with stunted employment growth rates. Over a ten-year span, occupations in licensed states were shown to suffer a twenty percent lower growth rate than in states without licensure.[7] The reason for this is simple: by definition, barriers to entry into a given profession limit the number of people who may enter that trade.

While occupational licensing laws impose large social and economic costs on the public at large,

racial minorities, the less fortunate, and other politically powerless groups are hardest hit. One reason is that they cannot muster the political power to protect themselves from legislation that targets them. Another is that they cannot afford to satisfy the high burdens that occupational licensing often requires.[8] As a result, occupational licensing bans the people most in need of economic opportunity from entire professions, often for reasons having nothing to do with their ability to competently perform or provide service.

The high burdens of SB 204's requirements

Styled as a registration bill, SB 204 actually functions' as an occupational license bill because of the burdens it imposes. SB 204 requires prospective music therapists to satisfy three requirements: (1) apply to the Department of Health; (2) pay fees; and (3) pass the examination for board certification offered by the Certification Board for Music Therapists (CBMT) or show proof of such certification.[9] This is no small burden.

Requiring passage of the CBMT exam is a highly burdensome mandate. A person is only eligible to sit for the exam after completing an approved degree program in music therapy, *and* clinical training. Then, after paying a fee of $325, an applicant must take the three-hour, multiple-choice, 150 question certification exam.[10] Maintaining CBMT certification requires re-certification every five years by retaking the exam or completing more than eighty-three hours of continuing education.[11]

First, the CBMT requires applicants to have a bachelor's or graduate degree in music therapy. This means that if a prospective music therapist has not yet gone to college, she must enroll in a music therapy program. If she already has a music degree, but not a music therapy degree, she must return to school to complete a master's program. If however, she has already completed a bachelor's degree in an unrelated program, she must return to school and complete another bachelor's degree in music therapy. That's because a graduate degree in music therapy can only be earned by someone with a bachelor's degree in music.[12]

Importantly, an applicant must graduate from a program approved by the American Music Therapy Association (AMTA). According to the AMTA, there are only two such programs in Florida: Florida State University and the University of Miami.[13] The current estimated range of cost of attendance for four years at Florida State is $80,692-$141,356, depending on the student's residency and housing situation, and an estimated $249,368 at Miami.[14] As a result, the prospective music therapists forced to attend or re-enroll in school as a prerequisite to sitting for the CBMT exam must do so at great expense, and select between all of two choices, or move or travel to enter an out-of-state program.

Second, applicants must undergo 1,200 hours of clinical training before sitting for the exam. For comparison, Florida only requires about 270 hours for emergency medical technicians, and only about 930 hours of training for massage therapists.[15] It is absurd to suggest that music therapy warrants more than five times the amount of training required for emergency medical services–on which people's lives depend. Furthermore, since most people will now have spent the time and

money to earn a college degree in music therapy, requiring thirty weeks of training before they can seek certification creates an outrageously substantial added burden for prospective music therapists.

In sum, SB 204 imposes well over four years of training and tens of thousands of dollars in costs. Some prospective music therapists may even be forced to travel or move out of state to comply with it. And once all that is completed, the prospective therapist still must pass an exam. As should now be evident, even though a registration system may sound innocuous, SB 204 erects significant barriers to entering the music therapist profession, and actually functions as a license because, under the bill, only registered music therapists are authorized to practice in Florida. At a minimum, proponents of this bill should be required to show why such barriers are needed to protect the public.

Abuse of occupational licensing laws

With such significant costs and burdens associated with occupational licensing, it is reasonable to wonder how licensure has come to be so prevalent in the first place. Occupational licensing laws have a long, sordid history rooted in discrimination based on race and national origin.[16] Though they are now typically justified as necessary to protect health and safety, licensing statutes are usually requested by the industry members themselves. This is because many want to limit their competition and raise prices by taking advantage of government-imposed barriers and restricting the number of people allowed to enter the profession.

Unfortunately, music therapists have taken advantage of their organizational skills and are actively engaged nationwide in exactly these efforts to exclude new therapists from entering the field. Since 2005, AMTA and CBMT have been involved in a joint "State Recognition Operational Plan."[17] Implementation of that plan has resulted in the creation of "state task forces" in thirty-five states.[18] To provide additional support, regional organizations have also been formed. The Southeastern Region of the AMTA,[19] providing coverage from Kentucky to Florida, has six active state task forces, including one in Florida. To date, these efforts have succeeded in convincing four states to license music therapists and three to implement registration requirements.[20] Currently, industry members are trying to add Florida and seven other states to that list.

Music therapists claim that other state laws necessitate licensure of their profession. They assert that existing regulations sometimes require educational and healthcare providers to have a state license, so in the absence of licensure of music therapists, current and potential clients cannot access music therapy services within educational and healthcare facilities.[21] But even assuming this is true, creating a new, burdensome, government-enforced licensing scheme that stifles entrepreneurship is not the logical way to solve the problem. Amending the existing regulations to accommodate music therapists, and enhance economic liberty for Florida citizens, makes far better sense.

Once licensing is in place, it is very difficult to repeal it if it proves unnecessary or harmful.[22] Those protected from competition have a strong interest in ensuring licensure stays in place. In fact, in the last forty years there have been only eight successful instances of delicensing a profession at the state level.[23] And, in four of those eight instances, attempts to relicense the profession soon followed.[24]

That is why it is vital that the legislature determine that a license is truly necessary to protect the public–not vested interests–before enacting a tremendously burdensome law.

Occupational regulation can offend the U.S. Constitution

SB 204 does not just burden the right to earn a living; it also burdens speech. AMTA defines music therapy as "the clinical and evidence-based use of music interventions to accomplish individualized goals..."[25] In practice, a music therapist "provides the indicated treatment including creating, singing, moving to, and/or listening to music."[26] These speech activities are fully protected by the First Amendment.

Government restrictions on speech "must demonstrate that the harms" it seeks to address "are real" and that the restriction "will in fact alleviate [those harms] to a material degree."[27] The legislature cannot rely on speculation, it must "base its conclusions upon substantial evidence."[28] If SB 204 is signed into law and subsequently challenged in court, the burden of proving the speech restriction's efficacy will fall on the government.[29]

In 2014, the District of Columbia Circuit Court of Appeals struck down a license requirement for tour guides in Washington, D.C. under the First Amendment because the government failed to show any evidence that the dangers it claimed unlicensed professionals presented actually existed.[30] Even assuming the harms existed, the Court still would have struck down the law because a licensing system that created a barrier to entering the profession was not "narrowly tailored" to prevent harm from unqualified tour guides.[31]

Helpfully, the Court offered three examples of actions the District could have taken that would have been less restrictive–and satisfied narrow tailoring–while still effectively protecting the public from any alleged harms.[32] Most relevant to music therapy, one of the Court's examples was a voluntary certification program.[33] In other words, the Court recognized that the availability of voluntary certification would provide the public with a reliable source of qualified practitioners without erecting unnecessary barriers to free speech and the right to earn a living.

As in that case, the government and the various music therapist organizations calling for regulating their profession have failed to provide evidence of any harms that require this legislation. Perusal of the several websites advocating for licensure and registration do not mention any harms that unqualified music therapists cause. In fact, it puzzles the mind to imagine what real harm could result from music therapy performed by someone who is "unqualified."

Even if playing Mozart when Beethoven is more appropriate could be said to cause "harm," the government would have a hard time proving that this law, with its burdensome provisions, is narrowly tailored to preventing that harm. This last point proved to be fatal in the D.C. tour guides case. Just as tour guides had ample incentives beyond government prerogatives to perform well, or to obtain voluntary certification, music therapists do too. As a result, a license provides nothing that voluntary certification and market forces do not already create. While Florida may certainly forbid

music therapists from engaging in fraud or dishonesty, or impose licensing requirements that actually advance some public safety concern, SB 204's unjustified and burdensome requirements are unconstitutional.

Conclusion

Implementation of new licenses, especially when disguised as registration, should be opposed when it does not protect the health and safety of the public, harms entrepreneurs, and offends constitutional values. The voluntary certification program created by the CBMT for music therapists, the MT-BC, adequately creates industry standards and protects the public without a new state law. And through their lobbying efforts, the AMTA and the various task forces have shown themselves to be perfectly capable of creating awareness of their profession without needing official government "recognition" through licensing.

In agreement is California Governor Jerry Brown (far from a *laissez-faire* deregulator), who recently vetoed a bill that would have merely regulated music therapists' use of the descriptor, "board certified." He viewed this as unnecessary in light of the CBMT credential. This established, voluntary certification program gives consumers enough resources to choose a qualified music therapist without government intervention. State regulation causes direct social and economic harm to others, and is the wrong medicine for patients who may benefit from wider, not narrower, availability of music therapists. SB 204 is bad for consumers, bad for entrepreneurs, and unconstitutional.

Sincerely,

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1. *Barksy v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

2. Dept. of Treasury Offc. of Econ. Pol'y, et. al., *Occupational Licensing: A Framework for Policymakers* 3 (July 2015); https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

3. *See* Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Kalamazoo: Upjohn Institute for Employment Research, 2006).

4. *See Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) ("private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest").

5. Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism?* 3 (Kalamazoo: Upjohn Institute for Employment Research, 2011).

6. Dick M. Carpenter II, Ph.D., *et. al.*, *License to Work: A National Study of Burdens from Occupational Licensing* 54 (Institute for Justice, 2012).

7. Kleiner, *supra* note 5 at 2-3.

8. *See* David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers* (Institute for Justice, 2009).

9. CS for SB 204 § 3.

10. Program for Board Certification in Music Therapy, *Candidate Handbook* (The Certification Board for Music Therapists, June 2015), http://www.cbmt.org/upload/CBMT_Handbook_2015.pdf.

11. CBMT Recertification FAQ, http://www.cbmt.org/recertification/recertification-faq/.

12. Unlike other graduate programs, music therapy is more restrictive. Florida State University and the University of Miami do not allow entry into their graduate program unless the applicant has an undergraduate degree in music therapy or music. Florida State goes further in requiring even those with undergraduate music degrees to complete an additional equivalency program in music therapy. *See* Florida State University, College of Music Degree Programs: Music Therapy Equivalency, http://www.music.fsu.edu/Areas-of-Study/Music-Therapy/Degree-Programs; *see also* University of Miami Music Therapy Program Degrees, http://www.miami.edu/frost/index.php/music_therapy/degrees/.

13. Search result for AMTA-approved schools in Florida, https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=amta2&WebCode=OrgResult&FromSearchControl=Yes&FromSearchControl=Yes.

14. *See* Freshman Finances, Undergraduate Costs 2015-2016, http://admissions.fsu.edu/freshman/finances/; University of Miami 2015-2016 Cost of Attendance, http://www.miami.edu/admission/index.php/ofas/undergraduate/costofattendanceug/.

15. Carpenter, *supra* note 6 at 54-55.

16. *See* Timothy Sandefur, *Testimony to the U.S. Commission on Civil Rights Briefing on Regulatory Barriers to Entrepreneurship and Consequences for Civil Rights* (Pacific Legal Foundation 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206438.

17. *Implementation of AMTA and CBMT State Recognition Operational Plan* (American Music Therapy Association), http://www.musictherapy.org/policy/stateadvocacy/ (last visited December 8, 2015).

18. *Id*.

19. *State Organizations* (Southeastern Region of the American Music Therapy Association), http://www.ser-amta.org/state-organizations/ (last visited January 4, 2016).

20. *Music Therapy Licensure Legislation Signed into Law!* (American Music Therapy Association), http://www.musictherapy.org/policy/stateadvocacy/ (last visited December 8, 2015) (North Dakota and Nevada created licenses in 2011, Georgia in 2012, and Oregon in July, 2015); *State Licensure* (The Certification Board for Music Therapists), http://www.cbmt.org/examination/state-licensure/ (last visited January 5, 2016) (Wisconsin, Utah, and Rhode Island have created registration schemes).

21. *State Recognition: Licensure FAQ*, (The Certification Board for Music Therapists), http://www.cbmt.org/advocacy/state-recognition/ (last visited December 8, 2015).

22. *See generally* United States Bureau of Labor Statistics, *The de-licensing of occupations in the United States*, (Monthly Labor Review, May 2015).

23. *Id*.

24. *Id*.

25. *What is Music Therapy?* (American Music Therapy Association), http://www.musictherapy.org/about/musictherapy/ (last visited December 9, 2015).

26. *Id*.

27. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

28. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1996).

29. *Edwards v. District of Columbia*, 755 F.3d 996, 1003 (D.C. Cir. 2014) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001).

30. *Id*. at 1009.

31. *Id*.

32. *Id*.

33. *Id*.