

# Are National Certification Prerequisite Changes a “State Action”?

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Recent actions by the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB) to change prerequisites, apparently without wide public notice and review, have raised a number of questions and concerns within the profession [7,9]. Part of the concern derives from questions about whether the NCBTMB is acting as a private organization or as an agent of the state. A public regulatory body has a greater responsibility for due process, public input, and determination of benefits and detrimental effects of any regulatory changes it makes. This accountability should not dissipate into thin air when a public body outsources (i.e. hires an agent or contracts out) part of its regulatory function but must remain with the public agency. The responsibility to insure that changes are made under due process, however, can remain with the public body or be taken on by the private agent.

A fully private organization does not have the same level of accountability – normally. The NCBTMB, however, has not only not acted to protect its role as a voluntary certification agency (similar to protecting a trademark), it has actively lobbied to, as an effective sole provider of massage certification, to be written into laws and ordinances. In short, it has worked successfully to act as an agent of multiple public agencies. It also received economic benefit from this arrangement of acting as a certifying agent for public agencies.

There is a legal question of whether the NCBTMB takes on the mandate for public due process in being willing to act as an agent via public agency mandate. If so, they would be required to hold hearings and to file a report assessing benefits and detriments. They might not be held to the exact requirements of each separate mandating body, but it would be reasonable to expect an accountability process typical of such public bodies and seeking input from all affected.

If NCBTMB does not assume the responsibility to the affected public with becoming a state actor, as appear to currently be the case, then the requirement for such process would remain with the public agency. In short, each agency could be legally held to be responsible to receive input, assess benefits and detriments, and determine whether to maintain use of the NCE, eliminate such use, or suspend use to ameliorate short term effects when NCBTMB changes requirements. An example of such amelioration would be to suspend use to allow time for a typical school curriculum development / state-approval cycle to occur. The following two quotes underline both the current lack of due process and the need for accountability in a public mandate.

*ABMP disagrees with the process, specifics, and timeframe of the decision to change requirements for the National Certification Examinations [9].*

*However, the closer the private entity's function is to one that (1) would have been actionable if performed by a governmental entity and (2) was traditionally and exclusively performed by the state, the more likely that the court will find the entity to be a state actor. Applying this analysis, aggrieved applicants and recipients should be able to challenge eligibility*

*determinations and sanctions rendered by private contractors to the same extent as when those decisions are undertaken by a local governmental actor [3].*

In order to establish the NCBTMB as a "state actor", a determination would have to be made that they were both an actively willing and specific designee of state mandates and that they were performing a function normally reserved to state and/or local government. Speaking of willingness, the NCTMB was not reserved as a voluntary certification or set of certifications. The NCBTMB could have protected voluntary status simply by certifying only those already licensed to practice (state or local) and protesting if the certification were otherwise used. The concept of protection here is similar to protecting a trademark or in protecting private property from becoming a public right-of-way (easement of prescription) by not allowing use without protest. Instead, the NCBTMB have both allowed and actively lobbied for, as pretty much a sole provider of entry level certification, being mandated as a private determiner of licensing eligibility. They are thus denied the remedy of a claim to being a purely voluntary certification unwittingly included in public mandates. The NCBTMB also can not claim that the mandate was unspecific since, in most cases, the mandate would not have been feasible except for the exam established by the NCBTMB. Infeasibility here has the sense that regulative wording such as "require passage of a national certification exam administered by a certifying agency approved by NOCA/NCCA" would have amounted to a *de facto* ban on practice.

The NCBTMB is thus seen to be both an explicitly willing and specific designee of mandates requiring national certification. Moreover, determination of eligibility of licensing is a role reserved to government. There is thus considerable basis for a determination that the NCBTMB were acting in the role of an agent of the state, county, or city in determining eligibility of applicants to license for practice of massage, even if that determination was partial.

In this role, they are acting as an agent of government (i.e. a "state actor"), since it is government that reserves the legal right to set restrictions on eligibility for practice. It is in this sense that due process and input/response from/to the entire regulated community, the public accountability associated with regulatory changes, become important in changing prerequisites.

Adding new certifications, even with new prerequisites, is not so much a problem, as long as the original method and conditions of satisfying a government mandate is maintained.

## **References**

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Author's Notes: Many of the articles above for which an online URL was not given are within the InfoTrack/OneFile® database and will often be available online via local public library subscriptions. Several articles, including some not referenced here, are part of a conference and symposia documented in the June 2001 issue (28:5) of the Fordham Urban Law Journal.