

April 24, 2017

State Medical Board of Ohio  
30 E. Broad Street, 3rd Floor  
Columbus, OH 43215

Re: Confidential Monitoring Program

Dear Medical Board Members,

On behalf of the Medical Association Coalition (MAC) and entities referenced below, we are submitting this letter to share our collective view on the development of the State Medical Board of Ohio's confidential monitoring program and corresponding proposed rules 4731-28-02, 4731-28-03, 4731-28-04, and 4731-28-05. This is being submitted in response to the request for comment in a communication dated April 10, 2017.

This response represents our best effort to offer a common position statement and to submit concerns about this proposed change. Working with you and your colleagues, we are confident that we can develop a comprehensive solution to assist licensees who are dealing with mental or physical illness. We appreciate your dedication to this issue and your continued willingness to work with the medical associations.

We have concerns that the program as drafted determines entry into the confidential monitoring based on diagnosis or condition and not conduct, is not truly confidential, could aggravate existing mental or physical health conditions, and lacks adequate due process.

**Board Confidential Monitoring is based on diagnosis or condition *not* related to conduct:**

- Eligibility for entry into the program appears to be based on diagnosis or condition and not related to conduct. The proposed rules specifically mention conditions that, if granted entry into the non-disciplinary program, would require monitoring for the duration that a license is held without requiring any evidence of conduct that impairs ability to practice.
- The proposed rules define conditions as any "significant degenerative/progressive condition". Any illness could be considered progressive without treatment allowing for discretionary application of this ongoing monitoring requirement;
- There is no definition of "significant" which allows for discretion of monitoring requirements and establishing unnecessary length of monitoring terms.

**Program not truly confidential/Aggravation of Mental or Physical health conditions:**

- While the program is considered to be 'non-disciplinary' it would still be managed by the State Medical Board of Ohio. It suggests that the program would be 'confidential' but members of the Board and Board staff will have access to licensees' medical records, progress notes from treatment, diagnosis and prognosis. Most licensees are very reluctant to have their licensure board be privy to this type of information.
- Lack of confidentiality will have a chilling effect on licensees seeking treatment when needed.
- Participation in the Board's investigative and monitoring processes may result in progression of mental health conditions as a result of additional burdens and stigma.
- Does not account for dual disorders where the individual may be participating in the confidential One-Bite program for a substance use disorder.

**Lack of Due Process:**

- The program allows for the Board and staff to use discretion in determining entry into the program, identification of what would disqualify continued participation, and termination from the program;
- The participation agreement requires treatment acceptable to the Secretary/Supervising Member. The Secretary and Supervising Members of the Board are not required to be physicians and/or be psychiatrists or the specialty of the condition of concern;
- Participation is described as voluntary and confidential; however, unwillingness to sign the non-disciplinary program agreement will result in formal disciplinary proceedings;
- Ongoing compliance with the participation agreement shall be monitored by appropriate board staff; however, staff does not have appropriate clinical training or credentials to adequately oversee treatment plans;
- Physicians will be deemed disqualified for any alleged violation under the sole discretion of the Secretary/Supervising member. Disqualification at any time results in automatic formal disciplinary proceedings;
- Disqualifications include any allegations or conduct even if the board is unable to conclusively confirm the credibility of the allegations and even if it is unrelated to the condition; and
- Disqualifications include any allegation or conduct related to: convictions, charges, or evidence demonstrating acts constituting a felony or misdemeanor at any time and unrelated to the condition.

Additionally, the participation agreement is listed as confidential pursuant to R.C. 4731.22(F)(5), implying that any participant in the confidential program is under “investigation” for as long as he/she remains under the agreement. Credentialing with hospitals, Medicare, Medicaid, DEA, etc. often require disclosure of any open or pending investigation of their medical license, their confidentiality may be defeated by virtue of mandated disclosure of the agreement (and their medical condition) by the licensee in other health care arenas. Participation in the monitoring program may also result in loss of Board Certification due to the ongoing investigation status.

We also have additional concerns of the disqualification of eligibility. The proposed rules identified that a licensee would be denied entry to the confidential program for conduct that does not constitute a violation of the medical practices act. Most traffic violations are misdemeanors and other traffic violations may result in a conviction of a felony or misdemeanor but are not disciplinary offenses under R.C. 4731.22.


We would also like to identify that the minimum length of monitoring has been identified as two (2) years but there are many situations where this may not be appropriate. An example would be a single-year fellowship program pursuant to a one (1) year training certificate.

We believe as drafted, the program will likely not reduce the number of individuals receiving formal disciplinary action and may result in additional physicians and other licensees receiving monitoring agreements who disclose they have a history of mental illness and/or physical illness.


While we believe the intent of the development of this program was a positive one, we have concerns that many of the practices of the program may be in violation of the Americans with Disabilities Act. We would like to share with you the findings of the United States' Investigation of the Louisiana Attorney Licensure System Pursuant to the Americans with Disabilities Act (DJ No. 204-32M-60, 204-32-88, 204-32-89) as well as the settlement agreement between the United States of America and the Louisiana Supreme Court. We believe you will find similarities in practices proposed in the Medical Board's confidential program to those found to be prohibited in this case.

We appreciate the opportunity to provide comment on these rules and would kindly request the use of the small working group of the Medical Board and the Ohio Physicians Health Program to find a mutually agreeable solution. We believe that the use of this small working group and collaboration on the One-Bite changes led to a positive outcome for both parties. We anticipate that the same can be accomplished with this issue and look forward to additional discussion.

Sincerely,



Robyn Chatman, MD, MPH, FAAFP, CPE, CPHIMS, CHEP  
President, Ohio State Medical Association



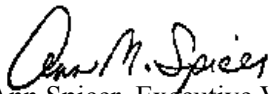
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