VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
PRELIMINARY SUNRISE ASSESSMENT: ART THERAPY (2016/17)

In 2014, the Art Therapy Association of Vermont (ATAV) and its parent organization, the American Art Therapy Association, filed with the Office of Professional Regulation (OPR) an *Application for Preliminary Sunrise Review Assessment*.[1] The associations proposed to remove art therapists from the ambit of the Board of Allied Mental Health Practitioners, which licenses counseling professionals and registers psychotherapists without regard to modality, and to establish, through a new chapter in Title 26, a distinct art therapy license directly administered by the Director of Professional Regulation.

OPR conducted a preliminary sunrise analysis. In a report submitted to the Legislature January 9, 2015[2], the Office recommended against creating a new regulatory structure specific to art therapists, concluding "that existing regulation of art therapists adequately protects the public."[3]

The associations disagreed with the 2015 recommendation, arguing that OPR's first analysis had misunderstood aspects of their proposal, and more important, that new developments among non-governmental mental-health-education accrediting bodies created new urgency around separate licensure. In view of these concerns, new legislative developments outside the State, and ongoing legislative interest inside the State, the House Committee on Government Operations asked that OPR take in new information and conduct a new sunrise assessment.

I. Legal Standards and Analytical Structure

Vermont law sets clear policies and objective standards for legislative review of proposed licensing statutes. *See* 26 V.S.A. Chapter 57. In short, the law calls for a structured cost-benefit policy analysis of proposals for new professional regulation. The law places unambiguously upon the proponents of new regulation the burden to demonstrate the genuine necessity of that regulation to the protection of the public.

> ***It is the policy of the State of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public.*** *The General Assembly believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the State to protect the interests of the public by restricting entry into the profession or occupation.* ***If such a need is identified, the form of regulation adopted by the State shall be the least restrictive form of regulation necessary to protect the public interest****. If regulation is imposed, the profession or occupation may be subject to review by the Office of Professional Regulation and the General Assembly to ensure the continuing need for and appropriateness of such regulation.*
> --26 V.S.A. § 3101 (subsection labels omitted; emphasis added).

[1] 2014 *Application for Preliminary Sunrise Review Assessment*, available at: https://www.sec.state.vt.us/media/522903/Art-Therapy_Application-for-Preliminary-Sunrise-Review-2014.pdf.
[2] Winters, C.; *Art Therapists Sunrise Application Review: Preliminary Assessment on Request for Licensure*, available at: https://www.sec.state.vt.us/media/664176/Art-therapist-Sunrise-Report-2015-0109.pdf.
[3] *Id*, p. 12.

"Any new law to regulate [a] profession or occupation shall be based on the relevant criteria and standards in [26 V.S.A. § 3105]." *Id*. § 3102(c). "Prior to review … and consideration by the General Assembly of any bill to regulate a profession or occupation," OPR is to prepare for the Legislature a preliminary, written assessment of whether a "request for regulation meets the criteria set forth in [26 V.S.A. § 3105(a)]." *Id.* § 3105(d). OPR "shall base its written preliminary assessment upon information contained in the request for regulation, oral comments received at the public meeting, written comments submitted after the public meeting, its own budget analysis, and any other information pertinent to the request." CVR 20-4-1: 2.3.

Section 3105(a) provides:

> *A profession or occupation shall be regulated by the state only when:*
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> *(1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;*
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> *(2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and*
>
> *(3) the public cannot be effectively protected by other means.*

If and only if regulation of the profession is found necessary by the Legislature based upon the § 3105(a) criteria "and considering governmental and societal costs and benefits," then "the least restrictive method of regulation shall be imposed, consistent with the public interest" and the policies set out at *id.* § 3105.

Chaper 57 recognizes a three-part hierarchy of regulation: registration, certification, and licensure:

> ***"Registration"*** *means a process requiring that, prior to rendering services, a practitioner formally notify a regulatory entity of his, her, or its intent to engage in the profession or occupation. Notification may include the name and address of the practitioner, the location of the activity to be performed, and a description of the service to be provided*
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> * * *
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> ***"Certification"*** *means a voluntary process by which a statutory regulatory entity grants to a person who has met certain prerequisite qualifications the right to assume or to use the title of the profession or occupation, or the right to assume or use the term "certified" in conjunction with the title. Use of the title or the term "certified," as the case may be, by a person who is not certified is unlawful.*
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> * * *
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> ***"Licensing"*** *and* ***"licensure"*** *mean a process by which a statutory regulatory entity grants to a person who has met certain prerequisite qualifications the right to perform prescribed professional or occupational tasks and to use the title of the profession or occupation. Practice without a license is unlawful.*
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> --26 V.S.A. § 3101a(7), (1), & (2) (ordered respectively; emphasis added).

The law establishes five enumerated policies by which to identify the least restrictive regulatory response:

> *(1) if existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions;*
>
> *(2) if a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners;*
>
> *(3) if the threat to the public health, safety, or welfare including economic welfare is relatively small, regulation should be through a system of registration;*
>
> *(4) if the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification; or*
>
> *(5) if it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed.*
> -- 26 V.S.A. § 3105(b)(1)-(5).

Finally, Chapter 57 requires that proponents of new regulation explain ten factors judged by the Legislature to be relevant to sunrise analysis. These ten factors are substantially incorporated in the sunrise review application form promulgated by OPR and completed by applicants for regulation. They are:

> *(1) Why regulation is necessary …*
>
> *(2) The extent to which practitioners are autonomous…*
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> *(3) The efforts that have been made to address the concerns that give rise to the need for regulation…*
>
> *(4) Why … alternatives to licensure … would not be adequate to protect the public interest…*
>
> *(5) The benefit to the public if regulation is granted…*
>
> *(6) The form and powers of the regulatory entity…*
>
> *(7) The extent to which regulation might harm the public…*
>
> *(8) How the standards of the profession or occupation will be maintained…*
>
> *(9) A profile of the practitioners in this state, including a list of associations, organizations, and other groups representing the practitioners including an estimate of the number of practitioners in each group.*
>
> *(10) The effect that registration, certification, or licensure will have on the costs of the services to the public.*
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> --26 V.S.A. § 3107 (omitting more descriptive subcategories).

II. Supplementary Questions, Submissions, Comments, and Hearing

To avoid duplication of effort, ATAV was invited to let its 2014 application stand and to provide a 2016 supplement.[4] The Office sought first to elicit correction of any errors in the 2015 sunrise analysis, and second to elicit focused responses in those areas that drove the conclusions in the first analysis. ATAV provided a helpful and comprehensive reply, identifying points of factual dispute in the 2015 analysis and supplying supplemental information.[5]

OPR published a sunrise website[6] to elicit public comment on the proposal and to advertise a public hearing. A hearing Friday, October 28th, 2016, was broadly advertised to ATAV's membership and OPR licensees in the mental health professions. The hearing was broadcast by webinar to facilitate participation by interested parties unable to be present in Montpelier. A dedicated email address was established to receive public comment.

III. Existing Landscape for Art Therapists in Vermont

Most applications for new regulation under Chapter 57 invite the State to involve itself for the first time in regulating a profession or occupation that is wholly unregulated. That is not the case here. Situated as they are among the counseling and therapy professions, art therapists already are regulated under a thick blanket of State law—just not by name. Consequently, in this analysis, as in the 2014 analysis that preceded it, the relevant question is not whether the unregulated marketplace for art therapy services harms the public in ways that might be mitigated by regulation, but instead, whether State regulation of therapists and counselors harms the public by treating those professions generally, without a specific license distinguishing art therapists from other therapists.

Today, professionals wishing to offer art therapy to the public may do so in a number of recognized and regulated professional roles. Art therapy may be employed as a treatment modality by, among others, a psychologist licensed under Chapter 55 of Title 26; a psychiatric nurse practitioner licensed under 26 V.S.A. § 1611; a psychoanalyst certified under Chapter 77 of Title 26; an independent clinical social worker licensed under 26 V.S.A. § 3205; a clinical mental health counselor (LCMHC) licensed under Chapter 65 of Title 26; or a marriage and family therapist licensed under Chapter 76 of Title 26. A person ineligible for any of those licenses or certifications could yet register to be placed on the Roster of Psychotherapists who are Nonlicensed and Noncertified, under Chapter 78 of Title 26.

In a sense, legislators and regulatory authorities already have done the work of identifying what core competencies or other requirements should attend various types of licensed counseling and therapy. Over time, they have delivered a robust continuum of regulatory programs. Recalling the hierarchy of regulatory responses discussed in the preceding section, these programs span from mere registration, on the Roster, to full licensure predicated upon doctoral-level training, for psychologists and

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[4]For the particular questions posed, *see*, Gilman, G., letter to Elizabeth Myers, LCAT, CCMHC, ATR-BC, Government Affairs Chair, Art Therapy Association of Vermont, April 15, 2016; available at: https://www.sec.state.vt.us/media/775758/elizabeth-myers-letter.pdf.

[5] For ATAV's response, including supplemental application information, *see*, Myers, L., letter to Gabriel Gilman, General Counsel, and Colin Benjamin, Director, Office of Professional Regulation, July 11, 2015, available at: https://www.sec.state.vt.us/media/775757/2016-atav-supplement.pdf.

[6] https://www.sec.state.vt.us/professional-regulation/sunrise-review/art-therapists-2016.aspx

independent clinical social workers. In an effort to unify disparate counseling professions and set common standards for licensure, the Legislature established a six-member Board of Allied Mental Health Practitioners. 26 V.S.A. § 3262a. Represented on that Board are two licensed clinical mental health counselors, one licensed marriage and family therapist, one nonlicensed and noncertified psychotherapist, and two members of the public. *Id*. § 3262a(b).

It is the law of Vermont that "No person shall practice or attempt to practice clinical mental health counseling … unless the person is licensed …" 26 V.S.A. § 3262. Although the applicants are at pains to define art therapy as a fundamentally different profession from licensed clinical mental health counseling—the obvious, master's-level box into which a naive regulator would fit them—comparison of the statutory definition of "clinical mental health counseling" to art therapists' proposed statutory self-definition shows that the latter fits neatly within the former.

> *'Clinical mental health counseling' means providing, for a consideration, professional counseling services that are primarily drawn from the theory and practice of psychotherapy and the discipline of clinical mental health counseling, involving the application of principles of psychotherapy, human development, learning theory, group dynamics, and the etiology of mental illness and dysfunctional behavior to individuals, couples, families, and groups, for the purposes of treating psychopathology and promoting optimal mental health. The practice of clinical mental health counseling includes diagnosis and treatment of mental conditions or psychiatric disabilities and emotional disorders, psychoeducational techniques aimed at the prevention of such conditions or disabilities, consultations to individuals, couples, families, groups, organizations, and communities, and clinical research into more effective psychotherapeutic treatment modalities.*
> --26 V.S.A. § 3261(2) (bolded to emphasize common terms).

Compare the proposed statutory definition of *art therapy*:

> *'Practice of art therapy' means to engage professionally and for compensation in art therapy and appraisal activities by providing services involving the application of art therapy principles and methods in the diagnosis, prevention, treatment, and amelioration of psychological problems and emotional or mental conditions that includes, but is not limited to:*
>
> > *(A) Clinical appraisal and treatment activities during individual, couples, family or group sessions which provide opportunities for expression through the creative process;*
> > *(B) Using the process and products of art creation to tap into client's inner fears, conflicts and core issues with the goal of improving physical, mental and emotional functioning and well-being;*
> > *(C) Using diagnostic art therapy assessments to determine treatment goals and implement therapeutic art interventions which meet developmental, mental, and emotional needs; and*
> > *(D) Employing art media, the creative process and the resulting artwork to assist clients to:*
> >
> > > *(i) reduce psychiatric symptoms of depression, anxiety, post traumatic stress, and attachment disorders; (ii) enhance neurological, cognitive, and verbal abilities, develop social skills, aid sensory impairments, and move developmental capabilities forward in specific areas;*
> > > *(iii) cope with symptoms of stress, anxiety, traumatic experiences and grief;*
> > > *(iv) explore feelings, gain insight into behaviors, and reconcile emotional conflicts;*
> > > *(v) improve or restore functioning and a sense of personal well-being;*
> > > *(vi) increase coping skills, self-esteem, awareness of self and empathy for others;*

> *(vii) improve healthy channeling of anger and guilt; and*
> *(viii) improve school performance, family functioning and parent/child relationship.*

--Application, p. 19 of 28 (setting out draft legislation).

The offered definition of *art therapy* describes a modality within clinical mental health counseling, a robustly regulated profession. Indeed, the definition of *clinical mental health counseling* at § 3261(2) recognizes that clinical mental health counseling cannot be a one-size-fits-all practice, and anticipates that practitioners will engage in "clinical research into more effective psychotherapeutic treatment modalities." Art therapy is one such modality, and by all accounts heard during the sunrise review, an extremely promising and important one.

The existing statutory requirements to become a clinical mental health counselor are structurally and substantively similar to those proposed for new and additional regulation of art therapists.

> *To be eligible for licensure as a clinical mental health counselor an applicant …:*
>
> *(1) Shall have completed a minimum of* ***60 graduate hours and received a master's degree or higher degree in counseling or a related field****, from an accredited educational institution, after having successfully completed a course of study as defined by the board, by rule, which included a supervised practicum, internship, or field experience, as defined by the board, by rule, in a mental health counseling setting.*
>
> *(2) Shall have documented* ***a minimum of 3,000 hours of supervised work in clinical mental health counseling over a minimum of two years of post-master's experience****. Persons engaged in supervised work shall be entered on the roster of nonlicensed, noncertified psychotherapists[7] and shall comply with the laws of that profession, and shall have documented a minimum of 100 hours of face-to-face supervision over a minimum of two years post-master's experience. Clinical work shall be performed under the supervision of a licensed physician certified in psychiatry by the American Board of Medical Specialties, a licensed psychiatric nurse practitioner, a licensed psychologist, a licensed clinical social worker, a licensed marriage and family therapist, a licensed clinical mental health counselor, or a person certified or licensed in another jurisdiction in one of these professions or in a profession which is the substantial equivalent, or a supervisor trained by a regional or national organization which has been approved by the board.*
>
> *(3)* ***Shall pass the examinations*** *required by board rules …*

--26 V.S.A. § 3265.

The Legislature could not have intended, when establishing licensure of clinical mental health counselors, that each counseling modality explored within the profession, when found to be effective, necessarily would launch a new and separate regulatory program and profession. In fact, the Legislature went out of its way to leave sub-specialty regulation to the private marketplace, specifying that

[7] Note this use of the roster, on which psychotherapists who do not fit any regulatory box are permitted to practice, but required to register with the Board of Allied Mental Health Professionals, and in turn, to provide disclosure statements to patients. Within the roster are two groups: (1) therapists ineligible for certification or licensure under state law, who intend to remain so, and (2) therapists in training for licensure, who are required to register while practicing, but who intend to graduate to a more formal credential subject to more rigorous requirements. Registration is a final destination for some; a springboard for others.

"Nothing in this chapter shall be construed to prohibit the use and incorporation into the title of a clinical mental health counselor of a professional designation issued by a nationally recognized professional licensing organization." 26 V.S.A. § 3272. Thus are Vermont-licensed clinical mental health counselors expressly permitted and encouraged to earn and use professional designations just like the ATR and ATR-BC designations that art therapists seek to make the basis of a parallel and duplicative regulatory regime.

Chapter 57 sets out a decisive legislative policy that disfavors new professional and occupational regulation unless that new regulation is justified by a compelling need to protect the public that cannot be met by other means. As we move forward in this analysis under Chapter 57, in relation to a regulatory proposal that launches one profession from within another, the questions Chapter 57 challenges us to ask are: Is the regulatory *status quo* deficient in a way that demands new regulation?

IV. Regulation Proposed

The applicants propose minimum standards for governmental licensure of art therapists substantially equivalent to those required to obtain board certification by the non-governmental Art Therapy Credentials Board.[8] The Credentials Board offers three designations:

1. The ATR credential denotes Registered Art Therapist, while neatly addressing the difficulty of making an appealing initialism of that term.

2. The ATR-BC credential denotes Board Certified Art Therapist.

3. The ATCS credential denotes Art Therapy Certified Supervisor.

Individuals who hold one of those three credentials are easily located at the Art Therapy Credentials Board's online directory, under the heading, *Find a Credentialed Art Therapist*.[9] As of January, 2016, the directory identifies 35 Vermont residents who hold either the ATR or ATR-BC designation from the Art Therapy Credentials Board.[10] Of those, only 18 hold the more senior designation, ATR-BC, that exists as a private parallel to the governmental license proposed. Two of the 18 ATR-BCs in Vermont are inactive with the Credentials Board.

The applicants propose that the General Assembly establish a licensing mandate that effectively restricts the use of the terms "art therapist" or "art therapy" by any other practitioner—whether a psychologist, mental health counselor, independent clinical social worker, psychologist, or psychiatrist— no matter how qualified he or she otherwise may be, who does not qualify for the ATR-BC. Proposed minimum standards for licensure would include:

- a master's or doctoral degree in art therapy from an accredited educational institution;

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[8] The Art Therapy Credentials Board maintains a website at https://www.atcb.org/. A handbook available at https://www.atcb.org/resource/pdf/ATR_ApplicationHandbook.pdf explains the levels of certification available, as well as application and annual maintenance fees.

[9] https://www.atcb.org/verify

[10] See 2014 *Application for Preliminary Sunrise Review Assessment,* p. 21 of 28, available at https://www.sec.state.vt.us/media/522903/Art-Therapy_Application-for-Preliminary-Sunrise-Review-2014.pdf.

- a minimum of 60 graduate credit hours in an art therapy program approved by the American Art Therapy Association, or a substantially equivalent program approved by the Director;
- 2 years consisting of not fewer than 2,000 hours of supervised art therapy experience, earned under the supervision of someone holding the ATCS credential or its equivalent, of which half followed receipt of the master's degree; and
- a passing score on the Board Examination of the Art Therapy Credentials Board.[11]

The draft legislation, at draft § 4907(c)[12] would make holders of the ATCS credential gatekeepers and guardians of the 2,000-hour supervision program required for licensure; however, at the printing of this report, only one such person resides in Vermont, according to the Art Therapy Credentials Board's website.[13] Consequently, a graduate student or recent graduate aspiring to an art therapy license would be obligated to complete a supervision program equivalent to fifty full-time weeks, where only one person in the State is known to be eligible to provide the required supervision. If Vermont is equipped to turn out exactly one new art therapist per year, one can expect that most applicants will go where the supervisors are. Maine and New Hampshire have none; Massachusetts and Connecticut each have one; New York, with a population of almost twenty million, has fourteen. To accommodate this problem, the draft legislation allows supervised experience under "[an]other qualified supervisor approved by the Director," in lieu of an ATCS. But among the in-state professionals who would fit that bill almost certainly would be licensed LCMHCs, calling further into question the practical utility of creating a parallel licensing regime to protect a subspecialty title.

Proposed coordination-of-practice language would create an exemption from art-therapist licensure as follows: "This chapter does not restrict a person licensed or certified under any other law of this state from engaging in the profession or practice for which that person is licensed or certified if that person does not represent, imply, or claim that he or she is an art therapists or a provider of art therapy."[14] This accommodation with other professions—some with doctoral-level training—would create a scenario where other qualified professionals may use art therapy, but they may not talk about it or advertise the service in terms comprehensible to consumers. Because one generally cannot provide therapy using art without implying to the observer that he or she is a "provider of art therapy," one might expect, as a consequence of the legislation proposed, that more qualified professionals are apt to stop using art therapy than to start.

Owing to (1) an exceedingly narrow path to licensure that bottlenecks at supervision, and (2) the probable effects of restrictive, art-therapy-specific title protection upon the marketplace behavior of qualified counselors and therapists holding other licenses, the regulatory regime proposed could have the paradoxical effect of sharply reducing the availability of art therapy to Vermonters.

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[11] Application, pp. 21-22 of 28, available at https://www.sec.state.vt.us/media/522903/Art-Therapy_Application-for-Preliminary-Sunrise-Review-2014.pdf.

[12] *Id*, p. 22 of 28.

[13] *See* https://www.atcb.org/verify, where a *Credential Verification Search* identifies one Burlington resident as the State's only holder of the ATCS.

[14] Application, p. 20.

V. Summary and Analysis of Arguments for and Against Regulation

Based upon information contained in the request for regulation, interviews with interested parties and regulators of other counseling professions, written comments submitted, and independent legal and public health research, substantive arguments for and against regulation are identified and discussed in separate subcategories below. *Accord*, CVR 20-4-1: 2.3.

a. Prevention of Harm

There is no evidence that the existing programs regulating the practice of art therapy cause harm to the public that could be prevented by licensing art therapists under a freestanding, modality-specific license. Instances of reputed harm arising from insufficiently-regulated persons practicing therapy using art as a modality arrived by word of mouth, without names, times, or places, and consequently were not susceptible to verification. Those instances included, for example, the story of a psychology intern inappropriately using plaster to create a mask for a troubled child, causing the child to become agitated and to get plaster in her hair. A similar story related to a psychologist unwisely giving paint supplies to a child prone to physical agitation. Also by way of illustrating harm, the applicants asserted, without reference to any specific instance, that many professionals in Vermont use body tracings of children, and that such an activity could be distinctly threatening to victims of physical or sexual abuse. This analysis has been unable to confirm that body tracing is a common practice among Vermont therapy professionals. The propositions that (1) some art materials are inappropriate for volatile clients, or (2) that body tracing may be a very threatening incursion on the physical boundaries of an abuse victim, are not very much in doubt. What is, though, is that the particular master's level training suggested for art therapists is an exclusive means of imparting awareness of those propositions.

All professionals licensed by the Office of Professional Regulation, including those who are merely registered on the Roster, may be prosecuted and disciplined for unprofessional conduct for "[p]erforming treatments or providing services which the licensee is not qualified to perform or which are beyond the scope of the licensee's education, training, capabilities, experience, or scope of practice," or "failure to practice competently," which includes, "performance of unsafe or unacceptable patient or client care." 3 V.S.A. §§ 129a(a)(13) & 129a(b). This analysis was unable to identify any disciplinary prosecution arising from the inappropriate use of art practices or art materials by any registered or licensed therapist or counseling professional.

The legal standard set out at 26 V.S.A. § 3105 is that a profession or occupation shall be regulated only when "it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative." The harms supposed in this case are distinctly remote and speculative.

b. Assurance of Competence

Over the years, the Legislature has established licensing programs in clinical social work, psychology, clinical mental health counseling, and alcohol and drug counseling—each serving to assure the consumer of these sensitive services that a particular practitioner meets minimum standards of initial and continuing professional competency. This history implies a longstanding legislative finding that the public does benefit from the assurance of initial and continuing competence derived from regulation of

counseling and therapy professions generally. But nothing suggests that this assurance is enhanced when driven to the level of the particular modality used.

Fundamentally, it is unnecessary for the government to regulate specialty practices at the suggested level of granularity, because credible, non-governmental certifying bodies offer board certifications and other assurances of competency upon which consumers, referrers, and potential employers reasonably may rely. Today, most non-governmental certifications, like most government licenses, are databased and readily available to anyone with an internet connection. Excellent examples are found in the ATR and ATR-BC credentials offered by the Art Therapy Certification Board. Existing Vermont law unambiguously permits licensed clinical mental health counselors to earn and use the ATR and ATR-BC credentials offered by the Art Therapy Certification Board.

c. Reimbursement and Access

Proponents of new regulation argue that a separate and freestanding art-therapy license would facilitate payment by insurers, governmental healthcare payers, and public school systems, thereby improving access to care. Institutional payers generally will compensate only what they can understand and verify, and licensure does much for the required understanding and verification.

For art therapists practicing as licensed clinical mental health counselors, reimbursement rarely is problematic, as the LCMHC license is broadly recognized. For art therapists practicing as rostered psychotherapists, however, reimbursement often is problematic, because payers generally insist upon licensure as a precondition to reimbursement. LCMHC licensure ensures relevant training in terms of education, practical experience, and examination. Registration on the roster does not. As between licensure as an LCMHC and registration as a psychotherapist, it should be unsurprising that payers consistently favor the enhanced assurance of competence that comes with the former. Under the policies articulated in Chapter 57, this is as it should be. Marketplace pressure, not legislative mandates, naturally encourages therapists to avail themselves of the competitive benefits of LCMHC licensure. The governmental license provides an effective means of reducing information asymmetry between therapist and client or payer, thereby reducing uncertainty in the market for professional services. That the LCMHC credential provides a competitive advantage to practitioners of art therapy, in a context where some have the lawful option to do without it, is a signal that the credential is credible, meaningful, and effective at providing the assurances it is meant to provide.

Although this analysis did find frustration among graduates of art-therapy programs with the difficulty of receiving reimbursement for services, that frustration was exclusive to graduates who did not meet minimum qualifications for the LCMHC credential. Any art therapist who meets LCMHC criteria may, under existing law, obtain that license, and with it, much broader access to reimbursement than is available without it. To the extent that graduate programs are out of alignment with minimum statutory standards for a particular license, the public may be better served when the programs conform to the licensing standard than when the licensing standard is changed for the benefit of a non-conforming program.

d. Protection from Outside Control

Urgent appeals to the states to codify in statute a separate and parallel regulatory apparatus for art therapists arise from anxiety that national accrediting bodies are planning to standardize counselor

education in a manner that will marginalize art therapists and diminish the value of art-therapy degrees within the regulatory landscape. Asked what has changed since 2014, ATAV explains:

> *Of continuing concern is the progress that has been made by the National Board of Certified Counselors (NBCC) to define counseling more precisely and distinguish it more clearly from other "helping professions" as a clinical mental health discipline. The NBCC has moved aggressively to create a uniform image and training standards for all counselors based on the Council for Accreditation of Counseling and Related Educational Programs (CACREP) criteria. The united effort of the NBCC and other professional counseling groups has resulted in changing licensing standards in increasing numbers of states and eliminating licensing options for art therapists and others with counseling-related degrees. When AATA initially described this effort by the NBCC during the July 2014 San Antonio national art therapy conference, it was noted that 17 states (out of the 40 states that have AATA chapters or member groups seeking licensure) had adopted CACREP-only degree requirements or CACREP or equivalent degree requirements for counseling licenses. Some of the standards for the CACREP equivalent degrees were written so tightly as to apply only to CACREP-accredited programs or those in the process of gaining accreditation. Since that time, 8 additional states have enacted similar restrictions on counselor licenses, most recently in Connecticut. At least one additional state, Virginia, is completing a regulatory process to do so.*[15]

If art therapists saw the world with the prudent skepticism of a regulator, and if all regulators were prudently skeptical, there would be less cause for anxiety all around. Excessive and unmonitored delegation to accrediting bodies is a tendency inherent to governmental licensing, and one we must be careful to check. But unwise policy in other states does not portend, and certainly does not compel, unwise policy in this one.

Importantly, this analysis found nothing to suggest malign intent or malignant output emanating from CACREP and the NBCC. Accrediting bodies exist, in some sense, to eliminate options. Anyone who sets a standard eliminates the options below that standard. Seen in this light, an accrediting body working hard to enforce consistent training standards and uniformity among academic programs is an accrediting body doing its job.

More important, the applicants' underlying fear— that Vermont regulators "will adopt CACREP-only degree requirements or CACREP or equivalent degree requirements for counseling licenses"—is unwarranted. The *Administrative Rules of the Board of Allied Mental Health Practitioners* wisely avoid delegating, to CACREP or to any other non-governmental body, untrammeled authority to define what degrees are acceptable for licensing in Vermont. The rule governing acceptable non-CACREP degrees, CVR 04-030-350, § 3.8, Sub-Part- A, stands as the State's existing, independent standard of mandatory degree content, and consequently bears reproducing in full:

> *(a) To be considered an "acceptable" master's or higher degree in "counseling or a related field," the degree must contain no fewer than 3 graduate credits in "Diagnosis, Assessment and Treatment."*
>
> *(b) Diagnosis, Assessment and Treatment means: studies that provide an understanding of psychopathology. Studies in this area include the Diagnostic and Statistical Manual and its use in counseling, and assessing psychopathology. The course shall also include the development of*

[15] Myers, pp. 2-3.

treatment plans and the use of related services, and the role of assessment, intake interviews, and reports, if that material is not covered in another treatment course.

(c) If the degree does not contain 3 graduate credits in Diagnosis, Assessment and Treatment, the degree does not qualify as a degree in "counseling or a related field" and cannot be used as the basis for licensure as a clinical mental health counselor. The course work in Diagnosis, Assessment and Treatment must be completed within the degree conferred. This deficiency cannot be remedied by taking post degree course work. It cannot be supplemented.

(d) The degree must contain course work from no fewer than five of the seven areas (1) through (7) below:

> ***(1) Human Growth and Development:*** *3 Graduate credits. Studies that provide an understanding of the nature and needs of individuals at all developmental levels throughout the life span. Studies in this area would include theories of individual and family development and transitions across the life span, and theories of learning and personality development.*
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> ***(2) Theories:*** *3 Graduate credits. Studies that survey counseling theories (e.g., Psychodynamic, Humanist, Behavioral, Transpersonal) and their historic and functional relationship to specific counseling approaches (e.g., Cognitive Behavior Therapy, Psychoanalysis, Family Systems, Solution Focused Therapy, Rational Emotive Therapy).*
>
> ***(3) Counseling Skills:*** *3 Graduate credits. Studies that provide an understanding of the counseling and consultation processes, development of student self-awareness, and the skills necessary for developing a positive therapeutic relationship.*
>
> ***(4) Groups:*** *3 Graduate credits. Studies that provide an understanding of group development and group dynamics. Studies in this area would include group counseling theories, group counseling methods and skills, group leadership styles, and other group work approaches.*
>
> ***(5) Measurement:*** *3 Graduate credits. Studies that provide an understanding of group and individual educational and psychometric theories and approaches to measurement. Course work would cover data and information-gathering methods, validity, reliability, psychometric statistics, factors influencing measurements, and use of measurement results in the counseling process.*
>
> ***(6) Professional Orientation and Ethics:*** *3 Graduate credits. Studies that provide an understanding of the professional counselor's roles and functions. Course work would cover professional counseling organizations and associations, history and trends within the counseling profession, ethical and legal standards, and counselor preparation standards and credentialing.*
>
> ***(7) Treatment Modalities:*** *3 Graduate credits. Studies that provide an understanding of specific treatment approaches such as Cognitive Behavioral Therapy, Feminist Therapy, Narrative Therapy, and Psychoanalytic Psychotherapy. Studies will focus on one or more modalities. Emphasis will be placed upon the application of theories to practice, including case conceptualization and corresponding therapeutic interventions.*

(e) If the degree does not contain the required credits in 5 of the 7 areas, the degree does not qualify as a "degree in counseling or a related field." It cannot be used as the basis for licensure as a clinical

mental health counselor. This deficiency cannot be remedied post degree. It cannot be supplemented.

(f) The degree must contain a supervised internship of at least 600 hours, as set forth below.

(g) A degree based from a program with fewer than 600 hours of supervised internship does not qualify as a degree in "counseling or a related field" and cannot be used as the basis for licensure as a clinical mental health counselor. This deficiency cannot be remedied post degree. It cannot be supplemented.

The rule above mandates, as a prerequisite to degree acceptance for the LCMHC credential, satisfactory credit hours in at least five of the seven counseling-related topics enumerated. The holder of a degree accepted with fewer than seven of the enumerated categories satisfied must make up the remainder post-degree. CVR 04-030-350, § 3.8, Sub-Part-B(a). To complete the argument that LCMHC degree requirements are excessive or irrelevant, proponents of art-therapist regulation would identify which of those seven core areas reasonably are expected of all LCMHCs except those who specialize in art therapy. That has not been done.

Though arguments against the application of LCMHC *degree* requirements to art therapists are unavailing, art therapists argue persuasively that *course* requirements[16], found just below, at CVR 04-030-350, § 3.8, Sub-Part- B(b), are strikingly rigid and of dubious relevance to the practice of art therapy. Specifically, LCMHC candidates must earn three graduate credits each in (1) multi-cultural studies, (2), research and evaluation, and (3) career development and lifestyle appraisal. Art therapy degree commonly satisfy Sub-Part-A requirements, but without satisfying Sub-Part-B career-development courses. Graduates of rigorous art-therapy degree programs understandably chafe at the result: many must return to graduate school to earn credits in career development and lifestyle appraisal, further described as including "studies that provide an understanding of career development theories, occupational and educational information services, career counseling, and career decision making."

Few art therapists or aspiring art therapists work through career issues with clients. To them, this LCMHC licensing requirement appears uniquely arbitrary and odious. The efficient solution, though, is not the establishment of a new regulatory program, but rather prompt review and reform, if warranted, of CVR 04-030-350, § 3.8, Sub-Part- B course requirements. This relatively simple fix would resolve the overwhelming majority of equity, mobility, and reimbursement problems described by commenters and hearing participants.

e. Balkanization: Regulating Modalities and Specialties vs. Core Competencies

Government regulation of professions and occupations historically has worked by gathering professional communities, defining core competencies common across each profession, codifying those in law or regulation, and then judiciously declining invitations to adjudicate, in the absence of compelling

[16] The distinction takes some chewing: Five of the seven *degree* content categories must have been part of the curricular program leading to a degree, or the degree is ineligible for recognition. *Course* requirements, by contrast, may be supplemented post-degree. Graduates of art-therapy programs, and other forms of modality-specific therapy curricula, earn much more *modality* credit than is required. This excess goes to waste under the existing LCMHC licensing rules. In view of the growth of quality, modality-specific curricular programs, regulations should be modernized to permit substitution of excess modality-based credit for mandatory credit requirements of dubious relevance, career-development conspicuous among them.

evidence, intra-professional disputes about which of a competing set of approaches, techniques, theories, or methods is best. In one telling, this is how progress toward professionalization is made. Where the government steps in prematurely to legislate winners and losers among competing modalities, the intrusion may harm the public by retarding innovation and freezing practitioners in old ways. As a general principle of professional regulation, we can most effectively and efficiently regulate a field by focusing on the health of its trunk rather than describing in law the nooks and crannies of its branches and leaves. This principle is the raison d'être for the Board of Allied Mental Health Professionals. Governmental nano-credentialing of the type proposed would risk advancing the professional fragmentation the Board of Allied Mental Health Professionals was created to prevent and cure.

That the government should stay out of nano-credentialing does not mean that specialty certifications have no utility. Where they offer market utility, specialty certifications tend quickly to become available from non-governmental certifying boards focused upon one or another specialty springing from core profession. To see this phenomenon in action, one need look no further than the Art Therapy Credentials Board, which will offer the ATR or ATR-BC to any Vermont practitioner who meets its criteria, whether or not Vermont issues a special art-therapist license. A practitioner wishing to distinguish himself with such a credential may do so, right now, under existing law. A consumer or healthcare payer wishing to have the extra assurance of competence attendant to such a credential may do so, right now, under existing law.

Those alarmed that the State does not license art therapists should be terrified to learn that the State equally declines to license cardiologists, otolaryngologists, cardiothoracic surgeons, pulmonologists, nephrologists, merger-and-acquisition attorneys, Freudian analysts, cognitive-behavioral therapists, and others practicing any number of deeply unique and highly consequential professions. Instead, we offer these practitioners more general licenses that recognize core competencies—a medical license; a law license; a psychology license. This regulatory model works if, and because, being a professional is synonymous with having the knowledge, duty, and obligation to understand one's own limitations. Our law reflects this. It is unprofessional conduct for any Vermonter licensed, certified, or registered, including rostered psychotherapists, to "perform[] treatments or provid[e] services which the [he or she] is not qualified to perform or which are beyond the scope of the [his or her] education, training, capabilities, experience, or scope of practice." 3 V.S.A. § 129a(a)(13).

The application in this case urges the Legislature to write a new chapter of Title 26 for a subspecialty of an existing profession. Regulation by subspecialty or modality is easy to start and hard to stop. Within the counseling and therapy professions alone, it is impossible to say why art therapists have superior claim to independence by comparison to narrative therapists, dance therapists, equine therapists, play therapists, drama therapists, feminist therapists, or music therapists. The achievable task of government regulation is to ensure that individuals entering these diverse fields have a common core of knowledge respecting the fundamentals of counseling theory, human psychology, clinical expertise, and professional ethics. Attempting to describe the branches of a field as they grow is a task to which legislatures and regulators are unsuited, and the attempt of it tends unfortunately to stunt growth. For reasons both principled and pragmatic, an invitation to engage in nano-regulation of subfields and modalities is best declined.

f. Scale

The very small number of prospective art-therapist licensees augers against independent licensure. We estimate that fewer than fifty Vermonters would seek licensure specifically as art therapists. But regulatory programs have fixed costs that become more burdensome and more difficult to justify when their beneficiaries are few in number. The costs of rulemaking, for example, include weeks of attorney time, the administration of public hearings, and publication of legal notices in newspapers of record. A parallel regulatory program for art therapists would require that investigative and prosecutorial staff invest hours orienting themselves to inconsistent statutes and rules from those attending mental health counselors. Demands inevitably would follow for enforcement of art-therapist title protection against other professionals alleged to be intruding upon protected territory. Litigation would follow as necessary to keep other practitioners in their respective boxes.

The parade of horrible expenditures set out above is little but a pejorative recitation of expected regulatory costs. But costs do not scale down to match the number of regulatees. The high per-capita cost of a new licensure program specific to art therapists is particularly difficult to justify where remarkably similar work is going on within the Board of Allied Mental Health Practitioners, with much lower expense per licensee, both because the licensees are more numerous and because the regulatory edifice already has been built.

g. Delegation

As described above, proponents of separate licensure for art therapists are driven in significant part by a fear that state governments throughout the country have over-delegated credentialing responsibilities affecting art therapists, such that non-governmental actors can effectively make state licensing policy. There is some irony, then, in the solution proposed: over-delegating to a different non-governmental actor. Instead of CACREP-or-equivalent degrees—which are not actually required in Vermont—we would require AATA-or-equivalent degrees.[17]

Fortunately, all that is required to avoid the perils of over-delegation is awareness. The Board of Allied Mental Health Professionals' rule on degree recognition, excerpted at length above, illustrates such awareness. By structuring a rule that recognizes a credible accreditor without giving away the store, the Board has effectively leveraged the benefits available from the accrediting body while avoiding the liabilities that arise from excessive delegation.

VI. Application of Statutory Criteria; Recommendations

We inquire first into the risk of harm presented by inaction. The applicant associations have not demonstrated the practice of art therapy under existing regulatory structures "can clearly harm or endanger the health, safety, or welfare of the public" with a "potential for … harm [that] is recognizable and not remote or speculative." 26 V.S.A. § 3105(a)(1). Instances of harm identified have been apocryphal and speculative. But more important, in those few cases where risk to the public arguably was shown to have arisen in relation to art therapy, the licensure program proposed would have done nothing to mitigate the risks identified.

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[17] Application, p. 21 of 28.

We inquire next into whether "the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability." 26 V.S.A. § 3505(a)(2). But because the fields in which one might practice art therapy as a modality already are pervasively regulated in Vermont, the question remaining for analysis is narrower: whether a public already able to rely on a range of counseling and therapy credentials would benefit yet more from specific assurance that an otherwise competent practitioner will use art competently as a therapeutic modality. To be sure, some would. However, members of the public wanting that assurance can have it from the non-governmental board certification offered by the Art Therapy Credentials Board. New regulation transforming non-governmental board certification into a statutory licensing mandate would add complexity, bureaucracy, and cost, with no countervailing benefit to the public health, safety, or welfare.

Finally, the applicant associations have not shown that "the public cannot be effectively protected" by means other than the creation of new regulation specific to art therapists. 26 V.S.A. § 3105(a)(3). A considerable regulatory apparatus already protects the public from incompetent or unscrupulous therapists, including art therapists. By available measures, that apparatus is effectively protecting the public right now, without need of new regulation. Although it is lawful to practice art therapy with a registration only, market pressure from consumers and payers desirous of enhanced assurances of competence impels many art therapists to pursue mental-health-counselor licenses. Where those licenses are too general to ensure competence in art therapy specifically, certification is available from the non-governmental Art Therapy Credentials Board and readily verifiable online.

The Office concludes that new regulation specific to art therapists does not meet the criteria required by 26 V.S.A. § 3105(a). New regulation creating a monopoly on the use of the term "art therapist," though proposed in hopes of increasing access to care, is likely to have the paradoxical effect of making it more difficult for consumers to find qualified providers of art-based therapies, because the regulation proposed operates by prohibiting qualified psychiatrists, psychologists, social workers, licensed mental health counselors, psychiatric nurse practitioners, and rostered psychotherapists from advertising art-based therapeutic services. One does not increase access to a professional service by choking its supply.

The Office recommends that the Board of Allied Mental Health Practitioners review its administrative rules to ensure that requirements for degree recognition are developed on the basis of public health and safety rather than private interest or path dependence; that its educational criteria for applicants do not call for undue or irrelevant coursework; and that its policies maximize, to the extent possible, the mobility of qualified therapists into and out of the state. Rigid course requirements in career development, in particular, appear conspicuously problematic to otherwise-qualified practitioners of art therapy and should be carefully reviewed and promptly eliminated if they cannot be justified. If the Board attends carefully to these duties—as we are confident it will—practitioners of art therapy should have no reason to fear exclusion from the diverse range of counseling modalities accommodated and effectively regulated by Vermont's existing regulatory programs.

Respectfully submitted to the House and Senate Committees on Government Operations.

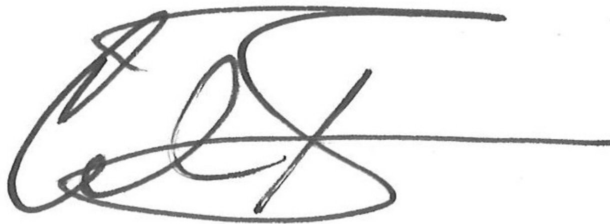
STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION

BY:

_______________________________ February 6, 2017

Gabriel M. Gilman Date
General Counsel

APPROVED:



_______________________________ February 6, 2017

Colin R. Benjamin Date
Director