

STATE OF WEST VIRGINIA

REGULATORY BOARD EVALUATION OF THE

Board of Licensed Dietitians

**Continued Regulation of the Board
of Licensed Dietitians Is Not
Necessary For the Public's Interest**

**Board's Compliance With Applicable
Laws and Rules Can Be Improved**

**OFFICE OF LEGISLATIVE AUDITOR
Performance Evaluation and Research Division
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January 2001

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John Sylvia
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January 7, 2001

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable Vicki V. Douglas
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Regulatory Board Evaluation of the *Board of Licensed Dietitians*, which will be presented to the Joint Committee on Government Operations on Sunday, January 7, 2001. The issues covered herein are "Continued Regulation of the Board of Licensed Dietitians Is Not Necessary For the Public's Interest; and Board's Compliance With Applicable Laws and Rules Can Be Improved."

We conducted an exit conference with the *Board of Dietitians* on December 15, 2001. The Board did not provide a written response.

Let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

JS/wsc

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Executive Summary

The West Virginia Board of Licensed Dietitians was created by the Legislature in 1996 to protect the public. The title Licensed Dietitian (LD) is bestowed by the Board. The Board consists of five members; four dietitians and one lay member. This is the first Regulatory Board Review on the Board. However, last year a preliminary performance review of the Board was conducted and termination recommended. The Legislature chose to continue the Board for one year. This review identifies two issues, briefly described below.

Issue Area 1: Continued Regulation of the Board of Licensed Dietitians Is Not Necessary For the Public's Interest

Regulation of professions is to be imposed only when necessary for public protection. The review has found no compelling evidence to support continued licensure of this profession because there is low risk of harm if the profession were unregulated. The criteria to be a Registered Dietitian (RD) and a LD do not differ so the West Virginia credential adds no value. Further, the State has no practical disciplinary powers upon the 87% of licensees who are also (RD). Should an RD's LD title be revoked, the individual could continue to practice under his/her RD title. In West Virginia, regulation can be evaded by choosing not to use titles of "dietitian" or "licensed dietitian." The Legislature should consider terminating the Board of Dietitians.

Issue Area 2: Board's Compliance With Applicable Laws and Rules Can Be Improved

The Legislative Auditor finds that the Board of Licensed Dietitians has complied with the following Chapter 30 General Provisions: met annually; maintained a record of proceedings; has set out in rule a sufficient fee structure to carry out its duties; and has attended the State Auditor's orientation session.

The Board's filing of open meeting notices has improved from 48% as reported in last year's review, to 67% during the scope of this review. The Board did publish its telephone number in the Charleston area telephone directory as required but failed to list its address. Proposed rules will be before the Legislature in the 2001 session that will address some of the deficiencies in the Board's continuing education process. The Board has never received a complaint against a licensee, primarily complaints allege possible unlicensed practice. Annual reports, election of officers, the roster and register are either not fulfilling statutory requirements completely or are not being maintained at all.

Background

The *Board of Licensed Dietitians* was created under Chapter 30 of the West Virginia *Code* in 1996. There are five board members, all but one of which are required to have at least three years of experience as a registered or licensed dietitian. All are appointed by the Governor for overlapping terms of four years. Members are not permitted to serve more than four years. Three members are presently serving on lapsed terms.

As of October 3, 2000 there were 304 licensed dietitians and 11 provisional licensees in West Virginia. Provisional licenses are granted to individuals who have met the educational requirement but are lacking the experience requirement. A provisional license can be renewed annually for up to three years. License and renewal fees are \$50 annually. The Board was created to be self-sufficient, relying on the application and renewal fees of licensees.

	FY 2000	FY 1999	FY 1998
Revenue	16,475	16,600	3,600
Expenditures	17,762	5,246	7,849
End of Year Cash Balances	17,928	20,133	8,782

Source: 2000 PERD Analysis of FIMS Documents

Objective, Scope and Methodology

This *Regulatory Board Evaluation* of the Board of Licensed Dietitians was conducted in accordance with the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code* as amended. The West Virginia Board of Licensed Dietitians was created to protect the public by requiring that “*anyone who represents or implies to the public by use of the title, “dietitian” or “licensed dietitian” or any other title intended to convey the impression that he or she is authorized to practice dietetics in this state must be licensed pursuant to this article*” (West Virginia Code §30-35-4a).

The primary objective of this review is to determine if it is in the public’s interest to continue regulation of the profession. The review also considered compliance with applicable laws and rules the Board is required to follow.

The regulatory board review covers the period from January 1996 through October 2000. Information compiled in this report has been acquired from the West Virginia *Code*, interviews, minutes of Board meetings, fiscal records, last year’s preliminary performance review, and other sources.

Issue Area 1: Continued Regulation of the Board of Licensed Dietitians Is Not Necessary For the Public's Interest.

During the 2000 Legislative Session the Legislature enacted a new kind of performance review under the Sunset Law. This type of review is called a *Regulatory Board Evaluation*. All Chapter 30 Boards are now scheduled to be reviewed over a 12-year period. As required, the Legislative Auditor must determine whether or not the board is necessary for the protection of public health and safety. **The finding of this review indicates that the continuation of the Board of Licensed Dietitians is not necessary to protect the public.** The basis for this finding is as follows:

- 1) Evidence shows there is a low risk of harm to individuals from this profession;
- 2) The Board of Licensed Dietitians duplicates to a great extent the nationally accepted credential of “*Registered Dietitian*” offered by the American Dietetic Association (ADA); (87% of West Virginia dietitians licensed by the Board also have the ADA credential of Registered Dietitian.)
- 3) An individual can practice the dietetic profession without being licensed by the Board by simply using a title other than Dietitian or Licensed Dietitian, such as the title Nutritionist.

Subsequent Legislation

The findings of this report are the same as the findings of a previous report issued by the Legislative Auditor in October 1999. Despite the recommendation of the 1999 report, the Legislature continued the Board for one year. Also, during the 2000 Legislative Session, House Bill 4477 would have defined a scope of practice of licensed dietitians that restricted persons who could practice “*medical nutrition therapy*” or “*nutrition therapy*”. Either of these terms would have been defined as:

Nutritional diagnostic assessment and nutrition therapy services for the purpose of disease management.

House Bill 4477 passed both legislative houses but it was vetoed by the Governor. It is somewhat unclear to what extent this legislation would have restricted the practice of dietetics because the number of persons providing this service is not readily available. The American Dietetic Association (ADA) estimates that about 67% of dietitians are employed by hospitals or other health care providers and 19.1% by public health programs or in educational facilities. These would be the most likely providers to advise on disease management. However, not all persons employed as dietitians by hospitals, health care providers, public health programs and educational facilities would be providing services for the purpose of disease management.

Low Risk of Harm from the Profession of Dietetics

In 1999, the Legislative Auditor's Office contacted the ADA. The ADA's Washington, D.C. based Government Affairs Division was asked for the most serious complaints it had received from across the nation against Registered Dietitians (R.D.). The ADA provided documentation addressing the need for licensure. While incidents are discussed in which persons were harmed as a result of receiving poor advice, they do not represent issues which could have reasonably been prevented by the West Virginia Board. For example, football coaches and relatives are likely to dispense advice whether or not doing so is subject to Board regulation. An abundance of the examples provided represent situations in which "nutritionists" or persons selling vitamins and supplements may have caused or contributed to a person's being harmed. Even had H.B. 4477 been signed into law these matters would not have been subject to the Board's control. Other examples of "quackery" can be made in which persons may be violating other laws and the scopes of practice of other licensed professions, defrauding consumers and other activities which would be illegal regardless of the Board's existence. These factors combine to indicate that public protection is not provided by licensing this profession.

ADA's Credential is Generally Recognized as a Standard of Competence

Both Marshall University and West Virginia University have programs that lead to baccalaureates in dietetics. These programs emphasize that the graduate would qualify to take ADA's examination to become a *Registered Dietitian (R.D.)*.¹ The universities web sites discuss what professions an individual with an R.D. can perform. Additionally, the State's Division of Personnel has classifications for nutritionists. These classifications either require the R.D. credential or indicate preference may be given to a person holding that credential.

The Board's Regulation Can be Evaded by use of Other Titles

Titles that could imply state endorsement, such as "nutritionist", are not regulated. A person could choose to call themselves a "nutritionist", and not be licensed by the Board. According to the *1998-99 Occupational Outlook Handbook*, the general educational requirements for both nutritionists and dietitians are the same and they perform essentially the same work.

According to the 1998-99 Occupational Outlook Handbook,

Dietitians and nutritionists plan nutrition programs and supervise the preparation and serving of meals. They help prevent and treat illnesses by promoting healthy eating habits, scientifically evaluating clients' diets, and suggesting diet modifications, such as less for those with high blood pressure or reduced fat and sugar intake for those who are overweight.

¹ADA's examination is offered through its credentialing arm, the Commission on Dietetic Registration.

According to a legal opinion from Legislative Services, the provision “*That a dietitian registered by the commission on dietetic registration may use the title of registered dietitian...*” allows one working under the title Registered Dietitian to do so without being licensed by the state board. **No registered dietitian would have to be licensed in order to practice in the State.** Despite this the majority, 87%, of current licensees are R.D.’s.

R.D.’s are not required to be licensed, or a situation like the following could occur. An individual holds both an LD and an R.D. title. The individual is disciplined by the Board and loses his or her LD status. However, the individual would retain the R.D. status and continue to practice. **Thus, the Board cannot stop someone from continuing to offer services to the West Virginia public that it deemed abusive or harmful when the license was taken.**

Individuals can choose whether to be regulated or not by the choice of title under which they practice. One’s work tasks may be the same as another regulated by the Board, but since the title used is not “dietitian” or “licensed dietitian” the Board does not require licensure. While further exclusions exist for registered dietitians, those practicing in weight loss clinics, health food stores and educational institutions, would not have to be licensed provided that person does not practice under the titles “dietitian” or “licensed dietitian”. According the American Dietetic Association, 42 states and the District of Columbia regulate “dietitians” in some manner. Twenty-seven states and D.C. license, 14 states certify and one state requires registration.

This review reiterates the findings of the 1999 review. There is nothing to substantiate that continuance of the Board is in the public’s interests.

Recommendation 1:

The Legislature should consider terminating the West Virginia Board of Licensed Dietitians pursuant to the Sunset Law.

Issue Area 2: Board's Compliance With Applicable Laws and Rules Can Be Improved.

The Legislative Auditor finds that the Board of Licensed Dietitians' compliance with the General Provisions of Chapter 30, which are essential for the effective operation of a licensing board, can be improved. The Board has complied with the following requirements:

- An official seal has been adopted.
- The Board meets at least once annually.
- The Board has set an annual license fee by rule that is sufficient for carrying out the operations of the Board.
- The Board maintains a record of its proceedings.
- A Board member has attended the orientation session provided by the State Auditor's Office.

Board Accessibility

The 1999 review found that the Board was inaccessible to the public. The Board lacked a telephone listing, a permanent address and an Internet site. During the course of the review, the Board worked to improve its compliance with §30-1-12 which requires the telephone number and address to be published in the Government section of the Charleston area telephone book. A telephone number is now listed but an address is not. The Board has a different telephone number listed on the State's website but does not have a site of its own. Yet a third telephone number is listed in the Capitol Telephone directory which does have an address listed.

Open Governmental Proceedings

The last review found that only 48% of the Board's meetings between the Board's creation in 1996 and April 1999 had open meeting notices filed with the Secretary of State. From the September 1997 meeting forward, the Board maintained a higher percentage of compliance with the statutory requirement. This review found that the Board has met 15 times since May 1999 but has filed notices timely on only 10 of those occasions, increasing its compliance with statute to 67%.

Fee Payment

In August 1999, the Board reversed its standing policy of requiring fees be paid by a money order or cashier check. Not issuing a license until payment clears insures payment. Further, statute

allows the Board to impose fines to compensate for any returned checks. A recommendation was made that the Board seek to amend its rule to include a returned check policy. The Board did not seek to incorporate this recommendation into its rules.

Continuing Education

In the general provisions applicable to all boards, §30-1-7c, boards are to establish continuing education requirements that include course content, course approval, hours required and reporting periods. The October 1999 review found that the Board was not meeting its obligation to establish course content or approve courses.

Continuing education hours were being approved by the American Dietetic Association and the standards set by the same association. A recommendation was made that the Board immediately begin complying with the statutory requirement by maintaining its own continuing education requirements, preferably in legislative rule. The recommendation was also made that the rule be amended to ensure continuing education be approved by the Board, not the Association. Amended rules were filed with the Secretary of State's Office on August 29, 2000. These rules would establish that course approval is granted by the Board if the course is given by a Board approved provider and course content must meet elements defined in the proposed rules.

Complaints

As of October 2000 the Board has not received a complaint against a licensee. The Board has received complaints alleging unlicensed practice as well as one incident where an individual had "lifted" someone else's national association number. Further, at least one of these complaints was against a Registered Dietitian. Registered Dietitians do not have to be licensed to practice in West Virginia but the Board is informing both licensees and the persons involved in this incident that a R.D. does have to be licensed in West Virginia to practice. The Board is taking action against this person.

Roster and Register of Licensees

The Board's roster of licensees does not meet all statutory requirements. In neither 1998 nor 1999 did the roster meet the statutory requirements. With some adjustments it could comply with statute.

The Board does not maintain a register of applicants. The following provisions are found in the general provisions of Chapter 30:

The secretary of every board shall keep a record of its proceedings and a register of all applicants for license or registration, showing for each the date of his or her application, his or her name, age, educational and other qualifications, place of residence, whether an examination was required, whether the applicant was rejected or a certificate of license or registration granted, the date of this action, the license or registration number, all renewals of the license or registration, if required, and any suspension or revocation thereof.

Annual Reports

By January 1 of every year Boards are required by §30-1-12(b) to,

...submit to the governor and to the Legislature a report of its transactions for the preceding two years, an itemized statement of its receipts and disbursements for that period, a full list of the names of all persons licensed or registered by it during that period, statistical reports by county of practice, by speciality if appropriate to the particular profession, and a list of any complaints which were filed against persons licensed by the board, including any action taken by the board regarding those complaints.

The Governor's Office does not have a record of an annual report being submitted in 2000. The House and Senate Clerk Offices did receive a copy of the report, but not until March 2000. The annual reports the Board provided the Legislative Auditor do not precisely fulfill the statutory requirements mentioned above. The reports for January 1997 through March 1998, January 1998 through January 1999, and January 1999 through December 1999 do not have statistical reports by county of practice, do not have an itemized statement of receipts and disbursements and in the case of the reports ending January 1999 and December 1999 are not for the preceding two years. In the first two annual reports, the Board meets the requirement to have a list of names of persons licensed during that period but the most recent report has all persons licensed rather than during the period the report covers.

Annual Election of Officers

Board minutes indicate the Board has annually elected officers in all years except 1999. The Board should strive to hold elections annually in compliance with Chapter 30, Article 1.

Should the Legislature choose not to terminate the Board, the following recommendations apply:

Recommendation 2:

The Board should fully comply with §30-1-12 by having its address listed in the Governmental section of the Charleston area telephone book.

Recommendation 3:

The Board should comply with the Open Governmental Proceedings Act on all occasions.

Recommendation 4:

The Board should begin keeping the register of applicants as required by §30-1-12 and adjusting its current roster to comply with §30-1-13.

Recommendation 5:

The Board should fully comply with §30-1-12 by filing the annual report appropriately and include at a minimum what is specifically required.

Recommendation 6:

As required by §30-1-3 the Board shall annually elect from among its members a president and secretary.

APPENDIX A

Transmittal Letter to Agency

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
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John Sylvia
Director

December 4, 2000

Helen Lodge, Chairman
West Virginia Board of Licensed Dietitians
54 Twin View Lane
Huntington, WV 25704

VIA FACSIMILE

Dear Chairman Lodge:

Pursuant to the West Virginia Sunset Law, we are transmitting a draft of the Regulatory Board Evaluation of the Board of Licensed Dietitians, which is scheduled to be presented to the Joint Committee on Government Operations on Sunday, January 7, 2000. We would like to schedule an exit conference on Wednesday, December 13 at 10:00 a.m. to discuss any questions or concerns you may have on any part of the report.

Should you wish your written response to be printed in the report, please have it to us by noon Monday, December 19, 2000. If you have any questions or would like to discuss factual errors or to seek clarification please contact our office.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

Joint Committee on Government and Finance
