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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAREN S. WEBSTER Petitioner Below, Appellant, v. DELAWARE BOARD OF MEDICAL LICENSURE AND DISCIPLINE, Defendant Below, Appellee.	)	C.A. No. 593, 2014 Court Below: The Superior Court of the State of Delaware, C.A. No.: N13A-05-011 FSS

REPLY BRIEF OF APPELLANT KAREN WEBSTER

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

Cases

Statutes and Rules

INTRODUCTION

The practice of midwifery is not the practice of medicine. Just like the practice of psychology is not the practice of psychiatry and the practice of architecture is not the practice of engineering; midwifery and medicine are two different and distinct practices. It is not uncommon for two professions to deal with different aspects of a larger subject matter, approaching it with different perspectives and methods. When this situation occurs, the overlapping scope of practice subject matter does not morph one profession into the other or mean that each professional is engaged in the practice of the other profession.

The Board's entire argument for its authority to regulate the practice of midwives is predicated on the Recommendation's erroneous legal conclusion that the entire scope of midwifery practice falls within "the practice of medicine". This improper conclusion conveniently allows the Recommendation to ignore Ms. Webster's specific actions and rely upon only one fact: the Medical Practice Act contains the phrase "including the *management* of pregnancy and parturition" in its definition of the "practice of *medicine*". Therefore, the Recommendation concludes that because Ms. Webster is a midwife, and midwives also manage pregnancy, anything she does as a midwife constitutes the *per se* practice of medicine. The Recommendation ignores the broader scope of midwifery practice and that the Act's definition of "medicine" as "the *science* of restoring or preserving health and includes *allopathic medicine* and surgery, *osteopathic medicine* and surgery, and all the respective branches of the foregoing" limits the

scope of the Board's authority to practitioners who manage pregnancy and parturition pursuant to those branches of medicine.

The Recommendation's flawed legal conclusion is further evidence by the State of Delaware's definition of the practice of midwifery: "the *management* of women's health care, focusing particularly on pregnancy, childbirth, the postpartum period, care of the newborn, and the family planning and gynecological needs of women, including the prescription of appropriate medications and devices *within this defined scope of practice*" indicates that a midwife's "management of pregnancy" falls within a defined scope of practice that is separate and distinct from the management regulated by the Act. 16 *Del. Admin. C.* § 4106(3.0) (emphasis added). The mere inclusion of a construct of the phrase "management of pregnancy" does not, absent further factual investigation, provide support for the legal conclusion that the practices of medicine and midwifery are the same.

Absent this unsupported legal conclusion, each of the Board's arguments fails: concurrent jurisdiction is impossible; the Hearing Officer's decisions are not supported by substantial evidence; and whether the Board violated Ms. Webster's due process rights, or this Court's holding in *Richardson* becomes irrelevant because the Board's determination exceeds its authority and is therefore void.

SUMMARY OF ARGUMENT

I. Established Delaware law and the history of the Board's disciplinary procedures shows that its argument regarding concurrent jurisdiction was constructed solely for the defense of this litigation and is both legally and factually incorrect.

II. The Board's interpretation of *Richardson v. Board of Cosmetology & Barbering of the State of Delaware*, 69 A.3d 353 (Del. 2013) found in the Answering Brief is unsupported by this Court's plain language and the plain language of 24 *Del. C.* § 1734(b).

III. Ms. Webster's due process rights were violated by the Hearing Officer's decision to proceed with the DPR Hearing rather than grant Ms. Webster a reasonable opportunity to engage counsel. The Board's argument that Ms. Webster should have invoked the correct legal language in order to be granted a continuance violates Delaware policy to afford leniency to *pro se* defendants and undermines public confidence in the fairness of the DPR's hearing process.

ARGUMENT

I. THE BOARD CANNOT HAVE CONCURRENT JURISDICTION TO REGULATE THE PRACTICE OF MIDWIFERY ABSENT A SPECIFIC GRANT OF AUTHORITY FROM THE GENERAL ASSEMBLY

A. Question Presented: Can the Board have jurisdiction that has not been expressly conferred by the legislature?

This issue was raised in the Answering Brief at p.10-11 and 14-15.

B. Scope of Review: "[W]here, as here, the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary. *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

C. Merits of Argument:

The Board argues that Ms. Webster is not exempt from the Act "simply because Webster defines herself as a non-nurse midwife" or "she considers herself a certified non-nurse midwife." Answering Brief (hereinafter "AB"), pp.5, 9. This characterization is both disrespectful and unnecessary. Ms. Webster *is* a Certified Professional Midwife. Her title is not dependent on a permit to practice midwifery in the State of Delaware. As much as the Board would like this Court to believe otherwise, Ms. Webster does not cease being a Certified Professional Midwife ("CPM") for the purposes of these proceedings any more than a Delaware lawyer ceases to be a lawyer when leaving the State.

These derisive comments, however, do highlight the Board's opinion of the profession of midwifery, and offer an explanation for why the Board felt it had a

right to disregard midwifery status as a distinct profession by asserting it to be encompassed under the Board's jurisdiction despite not having a legislative grant to do so. Despite the Board's self-serving attitude toward midwifery, Ms. Webster remains a respected professional in a legitimate and respected profession. She is so well-respected that despite this ongoing case, and the fact that she is not a Delaware resident, in 2014, ironically, the Division of Public Health of the Delaware Department of Health and Social Services ("DHSS"), invited Ms. Webster to join its newly-formed Direct Entry Midwifery Policy & Regulations Subcommittee to develop Delaware legislation for non-nurse midwives.

1. The Board's assertion of concurrent jurisdiction with DHSS over the regulation of the practice of non-nurse midwifery is legally unsupported.

The Board's assertion that it has concurrent jurisdiction because, "[c]oncurrent jurisdiction routinely occurs between administrative bodies, . . .*even where the General Assembly has not expressly conferred such jurisdiction*", is unsupported by Delaware law. AB p.14 (emphasis added). The Board ignores that it is legally impossible for an administrative agency to have concurrent jurisdiction under this theory. It is clear and established Delaware law that as an administrative agency, the Board is limited only to those powers that have been expressly granted by the legislature:

> The powers, the authority and the jurisdiction of Administrative Agencies *must affirmatively appear* from the legislation under which they claim to act *and are not to be inferred*; it is for the General Assembly to *define and specify the authority* given to an Agency *so clearly that no doubt can reasonably arise in the mind of the public as to its extent*.

> Any Administrative Agency or Officer clothed with Administrative powers *must place his finger upon legislation* couched *in express and non ambiguous language to support the making of an order* if an order is challenged; the power granted by the General Assembly *must be worded in terms so clear that no doubt can reasonably arise in the mind of the public*.

Wilmington Vitamin & Cosmetic Corp. v. Tigue, 183 A.2d 731, 748 (Del. Super. 1962) (internal brackets and quotations omitted) (emphasis added).

The Board clings to the "management of pregnancy and parturition" language, read in isolation from the rest of the Act, as justification for its argument. There is simply no evidence, however, to support the Board's argument that one ambiguous clause (if read in isolation from the rest of the statute) constitutes the General Assembly's express and non-ambiguous grant of authority worded in terms so clear that it removes all reasonable doubt as to the extent of the Act. In fact, the General Assembly's explicit grant of authority to the Board to regulate physician assistants (24 *Del. C.* § 1774C and §§ 1713(e) and (f)), respiratory care practitioners (24 *Del. C.* § 1777A and §§ 1713(e) and (f)), and paramedics (16 *Del. C.* § 9811(a) and 24 *Del. C.* § 1713(a)(17)) presents indisputable evidence that, if the General Assembly had wanted to grant the Board the power to regulate the practice of non-nurse midwifery, it would have done it explicitly.

Despite the language of 24 *Del. C.* § 1703(3), that recognizes that the broad language of the Act could create confusion regarding the extent of the Board's authority, the Board argues that if the scope of practice of two distinct groups of professions overlaps in any way the administrative bodies tasked with regulation of either group have concurrent jurisdiction over both professions (if the professional

is acting without a valid Delaware license). This reading of the statute leads to an absurd result. Nothing in that reading would limit concurrent jurisdiction to only two groups. Presumably then, the Board believes that the Board of Nursing has a concurrent claim over Ms. Webster with respect to this action. If the Board's argument is correct, 16 *Del. C.* § 122(3)(h) would also grant DHSS concurrent jurisdiction with the Boards for the unauthorized practice of midwifery over the practice of any unlicensed doctors or nurses who practice "the *management* of women's health care". The adoption of the Board's argument essentially means that a medical professional practicing in Delaware who allows her license to lapse is subject to disciplinary proceedings and penalties from any Board that can show an overlap in scope of practice, regardless of whether her actions were always entirely within the appropriate scope of practice of her profession. Such a regulatory system would serve no legitimate public purpose and result in disparate and arbitrary penalties. That simply cannot be the intent of the General Assembly.

Midwifery and medicine are two separate and distinct fields. Whether an act is the practice of midwifery or the practice of medicine is a factual question that is not dependent on whether the actor holds a permit from DHSS. Although the State concedes as much by stating "Webster blurs the real the issue in this case, which is whether the Board may issue a cease and desist order to a person like Webster who is engaged in the unlicensed practice of medicine; *not whether the Board may regulate the practice of non-nurse midwifery*." (OB, p.9, emphasis added). This concession directly contradicts the Recommendation, which clearly focuses only on the practice of non-nurse midwifery, stating:

> So the first question to answer is whether, *in acting as a midwife*, Ms. Webster engaged in the "management of pregnancy and parturition". I find as a matter of law, she has done so.
>
> * * * * * *
>
> The record in this case clearly supports a finding that *the midwifery in which Ms. Webster has been engaged* in Delaware and the surrounding states involves "parturition".
>
> * * * * * *
>
> The final step in the legal analysis is to determine whether *the midwifery engaged in by Ms. Webster* is exempt from the coverage of the Medical Practice Act under the terms of § 1703 of the Act.
>
> * * * * * *
>
> I find as a matter of law that the State has proved by a preponderance of the evidence that *Ms. Webster has been performing midwifery in Delaware for an extended period without legal authority to do so*. She has engaged in the "practice of medicine" as that term has been defined by the legislature because she has been engaged in the "management of pregnancy and parturition". She has not been issued a license to engage in medical practice by the Board of Medical Licensure and Discipline. She is not a licensee of the Board of Nursing and, thus, *is not authorized to practice midwifery* as a nurse midwife. *Finally, she has not secured the requisite permit from the Division of Public Heath in order to lawfully practice as a non-nurse midwife.*

Recommendation, pp. A208, A209, A210, A212-213 (emphasis added).

It is clear from the language of the Recommendation that Ms. Webster was found in violation of the Act based entirely on her practice of midwifery without a permit from DHSS. Such a finding is clearly an attempt by the Board to regulate the practice of non-nurse midwifery. There was no finding that she acted outside the scope of midwifery practice.

It is a vast oversimplification for the Recommendation to conclude that because the definitions of the practices of both midwifery and medicine each

include the clause "management of pregnancy" the two practices are identical. This is not the case. A woman could easily have a doctor, a midwife, a dietician and a personal trainer who are all involved in the "management of her pregnancy" yet all performing entirely different, yet complimentary, functions. This situation was clearly contemplated in the State's definition of the practice of midwifery, which includes the limiting clause "within this defined scope of practice" indicating that a midwife's "management of pregnancy" falls within a defined scope of practice, separate and distinct from the management regulated by the Act. 16 *Del. Admin. C.* § 4106(3.0).

The Recommendation and Public Order rely entirely on an erroneous determination—supported by one clause in the Act, read in isolation from the rest of the Act and the definition of midwifery—that the practice of midwifery is entirely subsumed within the practice of medicine. This legal determination has no factual support in the record because no factual inquiry was made into what actions constitute the management of pregnancy in either field. Without such factual findings it is impossible to conclude which, if any, midwifery practices may arguably overlap into the practice of medicine such that performance of those practices in Delaware may subject a midwife to jurisdiction under the Act.

2. The History of the Board's Disciplinary Actions over the previous fifty years exposes that its concurrent jurisdiction argument is a litigation construct created entirely in response to this case.

The Board argues that, despite the fact that Ms. Webster is a CPM, the Act only exempts professionals who hold a *Delaware* non-nurse midwifery permit. In fact, the Board's argument more broadly asserts jurisdiction over *any professional*,

otherwise exempt under 24 *Del. C.* § 1703(3) who fails to obtain a license, or has a license lapse, even if the licensee acts entirely within the scope of her practice. For example, if a trained psychologist, holding a license in a neighboring state, practicing holistic and homeopathic psychology, came to Delaware, saw a patient, determined the patient was having anxiety, and taught the patient a breathing exercise to help him manage the anxiety, the Board asserts it would have concurrent jurisdiction with (at least) the Delaware Board of Psychology to discipline the psychologist under 24 *Del. C.* § 1703(2)(9) for "[o]ffering or undertaking to prevent or to diagnose, correct, and/or treat in any manner or by any means, methods, or devices a disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition of another person, including the management of pregnancy and parturition." Under the Board's theory, this jurisdiction to regulate the "unauthorized practice of medicine" would exist despite the fact that homeopathic practices would not constitute "medicine" under the Act's definition, which includes the science of osteopathic and allopathic medical disciplines.

If the Board's assertion is to be believed, than one would expect that certainly, in the past 50 years, the Board has asserted this authority to discipline a professional other than those over which the Act grants the Board clear and specific jurisdiction. A review of the Board's disciplinary history, however, shows this not to be the case. The Board's records show 237 disciplinary decisions since 1963. Despite its *implicit* "concurrent jurisdiction" argument, the Board has only twice disciplined professionals without being able to point to "legislation couched

in express and non-ambiguous language" to support its authority to make the order. Spoiler alert: Both decisions were issued in 2012 against non-nurse midwives.[1]

This history does make logical sense. The Act contains the exemption language in 24 *Del. C.* § 1703(3) precisely because the Board is ill-equipped to understand if dozens of other professionals are acting appropriately within their respective, accepted scopes of practice, or to determine appropriate discipline. Such determinations are more appropriately made by professionals from each of those respective practices, especially considering the financial conflicts-of-interest that alternative treatment options pose to the doctors who make up the Board.[2]

The Board's Answering Brief provides no citation to an explicit grant from the legislature that allows it concurrent jurisdiction to regulate the practice of an unpermitted non-nurse midwife acting within the scope of midwifery practice and therefore, the Recommendation and Public Opinion must be reversed as invalid.

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[1] A history of the Board's disciplinary actions dating back to 1963 is available at http://dpr.delaware.gov/boards/medicalpractice/documents/dispaction.pdf (last visited January 20, 2015). Of the 237 disciplinary decisions issued by the Board since 1963, 216 have been issued against doctors. Ten have been issued against physician assistants, five have been issued against paramedics and four have been issued against respiratory care practitioners. The only other two were against midwives.

[2] There is no shortage of examples of courts finding that various State boards have used their disciplinary authority to improperly restrict competition and exclude competitors from the marketplace to gain a financial advantage. *See, e.g.*, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359 (4th Cir. 2013) (Dental Board attempting to restrict teeth whitening by non-dentists).

II. THE BOARD'S ARGUMENT THAT *RICHARDSON* DOES NOT REQUIRE THIS CASE TO BE REMANDED MISSTATES BOTH THE LANGUAGE OF THE CASE AND THE LANGUAGE OF 24 DEL. C. § 1734(b)

A. Question Presented: This argument is offered in rebuttal to the argument raised in the Answering Brief on pp. 17-22.

B. Scope of Review: This Court reviews *de novo* the application of law to uncontroverted or established facts. *See B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231, 1241 & n.13 (Del. 2007).

C. Merits of Argument:

This Court held in *Richardson v. Board of Cosmetology & Barbering of the State of Delaware*, 69 A.3d 353 (Del. 2013) that:

> the APA does require a record of a contested case hearing before the Board. Pursuant to § 8735(v)(1)(d), Richardson filed exceptions to the Hearing Officer's Recommendations challenging the recommended penalty as excessive. . . . *By contesting the Hearing Officer's Recommendations, Richardson triggered the protections of § 10125(d) of the APA which requires that a record be kept of the meeting from which a verbatim transcript could be prepared*. Such a record of the proceedings before the Board, is necessary for appellate review.

Despite this Court's plain language, the Board argues that in order to trigger the protections of the APA the appellant is required to request oral argument on the exceptions. AB, at 19. The filing of exceptions contesting the Hearing Officer's Recommendations requires the Board to hold a hearing. A request for oral argument is irrelevant to whether there is an adequate record upon which an appellate court can determine the basis for the Board's decision to reject the

arguments contained in the exceptions, and the Board's apparent determination that recusal pursuant to Ms. Webster's motion was unnecessary.

Ms. Webster's exceptions triggered the protection of the APA. The record in this case regarding the Board's discussions that resulted in the unanimous approval of the Recommendation is insufficient for appellate review. As a result, the case must be remanded for a record to be made of the proceedings from which a verbatim transcript may be prepared.

The Board's assertion that it may conduct executive session for "deliberations" pertaining to the Board's decisions on Exceptions filed in response to the Recommendation ignores the plain language of 24 *Del. C.* § 1734(b). Deliberations are allowed "only for the purposes permitted by § 10004 of Title 29." The plain language of § 10004 states, "A public body may call for an executive session closed to the public pursuant to subsections (c) and (e) of this section, *but only for the following purposes*:" and listing nine enumerated purposes, none of which pertain to Ms. Webster's case. (Emphasis added). Further, subsection (c) clearly states, "[e]xecutive sessions may be held *only for the discussion of public business*, and all voting on public business must take place at a public meeting and the results of the vote made public." (Emphasis added).

The Board improperly considered the Exceptions and Recommendation in closed Executive Session in violation of 24 *Del. C.* § 1734(b) and its failure to make a reviewable record regarding Ms. Webster's Exceptions requires remand.

III. THE STATE'S POSITION AND THE RECORD PERTAINING TO MS. WEBSTER'S LACK OF COUNSEL AT THE DPR HEARING UNDERMINES PUBLIC CONFIDENCE IN THE FAIR ADMINISTRATION OF JUSTICE

A. Question Presented:

This argument is offered in rebuttal to the argument contained in the Board's Answering Brief that no violation of due process existed in this case due to the fact that Ms. Webster "chose" to proceed *pro se*. AB at pp. 23-25.

B. Scope of Review: This Court reviews *de novo* the application of law to uncontroverted or established facts. *See B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231, 1241 & n.13 (Del. 2007).

C. Merits of Argument:

1. The Board's argument that Ms. Webster's "chose" to proceed *pro se* is unsupported by the written record.

The Board is well aware that, having not obtained counsel by the date of the hearing, despite her best efforts, Ms. Webster had no alternative but to appear without counsel. Nonetheless it argues to this Court that:

- "Webster affirmatively *elected* to proceed with the hearing without the assistance of counsel." AB, p. 24.
- "*Webster did not request a continuance* of the hearing to seek the assistance of counsel, and *chose* to represent herself at the hearing." *Id*.

These arguments misrepresent the record in this case, and asks the Court to ignore the leniency traditionally provided to *pro se* litigants by Delaware courts.

The Board's assertions are contradicted by the evidence in the record. First, the Board points out that a Notice of Hearing was sent to Ms. Webster on

Thursday, December 20, 2012, notifying her of a hearing taking place a mere four weeks later on January 17, 2013. AB, Ex. C. The Board asks this Court to conclude that it is unreasonable that a defendant, receiving a Notice of Hearing the Friday of the weekend before Christmas, could have difficulty meeting with, and securing, counsel for a hearing on a complicated issue of first-impression under Delaware law taking place two weeks into the following new year.

Second, the record is clear that, at two separate times, Ms. Webster articulated her understanding that her failure to obtain counsel prior to the hearing left her with *no choice* but to proceed without counsel. Despite this clear record, without explanation, the first factual finding in the Recommendation is that "Ms. Webster *chose* to represent herself" *pro se* at the DPR Hearing. App. Tab 7 A204. The Answering Brief attempts to support the Recommendation's finding by inappropriately quoting *part* of the last line of Ms. Webster's above conclusion, taken in isolation from its support, to imply that Ms. Webster "affirmatively elected to proceed with the hearing without the assistance of counsel" by stating "I'm representing myself pro se in this hearing." AB, p. 24. At her first opportunity to be heard at the Board Hearing, however, Ms. Webster clearly stated, "I'd like to say that I'm not represented by counsel at this hearing. *This is not by choice*." App. Tab 6, A90 (emphasis added). Ms. Webster further stated that although she had spoken with "at least 30 different attorneys and groups . . . . not one could agree to represent me. I'm not really sure why." *Id*., A91. Ms. Webster then stated:

> I am extremely frustrated by this and I am concerned about having to represent myself when the State of Delaware and the Medical Board is represented by counsel. *But I don't have a choice*. No other options. So I'm representing myself pro se in this hearing.

Id. Emphasis added.

When Ms. Webster's words are viewed in context, it is clear that despite her best efforts to retain counsel in the four week period truncated by Christmas and New Year's holidays, she had *no choice* but to attend the hearing without counsel.

Third, the State neglects to point out that under 29 *Del. C.* § 10161(e)(3), "If the respondent fails or refuses to appear, the hearing panel may nevertheless proceed to hear the complaint and render a decision." If Ms. Webster had "chosen" not to attend the hearing, rather than attend despite the fact that she was unable to obtain counsel, the hearing against her would have proceeded, and she would have been prosecuted *in absentia*.

Finally, the decisions of the Board and the Hearing Officer that resulted in Ms. Webster being denied the ability to be represented by counsel undermine the public confidence is the fairness of the administrative process. The Board asks this Court to ignore the prejudicial effects of the decision on Ms. Webster and join the Hearing Officer in ignoring the leniency traditionally granted to *pro se* litigants.[3] The Board implies that had Ms. Webster 'said the magic words' and requested a

[3] *See, Limehouse v. Steak & Ale Restaurant Corp.*, 2004 WL 304339, *2 (Del. Super. Feb. 5, 2004) ("The Court generally adheres to a policy of judicial lenience towards *pro se* plaintiffs."); *Wright v. Wilmington Trust Co.*, 1993 WL 1626508, *2 n.1 (Del. Super. May 20, 1993) ("Although this Court acknowledges the flaws inherent in the appellant's pleadings, the Court now considers his appeal on the merits, in deference to a policy of judicial lenience towards *pro se* defendants.").

"continuance" it would have been clear that she did not want to proceed without counsel. AB, p. 24. It is precisely because Ms. Webster did not have counsel that she did not know the magic words that Board asserts were required to invoke her due process rights. This type of circular logic suggests that the Board knowingly pressed forward in order to obtain an unfair advantage over Ms. Webster. The uncontradicted testimony shows Ms. Webster was actively attempting to obtain counsel and that she did not want to proceed *pro se*. The veracity of her testimony is evidenced by the fact that she was subsequently successful in her attempts to obtain counsel. The Board's implication—that Ms. Webster's desire for a continuance in order to engage counsel was unclear—is unconvincing.

2. The Board's argument that Ms. Webster's due process rights were not violated when she was forced to proceed *pro se* is unsupported by the written record.

Ms. Webster does not assert, as the Board suggests, that she has a right to have counsel appointed for her. AB, p. 25. The Board has already admitted that Ms. Webster had a statutory right to be represented by counsel at the DPR Hearing.[4] Ms. Webster now asserts that the Board's decision to allow Ms. Webster only four weeks (truncated by the Christmas and New Year holidays) to obtain counsel for the hearing, and the Hearing Officer's decision not to allow Ms. Webster additional time to obtain counsel—despite her testimony that she had been actively attempting to secure representation for the hearing and did not want to

[4] The Board points out that the Notice of Hearing sent to Webster on December 20, 2012, informed Ms. Webster of her "*right* to appear with counsel." AB, p. 24, *see also*, AB at Ex. C.

proceed without counsel—acted to deprive her of her right to be represented, in violation of her due process rights.

Ms. Webster asserts in her Opening Brief that the Hearing Officer's decision to simply proceed with the DPR Hearing acted as a practical denial of due process and resulted in severe prejudice to her.[5] In her Opening Brief, Ms. Webster merely asks this Court to hold that if a hearing officer elects to proceed in a manner that has the practical effect of denying a defendant from enforcing her right to counsel the burden is on the hearing officer to create a clear record containing adequate support and explanation to justify the deprivation and associated prejudice. Absent such record, the practical deprivation of a statutory right to counsel must be deemed to be a violation of due process. Continuing the DPR Hearing would have resulted in very little prejudice to the Board. In fact, had Ms. Webster been able to obtain counsel on the eve of the DPR Hearing and her counsel had requested a continuance to adequately prepare, it is unlikely the Board would have objected, and inconceivable that the Hearing Officer would not have allowed a continuance.

The Board does not assert any compelling facts that support the Hearing Officer's decision not continue the DPR Hearing to allow Ms. Webster additional time to obtain counsel. Instead, the Board simply asserts that Ms. Webster "chose" to proceed *pro se*, and thereby waived her right to counsel and any necessity for a clear record. Tellingly, the Board has declined to provide an explanation of what alternative choice was available to Ms. Webster.

[5] That prejudice was exacerbated by the Hearing Officer's decision to rule entirely on the basis of the Board's hearsay evidence in violation of 29 *Del. C.* § 10161(e), while sustaining a Board's objection to Ms. Webster's offer of hearsay evidence.

CONCLUSION

For the foregoing reasons, Appellant Karen Webster respectfully requests that this Court reverse the Superior Court and vacate the Recommendation and Public Opinion of the Board of Medical Licensure and Discipline for lack of jurisdiction over the practice of non-nurse midwives. Alternatively, Ms. Webster requests that the case must be remanded back to the Superior Court with instructions that the Court consider the legality of the Board's unrecorded executive sessions pursuant to this Court's decision in *Richardson* and for a thorough, independent determination of the issues raised on appeal.

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