Vermont Department of Education

In re: Nancy Clements, Clinical SLP License Applicant

Nancy Clements (hereinafter referred to as the Applicant) has applied to the Vermont Department of Education (hereinafter DOE) for licensure as a Clinical Speech Language Pathologist (hereinafter referred to as SLP-C). She was continuously licensed as an educator, with an Educational SLP endorsement (hereinafter referred to as SLP-E), from 1982 until 1999, at which time she allowed her SLP-E to lapse. In approximately 1984, the Applicant was issued a Certificate of Clinical Competence in Speech-Language Pathology (hereinafter referred to as CCC-SLP) from the American Speech-Language-Hearing Association (hereinafter referred to as ASHA). The Applicant's licensing file reflects no complaints, and contains no adverse evidence regarding her practice of SLP, from 1982 to the present. In addition, the Applicant has submitted letters of support from 17 individuals attesting to their belief that the Applicant is a highly qualified and competent SLP. Opposing the application, the mother of the child whose alleged denial of SLP services is the subject of detailed analysis below, has provided significant amounts of evidence concerning her child's case, but notwithstanding extensive general media publicity about the Applicant, and notwithstanding widespread email discussions on the local autism listserv, few (if any) other allegations of unprofessional conduct by the Applicant have emerged.

Prior to October 1, 2004, the SLP-C certification did not exist in Vermont. As of October 1, 2004, any SLP not holding a then-valid SLP-E was required to obtain a SLP-C in order to provide clinical SLP services. Vermont SLPs who held a valid Vermont SLP-E on October 1, 2004, have until June 30, 2008, to complete the requirements for the SLP-C, and may continue to provide clinical SLP services in Vermont in the meantime. The Applicant is alleged to have provided clinical SLP services since October 1, 2004, and for purposes of this analysis, those allegations are assumed to be true. The unauthorized provision of SLP services may be prosecuted criminally under 26 V.S.A. § 4452(b), and may subject the unlicensed practitioner to criminal prosecution and/or civil penalties under 3 V.S.A. § 127(b) and (c). As is described in detail in those statutes, the agencies which have the authority to initiate criminal prosecution, and which have the authority to pursue civil penalties, for the unauthorized practice of SLP services, are the Vermont Attorney General's Office (hereinafter referred to as the AG) and/or an appropriate State's Attorney and/or the Office of Professional Regulation (hereinafter referred to as the OPR). All of those agencies have declined to institute such proceedings. The DOE does not have the authority to institute such proceedings.

Allegations have been raised that the Applicant failed, during the 2003-2004 school year, to provide SLP services to an autistic student (hereinafter referred to as the Student) as mandated by his IEP. That IEP required 10 hours of SLP services per week. Extensive investigations into these allegations were conducted by the AG and by the Office for Civil Rights (hereinafter referred to as the OCR). Without restating all of the findings of those reports, the OCR concluded that the Student had not received the 10 hours per week

of SLP services which had been required by the IEP, and ordered the District to provide the Student with 250 hours of compensatory SLP services. The OCR report focused more on the fact of the District's failure, and not on the reasons for that failure. The OCR report also did not focus on the actions of the Applicant, and found that it was the District which directed the Applicant to provide only 5 hours of SLP services per week.

A dispute has arisen during the course of the investigations as to the definitions of "direct" and "indirect" services. A review of the literature does not disclose a clear-cut definition of these terms, but it can be inferred from the literature that direct services generally refer to those services which are provided in a face-to-face format. The literature is again unclear as to whether it is only face-to-face interactions between the SLP and the *client* which should be considered "direct," or whether face-to-face interactions between the SLP and other related professionals (such as occupational therapists and/or paraeducators) can also qualify as "direct" services. An inference can be drawn from the Student's 2003-2004 IEP that all of the 10 hours per week were to be "direct" services, but the form which was used by the District appears to have been created from a piece of proprietary (and therefore unofficial) software which coded the "Mode" of the service with the letter "D." That form contains, however, no key. Furthermore, it is illogical to assume that SLP services could ever be 100% "direct" in that sense, since under such an interpretation, there would be no billable time left for case plan preparation, lesson planning, report writing, billing, and the like.

It is therefore clear that there has some reasonable ratio, in any given case, between direct and indirect SLP services. In any given case, however, that ratio will depend upon the severity of the student's communication disorder, which in this case was severe. Clearly, however, it is simplistic to conclude that "10 hours per week" required 10 hours of face-to-face time with the Student.

The allegations of billing issues first came to light when Vermont Supported Living (hereinafter referred to as VSL), the location at which the Student's face-to-face SLP services were provided, was preparing to cease operations. In preparing the Student's transition plan, in the spring of 2004, the Student's case manager at VSL offered the opinion that the Student would benefit from more communication-related services. In response, it was pointed out that the Student was receiving a significant amount of SLP services under the IEP. This led to a dialogue in which the VSL employees who had been involved in the Student's case informed the entire team that, in their opinion, the Student had not been receiving meaningful and adequate SLP services, and had not been receiving the SLP services which were mandated under the IEP.

The concerns of the VSL staff members about the adequacy of Student's SLP services predated the transition meeting. In response to those concerns, and in an attempt to document the Applicant's non-provision of SLP services, VSL had set up a monitoring system (hereinafter referred to as the Log) to keep track of the times at which the Applicant was on VSL's premises providing SLP services to the Student. The Log was maintained by two VSL employees, but a preponderance of evidence establishes that the Log may not have captured all of the times when the Applicant actually provided face-to-

face services to the Student. For example, it appears clear that the Log does not capture certain services that were properly billable, including a certain number of occasions on which the Applicant arrived at VSL but found the Student absent, and a certain number of occasions on which the Applicant was called by the Student's case manager, on very short notice, and instructed not to come, and where the case manager felt that the Applicant should be paid anyway in light of the late notice of the cancellation. In addition, the contemporaneous notes of the Applicant appear to contradict the Log in that they suggest that there were some face-to-face services which were provided at VSL but which are not reflected in the Log. The Log reflects the period from November 2003 through March 2004.

The Log was then compared to the Applicant's billing records for the same period to produce what is herein described as the Audit. It appears that during the period of the Audit, face-to-face SLP services were provided to the Student primarily (although perhaps not exclusively) at VSL. During the period in question, the Audit suggests that of the over 100 total hours billed, perhaps only 8 hours were in the form of direct face-to-face services. In this respect, the Log is somewhat inconclusive, as it is unclear if and how the above-described absences by the Student, and cancellations by the case manager, were accounted for.

After conducting its investigation, the AG wrote letters to the DOE, the District's school board chair, and ASHA's Director of Ethics. The first two letters focused on recommendations for better record keeping at the District level. Those recommendations include the suggestion that districts have written contracts with their service providers. The DOE finds this recommendation undebatable, and concludes that the parties' failure to do so in this case reflects poorly on both the District and the Applicant. That failure is somewhat mitigated as against the Applicant by two letters from the Applicant to the District, written on August 21, 2001, and November 4, 2001, to which reference appears below. It is also worth noting that the first of those letters sheds light on how the Applicant and the District viewed the notion of "direct" services. The AG also recommends that detailed time records be kept, so that the record of the dates, types and duration of services are clear. Again, this recommendation is self-evidently beyond question. Both of these recommendations also follow from dictates of ASHA's Code of Ethics.

The AG's report also expresses frustration over the lack of definitional clarity of the terms "direct services" and "indirect services," as they relate to the provision of SLP services. There is simply no dispositive definition of these terms in the applicable federal or state statutes or regulations, or in the recognized secondary literature, and the DOE concludes that the absence of such definitions suggests that rigid reliance upon such definitions is neither wise nor necessary. Some read the term "direct" as being limited to face-to-face interaction with the client. Others include face-to-face interactions with other providers, such as paraprofessionals and occupational therapists. Finally, the IEP in the instant case can (in theory) be read to mandate that all of the SLP's services be "direct." Under this last interpretation, it would follow from the IEP that either: (a) everything an SLP does is considered "direct" service (which renders the term essentially

meaningless for the purpose of our consideration of the Applicant's licensing application); or (b) the SLP was forbidden from being paid for (and was therefore not expected to perform) tasks such as curriculum development, report writing, billing and the like (which is illogical and contrary to both of the 2001 letters).

The fact that the "direct/indirect service" dichotomy is misleading in this analysis is further illustrated as follows. Assume for the sake of argument that "direct" services are defined as "face-to-face services with the client." The appropriate direct/indirect ratio will vary (and dramatically so) depending upon the nature of the communication difficulties of the particular client. Some clients will require a lesser amount of face-to-face services, and more training by the SLP of the allied service providers. Other clients will require a much greater amount of face-to-face services, and much less training by the SLP of the allied service providers. In this particular case, the form which was used to produce the IEP was generated by a piece of proprietary software, and to the extent that it purported to require 10 hours of "direct" services, it cannot fairly be inferred that this was the therapeutic mandate. The record is clear that the District's special education director instructed the Applicant to provide the Student with only 5 hours per week of SLP services (whether direct or indirect), and expected (and again, instructed) that she provide the Student not more than one hour per week of face-to-face services.

The OCR report concluded that the Student had been deprived of his right to a Free and Appropriate Public Education (hereinafter referred to as a FAPE), and the District was ordered, as a result, to provide the Student with 250 hours of compensatory SLP services. The question in the context of this application for licensure, however, is not whether the *District* failed to provide the Student with the services which were required by the IEP, but whether the *Applicant* has demonstrated any of the disqualifying characteristics set forth in the applicable statutes. Although those questions are related, they are not identical. In this respect, it is highly significant that the District's special education director, during the period in question, instructed the Applicant not to provide more than 5 hours of SLP services to the Student per week, even though the IEP called for 10 hours per week. He also made it clear to the Applicant that he did not expect the Student to receive, and did not instruct the Applicant to provide, more than 1 hour per week of face-to-face services. These facts were elicited through interviews with the individual who was the District's special education director during the period in question, and are confirmed by the above-mentioned 2001 letters from the Applicant to the District, and by a September 29, 2004 letter from the District to the Applicant.

As previously mentioned, 17 letters and notes in support of the Applicant have been submitted by the Applicant. It is also important to this analysis that no other material complaints about the Applicant have been received by the DOE, notwithstanding extensive general publicity about the case, and notwithstanding specific listserv emails which have circulated within the autism community. Also, the AG, in its investigation, specifically undertook an in-depth search for evidence of similar conduct by the Applicant in the context of the treatment of other patients, and found none.

Much has been made in the press that this was a "Medicaid fraud case." In fact, the total amount ever billed to Medicaid during the course of the Applicant's provision of SLP services was in the vicinity of $75. Furthermore, once questions were raised about the propriety of those charges, the District immediately reimbursed all of those monies.

The grounds upon which a license application may be denied in this case are set forth in 16 V.S.A. §§ 1698(1)(A) or (E) and 1698(2), and in SBEM Rule 5710. The burden of proof in this circumstance is on the Commissioner by a preponderance of the evidence. 16 V.S.A. § 1704(b). We analyze the three potential grounds for denial in order, and as follows:

1. 16 V.S.A. § 1698(1)(A). "Grossly negligent conduct or greater, on or off duty, that places a student or students in meaningful physical or emotion jeopardy, or conduct that evinces moral unfitness to practice as an educator."

Clearly, even a single proven incident of fraudulent billing would be a sufficient basis upon which to deny licensure. As stated above, however, the record simply does not establish proof of fraudulent billing. The Log reflects roughly 8 hours of face-to-face contact in roughly 100 hours of billable time. The Applicant's contemporaneous notes, however, reflect roughly twice that amount. Also, there is some evidence that face-to-face contact occurred at places other than VSL. In addition, there were instances when the Student was absent without advance notice to the Applicant, and there were other instances when the Applicant was told, on very short notice, not to come, since the Student was not in a condition in which he would have been able to benefit from services. In both of these latter cases, the District's special education director indicated in interviews that he felt that it was appropriate, because of the lack of advance notice, that the Applicant be paid for the time that she could have spent otherwise gainfully employed. When one tries to reconstruct what actually happened from this complex set of facts, one can easily conclude that the ratio of indirect to direct services was in the vicinity of 4 to 1. The District's special education director testified, in more than one interview, that he specifically engaged the Applicant to provide no more than 5 total hours per week, and that he never expected more than one hour per week of face-to-face contact. In other words, he expected an "indirect to direct" ratio roughly 4 to 1. It is possible that the complaining parent did expect 2 hours of face-to-face services per day, as she might have gotten that impression from an IEP which was, for reasons discussed above, misleading in its form. Again, there is not a per se inconsistency in the District failing to deliver the IEP's required services (as found by the OCR investigation), and the Applicant doing as she was instructed by the District. On these facts, the DOE cannot rule out that the Applicant acted negligently, but neither can the DOE conclude that she did, and the law places the burden on the DOE to make such a finding in order to deny a license on that basis. Finally, the complaining parent has not introduced any expert testimony to establish that the Student was placed in "jeopardy" as required by the statute, nor can the same fairly be inferred from the circumstances. In regard to expert testimony, it is worth noting that the DOE's investigation has included consultation with highly-qualified currently-licensed clinical SLPs who are experts in the field.

2. 16 V.S.A. § 1698(1)(E). A pattern of willful misconduct or a single egregious act of willful misconduct in violation of duties and obligations of the position.

For the reasons set forth in the discussion of the factors enumerated in 16 V.S.A. § 1698(1)(A), the DOE cannot find a violation of 16 V.S.A. § 1698(1)(E).

3. 16 V.S.A. § 1698(2). Incompetence...the inability or incapacity to perform the duties and competencies required by the license.

As demonstrated by 25 years of successful practice, without even one previous allegation of actionable conduct, and with a long list of glowing recommendations from professionals within the field and from satisfied parents of many clients, it simply cannot be concluded that the Applicant lacks the "ability and capacity to perform the duties and competencies required by the license." That being said, the Applicant's attention to record keeping and billing detail for portions of the 2003-2004 school year were not of acceptable quality. Interestingly, her record keeping and billing for the same client for the two previous academic years was quite clear and complete. In this respect, there is evidence that the Applicant may have been suffering from transitory medical and financial problems during the 2003-2004 school year, which may have contributed to these documentation-related shortcomings. At the present time, however, the Applicant is no longer in private practice, and has demonstrated that she maintains appropriately detailed record keeping and billing systems which are designed by, and implemented through, her employer.

On the basis of the foregoing factual findings, as applied to the relevant legal standards, the DOE concludes that grounds for denial do not exist.

In concluding as set forth above, the DOE is not unmindful of the strong and evidently heartfelt opinions of the parent who complains of the Applicant's conduct. That being said, the OCR report finds fault with the District, not the Applicant. Furthermore, the AG has declined to prosecute because of the weakness of the evidence. ASHA has also declined to rule on the ethics questions which have been posed. Finally, the Student's parent has not sought an independent adjudication of the facts through a civil suit against either the District or the Applicant.

Conclusion and Stipulation

Based upon the proven record-keeping weaknesses of the 2003-2004 school year, and as agreed by the Applicant and her current employer, a clinical SLP license shall be issued to the Applicant with the following conditions and limitations:

1. The Applicant shall remain employed by her present employer, The Stern Center for Language and Learning (hereinafter referred to as The Stern Center), and shall not engage in private practice, absent a superseding written agreement between the DOE and the Applicant;

2. The Stern Center shall have a separate written contract for the provision of SLP services for each client to whom the Applicant shall provide SLP services;

3. The Applicant shall take and maintain detailed contemporaneous notes of all direct and indirect services which she provides to any of her SLP clients;

4. The Stern Center shall do all of the scheduling and billing for the Applicant;

5. The Applicant shall have a current copy of any and all IEPs of her clients; and

6. The Applicant hereby waives any right of appeal which she might have from this decision.

Vermont Department of Education,
Richard H. Cate, Commissioner

Date

Nancy Clements, Applicant

7/6/07
Date

for
The Stern Center for Language and Learning, Blanche Podhajski, Ph.D., President

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July 6, 2007

Vermont Department of Education, Richard H. Cate, Commissioner

Date

Nancy Clements, Applicant

Date

The Stern Center for Language and Learning, Blanche Podhajski, Ph.D., President

Date