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January 19, 2023

VIA FIRST-CLASS MAIL:

Wisconsin Department of Safety and Professional Services
Professional Counselor Section of the Marriage and Family Therapy, Professional
Counseling and Social Work Examining Board
PO Box 8366, Madison, WI 53708-8366

ALSO SENT VIA ELECTRONIC MAIL

Executive Director, Professional Counselor Section, Brad Wojciechowski
brad.wojciechowski@wisconsin.gov

RE: Nicole Burden – Professional Counseling Training Licensure

Dear Professional Counselor Section Board Members:

We represent Nicole Burden in connection with her recent application for a Professional Counselor Training License (“LPC-IT”) before the Wisconsin Department of Safety and Professional Services (“DSPS”) Professional Counselor Section (“Section”) of the Marriage and Family Therapists, Professional Counselors, and Social Workers Examining Board (“Examining Board”). Per your letter dated December 22, 2022, we understand the Section will review Ms. Burden’s LPC-IT application at its Section meeting on January 30, 2023. Additionally, while the Section has not yet formally denied Ms. Burden’s application, given your letter dated November 29, 2022, stating that “[her] education fails to meet the requirements of Wis. Stat. § 457.12(2) and Wis. Admin. Code §§ MPSW 11.015(1) and 14.01(2),” we understand the Section’s position is that if “the Section act[s] on [her] application . . . [it] will be denied based on the [asserted] lack of education required.”

As you are aware, Wis. Stat. § 457.12(2) sets forth the education requirement for granting an LPC-IT, requiring an applicant to submit evidence “that he or she has received a master's or doctorate degree in professional counseling or its equivalent from a program approved by the professional counselor section.” Given the Section’s statements on this education requirement in the abovementioned letters, the Section has apparently determined to apply the 2018 revised professional counselor equivalency requirements under Wis. Admin. Code MPSW § Chapter 14 to not only the professional counselor program-equivalent option under Wis. Stat. § 457.12(2) but also to the degree option.

For the reasons explained herein, the Section’s application of the education requirement is inconsistent with the standard set forth in Wis. Stat. § 457.12(2), and we

accordingly request either: (1) that her application be approved, or (2) if denied, your timely explanation as to the reasons for the denial and a response to the specific issues raised and questions posed in this letter.

Background

On May 11, 2012, Ms. Burden graduated from Concordia University, earning a Master of Science degree in Professional Counseling. The official academic record from the university states that Ms. Burden “[m]eets educational master degree requirements for endorsement for a Professional Counseling Training License through the Wisconsin Department of Safety and Professional Services.” After receiving her master’s degree in professional counseling, Ms. Burden continued her employment as a teacher in several different Wisconsin schools. Responding to the increasing need for mental health professionals in Wisconsin, in June 2022, Ms. Burden resigned her teaching position with the Waukesha School District and decided to utilize her master’s degree in professional counseling to serve her community in a new capacity.

Accordingly, in July 2022, Ms. Burden began applying with DSPS for an LPC-IT pursuant to the requirements at Wis. Stat. § 457.13, also reflected in Wis. Admin. Code MPSW § 11.015(1). On September 26, 2022, DSPS requested information concerning Ms. Burden’s education for review by a Section “Board Liaison” who would make a “determination.” Consistent with the statute’s option permitting a master’s degree in professional counseling as evidence of the education requirement, Ms. Burden provided proof of her master’s degree in professional counseling. Meanwhile, Ms. Burden began interviewing, and receiving interest from various employers, for supervised professional counseling positions pending obtainment of her LPC-IT. On October 3, 2022, the Board Liaison determined that Ms. Burden had not met the education requirement, pointing to unmet criteria under Wis. Admin. Code MPSW § 14.01(2) as the basis for “denial”. In the DSPS document entitled “Burden, N. Denied Individual Education Review,” DSPS states that “the applicant is denied – does not meet the necessary requirements [with respect to certain criteria under Wis. Admin. Code MPSW § 14.01(2).]”.

With her livelihood at stake and a family to support, Ms. Burden again queried DSPS and Section representatives as well as other government officials and representatives regarding the basis of the Section’s “denial,” in hopes of identifying a reasonable path forward toward obtaining an LPC-IT. Additionally, Ms. Burden had also planned to attend the Section’s scheduled meeting on October 19, 2022, optimistic that she might share her concerns regarding the Section’s position on the education requirement for the LPC-IT and learn of the Section’s options for granting licenses to individuals having advanced degrees in professional counseling earned before 2018. Unfortunately, the October 2022 meeting was cancelled,¹ further hampering Ms. Burden’s ability to move forward with her pursuit of an LPC-IT and with it, Ms. Burden’s employment opportunities. Indeed, Ms. Burden advanced with six potential employment opportunities for supervised professional counseling roles, all of which she has had to forego due to the Section Board Liaison’s “denial” regarding the education requirement

¹ E.g., <https://dsps.wi.gov/Pages/BoardsCouncils/MPSW/PC/Meetings.aspx>.

in combination with delays to DSPS's processing of Ms. Burden's LPC-IT application. Currently, would-be employer, American Behavioral Clinics, is the only remaining potential employer with a standing offer it hopes to hold for Ms. Burden.

On November 14, 2022, Ms. Burden attended the Section's meeting with her would-be supervisor from American Behavioral Clinics, Dr. James Winston. Together, they relayed their concerns about the Section's refusal to recognize Ms. Burden's master's degree in professional counseling as satisfaction of the education requirement for the LPC-IT under Wis. Stat § 457.12(2). They also inquired about the availability of continuing education coursework that would address any perceived deficiencies in Ms. Burden's master's degree and/or whether grandfathering or a waiver was available, as is the case in other DSPS licensing contexts. Unfortunately, Ms. Burden left the Section meeting with the impression that anything short of re-enrollment in graduate coursework for a second time in the same program would fail to meet the Section's interpretation of the LPC-IT education requirement. Since the November 2022 Section meeting, Ms. Burden has continued to reach out to DSPS, Section representatives and others regarding her LPC-IT application, the Section's position's on the education requirement, and how she might obtain her LPC-IT given her already conferred master's degree in professional counseling.

The LPC-IT Education Requirement under Wis. Stat. § 457.12(2)

The education requirement under Wis. Stat. § 457.12(2) sets forth two "either/or" alternatives in which an individual may be granted an LPC-IT: To satisfy the education requirement, an applicant may *either*, (1) submit evidence of a master's degree in professional counseling, *or* (2) its equivalent in a program approved by the Section. Contrary to the statute's straightforward two-option distinction, DSPS appears to be applying its requirements for professional counselor program-equivalents at Wis. Admin. Code MPSW § Chapter 14 to *both* the program-equivalent option and the advanced degree option, converting the statute's two-option standard into one DSPS-determined standard. Indeed, as in this case, when DSPS utilizes its recently updated equivalency requirements under MPSW § Chapter 14 to assess a master's degree in professional counseling conferred before the implementation of the 2018 revised regulations, the result is a complete override of the statute's dual option scheme permitting advanced degrees in professional counseling to satisfy the education requirement. This outcome is wholly incongruent with the statute and cannot stand as a matter of law.

While the Examining Board has a limited grant of rule-making power under Wis. Stat. § 457.03, two things are clear about that grant of authority. First, under Wis. Stat. §§ 227.10(2) and (2m), DSPS does not have the power to either "promulgate a rule which conflicts with state law" or "implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [the rulemaking procedures.]" Second, the Examining Board has not promulgated any rules establishing minimum standards for the first of the two options available under the statute—the

master's or doctorate degree option. The Examining Board has only promulgated standards for the second option—the equivalency option.

Dealing with the first issue first, the directive of the Legislature is clear in Wis. Stat. § 457.12(2) – a person meets the education requirement under § 457.13 if she “submits evidence satisfactory to the professional counselor section that he or she has received a master's or doctorate degree in professional counseling.” She does not also have to meet the requirements for the equivalency option. Under Wis. Stat. §§ 227.10(2) and (2m), the Section cannot override the legislative directive in § 457.12(2).

With respect to the second item, the Examining Board has promulgated no rule creating standards for advanced degrees in professional counseling. It is, therefore, no answer to say that the rule addressing the requirements for program equivalents available under the second option in the statute, also applies to the master's degree option. First and foremost, this is true because this is not what the rule says – in fact, the rule addresses professional counseling program equivalents; but in addition to that, to maintain such an interpretation is to subvert the clear dual option scheme under § 457.12(2).

Notwithstanding the above-raised issues, it is self-evident that Ms. Burden's master's degree in professional counseling from Concordia University “[met] educational master degree requirements for endorsement for a Professional Counseling Training License through the Wisconsin Department of Safety and Professional Services” at the time it was conferred in 2012. That is what the degree granted by Concordia University says on its face. If you dispute this, can you please explain why? Is there something about Ms. Burden's degree in 2012 that would have caused the Section to deny her an LPC-IT in 2012? If so, can you please explain what that is?

If we are correct that Ms. Burden's degree was sufficient in 2012, then it appears that what the Section is now contending is that Ms. Burden's duly conferred master's degree became void under the statute's advanced degree option when the professional counselor *equivalency regulations* relating to statute's program-equivalency option were revised in 2018. But any such interpretation of the statute is wrong as a matter of law.

The validity of existing advanced degrees in professional counseling for professional counselors and LPC-IT holders was not called into question when the revised professional counselor equivalency regulations became effective in 2018. Nothing in the statute or the revised rule supports such a conclusion. Ms. Burden's master's degree, being the same or materially similar to all such other existing master's degrees in professional counseling, is not any less a master's degree, and it cannot, therefore, cease to be a master's degree under Wis. Stat. § 457.12(2). In any event, DSPS certainly does not have the power to change the requirements “ex post facto.” Ms. Burden already obtained her master's in professional counseling, and here, DSPS is changing the rules after the fact.

Request for Public Records: In order to determine if the Section's treatment of Ms. Burden is consistent with its treatment of other similarly situated professionals,

pursuant to the Wisconsin Open Records Act at Wis. Stat. § 19.31 et. seq., we hereby request all records reflecting the identities of all individuals who received a master's degree in professional counseling from Concordia University between January 1, 2009 and December 31, 2018 and who received an LPC-IT under Wis. Stat. § 457.13 based upon this master's degree. Additionally, of those identified individuals, please indicate those individuals who still hold an LPC-IT or a professional counselor license in Wisconsin.

Finally, not only is the Section's interpretation of the LPC-IT education requirement under Wis. Stat. § 457.12(2) at odds with the plain language of the statute, but it also unnecessarily burdens the master's degree option with substantial requirements far beyond the statutory standard. For example, among other updates to the MPSW § Chapter 14 professional counselor equivalency regulations, in 2018, the minimum total course hour requirement increased from 42 to 60 credit hours.² For advanced degrees like Ms. Burden's, totaling 45 credit hours and conferred before the MPSW § Chapter 14 update, a 15 credit load difference valued at \$669 per credit hour would amount to more than a \$10,000 expense under current cost projections at Concordia University.³ This is a sizeable financial burden; and it further remains unclear as to how the "missing" coursework could be pursued since Ms. Burden already has her masters in professional counseling, and the coursework appears to be offered pursuant to a master's program.

In any event, according to the Section, the perceived deficiencies in Ms. Burden's education as cited under MPSW § 14.01(2) relate largely to requirements for a supervised practicum/internship experience. However, for an LPC-IT applicant like Ms. Burden who has already obtained a master's degree in professional counseling, a supervised counseling practicum was previously completed. Moreover, Ms. Burden's professional counseling role within the scope of an LPC-IT would, in many respects, mirror a practicum experience in which training is ongoing and work must be supervised. Dr. Winston of American Behavioral Clinics is a psychiatrist licensed under Wis. Stat. § 455 and would provide just such supervision and training.⁴

Given the foregoing, please explain precisely what Ms. Burden would need to do to meet the Section's interpretation of Wis. Stat. § 457.12(2). It is already impossible for her to go back and take supplemental classes at Concordia University (or any other institution). Is she supposed to start completely over and obtain a new master's degree? Is it the Section's position that, unless Ms. Burden does start over and get a new master's degree, that her only option is to satisfy the equivalency option? That position completely undercuts the two-option standard created by the Legislature.

Ms. Burden has now been engaged in the LPC-IT application process for over four months. We sincerely hope that upon considering the issues set forth herein, the Section

² Wis. Admin. Code MPSW § 14.01(2).

³ Concordia University, Master of Science – Professional Counseling Overview, <https://www.cuw.edu/academics/programs/counseling-masters/index.html#overview> (accessed Jan. 13, 2023).

⁴ E.g., Form 2456 – Professional Counselor Supervisor Approval Form.

will act to resolve this matter favorably for Ms. Burden, granting Ms. Burden's license application on January 30th. If the Section decides otherwise, then we would appreciate responses to the questions raised herein so that Ms. Burden can fully understand the Section's position (and her options) and we can assess her legal rights with her.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Attorneys for Nicole Burden



Cara Tolliver



Lucas T. Vebber

Enclosure: Public Agenda Request Form, Nicole Burden - DSPS Professional Counseling Section (also submitted via website 1/19/23)