

**BEFORE THE TENNESSEE STATE BOARD OF EDUCATION**

**IN THE MATTER OF:** )  
 )  
 )  
**BETHEL UNIVERSITY** )  
**Petitioner.** )

**PETITION FOR DECLARATORY ORDER AND REQUEST FOR STAY**

Petitioner, Bethel University (“Bethel”), by and through counsel, brings the following Petition For Declaratory Order And Request For Stay pursuant to Tenn. Code Ann. § 4-5-223 and the Uniform Rules for Hearing Contested Cases Before State Administrative Agencies, Tenn. Comp. R. & Regs. 1360-4-1-.07.

**1. Petitioner’s Name:** Bethel University  
Address: 325 Cherry Ave  
McKenzie, TN 38201

Telephone Number: (731) 352-4000

**2. Petitioner’s Attorney’s Name:** Samuel L. Jackson  
Lawrence F. Giordano  
Emily H. Mack  
Brad W. Craig

Address: 424 Church Street, Suite 2500  
P.O. Box 198615  
Nashville, TN 37219

Telephone Number: (615) 259-1359

**3. Agency rule, order, or statutory provision on which declaratory order is sought:**

- Tennessee Code Annotated § 49-1-302(a)(5)(a)(i)
- Tenn. Comp. Rules & Regs. 0520-02-04.01
- State Board of Education Policy 5.504

— Board action taken on July 22, 2016 denying approval of the Bethel University School of Education.

**4. Statement of the facts of the controversy and description of how this rule, order or statute affects or should affect the Petitioner:**

**A. The Board’s Action Has Never Been Authorized By Tennessee Statute.**

The Tennessee State Board of Education (the “Board”) is an agency of the State of Tennessee that is responsible for promulgating and adopting rules and regulations pertaining to education. The Board asserts the purported authority under State Board of Education Rule 0520-02-04.01(1) to approve all educator preparation providers and the licensure programs they offer and to adopt policies governing such approval. *See* Tenn. Comp. Rules & Regs. 0520-02-04.01(1). State Board of Education Rule 0520-02-04.01(4), asserts that only licensure programs that are conditionally or fully approved by the Board are eligible to prepare and recommend candidates for licensure. Tenn. Comp. Rules & Regs. 0520-02-04.01(4).

The only statute cited as and arguably providing legislative authority for the implementation of State Board of Education Rule 0520-02-04.01 is “T.C.A. § 49-1-302.” *See* Tenn. Comp. Rules & Regs. 0520-02-04.01. At the Board’s workshop held on July 21, 2016, Amy Wooten, Executive Director of Educator Licensure and Preparation expressly stated to the Board that the Board’s authority to regulate and approve teacher licensing programs is derived from Tennessee Code Annotated 49-1-302, which gives the Board the authority to adopt policies governing:

The qualifications, requirements and standards of and provide the licenses and certificates for all public school teachers, principals, assistant principals, supervisor and directors of schools.

Tenn. Code Ann. § 49-1-302(a)(5)(a)(i). The ordinary and plain meaning of this statutory language gives the Board the authority to adopt policies governing the qualifications and

requirements for teacher *licenses*. The above-quoted statutory language does not, however, confer upon the Board any authority to review, approve or otherwise regulate educator preparation providers or the pre-licensure programs that they offer.

To be sure, the Board has the express statutory authority “to set up rules and regulations governing the issuance of licenses for supervisors, principals, and all public school teachers,” as well as the authority to promulgate rules and regulations prescribing the minimum standards controlling the issuance, renewal and revocation of teacher licenses and certificates. Tenn. Code Ann. § 49-5-108. While the Board’s statutory authority to regulate the standards for the issuance, renewal and revocation of teacher licenses is clear, there is no corresponding statute that grants the Board the authority to regulate or approve educator preparation providers or the pre-licensure programs they offer. The authority to regulate the requirements for teacher licensure is entirely separate and unconnected to the ability to regulate the institutions of higher education from which those applicants graduate.

To be valid, “the power of an administrative agency must find its source in an **express statutory grant of authority**.” *Methodist Healthcare-Jackson Hosp. v. Jackson-Madison Cty. Gen. Hosp. Dist.*, 129 S.W.3d 57, 69 (Tenn. Ct. App. 2003) (citing *Sanifill, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995))(emphasis added). It follows that administrative regulations cannot be inconsistent with statutes, and any action by an administrative agency “which is not authorized by the statutes is a nullity.” *Id.* at 69. Because Tenn. Code Ann. 49-1-302 does not and has never granted the Board the power to oversee approval of education preparation programs offered by institutions of higher education, State Board of Education Rule 05-02-04.01 is invalid. Accordingly, all actions taken by the Board and the Tennessee Department of Education pursuant to this Rule are invalid and of no effect,

including but not limited to the adverse action taken by the Board against Bethel University on July 22, 2016.

**B. The Board's "Policy" 5.504 was improperly promulgated under the UAPA and is void.**

Moreover, because the Board does not have any statutory authority to set policies or promulgate rules or regulations governing the review or approval of post-secondary teacher licensure programs, the Board's action in adopting Board Policy 5.504 is likewise invalid, void and of no force or effect. Further, in addition to the lack of statutory authority referenced above, Board Policy 5.504 is also invalid because it constitutes a "rule" as that term is defined in the Tennessee Uniform Administrative Procedure Act ("UAPA") that was never adopted in compliance with the UAPA's rule making procedures. *See* Tenn. Code Ann. § 4-5-216.

As a state agency, there is no doubt that the Board is required to follow the UAPA's uniform procedures when making rules. It is equally beyond dispute that the Board did not adhere to the UAPA's rule making procedures when it initially adopted Board Policy 5.504 in October, 2014, or when it revised it in April, 2016.

There is no question that the approval and review procedures for educator preparation providers set forth in Board Policy 5.504 constitutes a "rule" that is not excepted from the rule making procedures. Board Policy 5.504 is, without question, an "agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practices requirements of [the Board]" relating to the standard for review and approval of education preparation providers and licensure programs. In doing so, Board Policy 5.504 directly purports to affect the "private rights, privileges or procedures available to the public" by impacting the ability of institutions of higher education to offer teacher licensing programs and the rights of students enrolled in those programs. *See* Tenn. Code Ann. § 4-5-102(12). As such, alleged Policy

5.504 goes beyond the mere “internal management” of the Board and does not fall within any of the other exception to the UAPA’s definition of a rule. Specifically, it is not a statement that concerns only the “internal management of state government,” nor is it an “intra-agency memoranda.” *See* Tenn. Code Ann. § 4-5-102(12). In reality, Board Policy 5.504 is a rule adopted and applied by the Board without authority or proper implementation. As such, it is void.

Indeed, Board Policy 5.504 is precisely the type of policy that Tennessee courts have long found to be invalid rules due to the agency’s failure to comply with the UAPA’s rule making procedures. *see also Heritage Early Childhood Dev. Ctr., Inc. v. Tenn. Dep’t of Human Servs.*, 2009 Tenn. App. LEXIS 636, \*23 (Tenn. Ct. App. Sept. 22, 2009) (policies and procedures contained in a manual relied upon by the Department of Human Services’ to terminate child care centers from program constituted invalid “rules,” under the UAPA and could not serve as the basis for the centers’ termination); *see also* Tenn. Atty. Gen. Op., 01-091 (June 4, 2001) (opining that the Board of Pharmacy’s Pharmacy Based Immunization Program Guidelines were a “rule” because they were mandatory for any pharmacist who wanted to participate in a pharmacy based immunization program—“if any pharmacist does not comply with the ‘specifications’ enumerated in the Guidelines, they cannot participate in a pharmacy based immunization program.”).

Because the Board did not comply with the UAPA’s rule making procedures in enacting Board Policy 5.504, Tennessee law commands that this policy “shall be *void and of no effect* and shall not be effective against any person or party *nor shall it be invoked by the agency for any purpose.*” Tenn. Code Ann. § 4-5-216 (emphasis added).

The action taken by the State Board of Education in approving the Tennessee Department of Education's recommendation of denial of the Bethel University School of Education's professional education unit and licensure programs was made without *any* express statutory grant of authority and as such, it is null and void. Likewise, the review and approval procedures set forth in Board Policy 5.504, which were relied upon by the Board in denying Bethel's approval, are null and void because the Board had no statutory authority to adopt such policies. Board Policy 5.504 is "void and of no effect" and cannot be legally invoked by the Board "for any purpose" because the Board failed to adhere to the UAPA's rule making procedures in adopting it.

**C. The Board's Conduct On July 22<sup>nd</sup> Violated Petitioner's Rights to Due Process of Law Under the Constitutions of Tennessee and the United States of America.**

The Board's *ultra vires* action in denying approval to Bethel's School of Education on July 22, 2016, was also in violation of Bethel's due process rights under both the state and federal Constitutions. It is well-established that the protections of procedural due process apply to administrative proceedings so long as the party alleging the due process violation has a protected liberty interest. See *Howell v. Metro. Sexually Oriented Bus. Licensing Bd.*, 466 S.W.3d 88, 102 (Tenn. Ct. App. 2014). The right to engage in a chosen business, occupation, or profession without unreasonable government interference or deprivation thereof is a property interest protected under both the United States and Tennessee Constitutions. Moreover, once the government grants a business the right to engage in such business, the right to pursue that business becomes a right that cannot be deprived without due process of law.

Without question, on July 25, 2014, the Board granted Bethel the right to engage in the business of offering educational licensure programs when it voted to approve the Department of

Education's recommendation to grant Bethel Conditional Approval with Stipulations for three years until the fall of 2017. In addition, in July of 2015, at the Board of Education's workshop, the Commissioner of Education expressly and publicly stated that the Board granted Bethel a "three year window from 2014-2017 to actually create the improvements to [its current status of] approval with stipulations." The Commissioner further acknowledged that Bethel had, in fact, demonstrated improvement in all areas of noted deficiency. As evidence of this improvement, Bethel's students have achieved a one hundred percent (100%) passage rate in three of the last five years on the Praxis® Principles of Learning and Teaching examination test, which applicants for teacher licensure are required to take by the State of Tennessee. In the other two years, Bethel students achieved a ninety three percent (93%) and ninety eight percent (98%) passage rate.

By granting Bethel conditional approval from 2014-2017, Bethel had a clear expectation that it could continue to offer educator licensure programs until at least 2017. In other words, under established law, Bethel had acquired a constitutionally protected interest in its conditional approval that could not be revoked without due process.

The Tennessee Court of Appeals has held that the minimum requirements of due process must be satisfied when an agency's decision could adversely affect vested property interests or other constitutional rights. In these cases, agencies must afford affected parties, at a minimum, (1) adequate notice (2) an opportunity for a hearing at a meaningful time and in a meaningful manner and (3) an opportunity to obtain judicial review of the board's or agency's decision. *See Howell v. Metro. Sexually Oriented Bus. Licensing Bd.*, 466 S.W.3d 88, 104 (Tenn. Ct. App. 2014). The Board's actions in denying Bethel's approval during the term of its conditional

approval did not comport with any of the above requirements and were in clear violation of the Board's due process rights.

Board Policy 5.504 fails to comport with due process as it does not contain any meaningful notice requirement nor any opportunity for educational institutions that have been denied approval to be heard in a meaningful time and in a meaningful manner. Likewise, there is no procedure for appealing a denial of approval in Board Policy 5.504. Policy 5.504 is facially unconstitutional and the Board's attempt to enforce its defective policy is similarly unconstitutional.

Due process also demands a fair hearing before a neutral or unbiased decision-maker as well as an appearance of fairness and the absence of probability of outside influence on the adjudication. Here, the Commissioner's action in making recommendations to the Board regarding the approval status of professional education units and licensure programs arguably constitutes a conflict of interest and presents an appearance of impropriety because immediately prior to her appointment as Commissioner, Candice McQueen was employed as the Vice President and Dean of Lipscomb University's College of Education. Lipscomb University and Bethel are direct competitors for students seeking to teach in Tennessee. In addition, Board member William E. Trout's participation in voting to deny Bethel's approval arguably constitutes a conflict of interest and presents an appearance of impropriety because he is currently the President of Rhodes College—again, a direct competitor of Bethel.

The Board's behavior toward Bethel on July 22, 2016, was an unconstitutional deprivation of the Petitioner's right to due process of law and is void.



**5. Description of requested ruling:**

**A. Request for Stay:**

Petitioner Bethel University respectfully requests that the Board immediately stay enforcement of its decision denying approval of Bethel's education preparation program upon receipt of the Petition and until the issuance of a declaratory order following a contested case hearing or until the time limit for convening a contested case pursuant to Tenn. Code Ann. § 4-5-233(c) has expired. Petitioner submits that a stay of the Board's decision is necessary to prevent irreparable harm to Bethel and its students currently enrolled in Bethel's education licensure programs while Bethel exhausts its administrative remedies under the UAPA.

**B. Request for Expedited Declaratory Order:**

Petitioner Bethel University respectfully requests that the Board grant this Petition and convene a contested case pursuant to Tenn. Code Ann. § 4-5-233(a)(1). Bethel requests that the Board convene a special called meeting on an expedited basis to consider this request and either refuse to issue a declaratory order pursuant to Tenn. Code Ann. § 4-5-233(a)(2) or set this matter for a contested case hearing as soon as possible prior to the sixty day time limit set forth in Tenn. Code Ann. § 4-5-233(c). The basis for this request for an expedited hearing is the ongoing immediate and irreparable harm to Bethel caused by the Board's July 22, 2016 actions. Bethel further requests that, upon evidence presented at this contested case proceeding, the Board issue a declaratory order ruling as follows:

1) that the Board does not have the statutory authority under Tenn. Code Ann. § 49-1-302 to oversee approval of education preparation providers and licensure programs offered by institutions of higher education;

2) that State Board of Education Rule 0520-02-04.01 and Board Policy 5.504, and the actions taken by the Board pursuant to this Rule and Policy, are invalid, and are null and void because they are *ultra vires* and outside the scope of the authority proscribed and granted to the Tennessee State Board of Education by the Tennessee General Assembly;

3) that purported Tennessee Board of Education Policy 5.504 is null and void as it was implemented unlawfully and outside of the procedures set forth in the Tennessee Uniform Administrative Procedures Act (“UAPA”), Tenn. Code Ann. §§ 4-5-101 *et seq.*

4) that the Board’s action to deny approval to Bethel’s School of Education was in violation of Bethel’s procedural due process rights under Article I section 8 of the Tennessee Constitution;

5) that purported Board Policy 5.504 is facially unconstitutional as it fails to comport with the minimum Constitutional requirements for due process of law; and

6) that Bethel’s Conditional Approval with Stipulations from 2014 through 2017 is immediately reinstated.

Respectfully submitted,

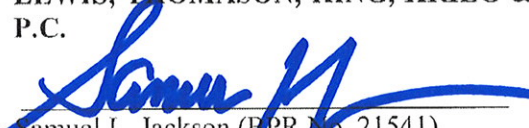
**Bethel University**

By:   
Its: President

Address: 325 Cherry Ave  
McKenzie, TN 38201

Date: September 15, 2016

**LEWIS, THOMASON, KING, KRIEG & WALDROP,  
P.C.**

  
Samuel L. Jackson (BPR No. 21541)  
Lawrence F. Giordano (BPR No. 006104)  
Emily H. Mack (BPR No. 31217)  
Brad W. Craig (BPR No. 31082)  
424 Church Street, Suite 2500  
P.O. Box 198615  
Nashville, TN 37219  
(615) 259-1366

*Counsel for Bethel University, Petitioner*

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Petition For Declaratory Order And Request For Stay has been served on the following counsel in the manner of service indicated below:

**BY HAND DELIVERY AND E-MAIL TO:**

**Tennessee State Board of Education**  
c/o Elizabeth Taylor, General Counsel  
710 James Robertson Parkway  
1<sup>st</sup> Floor  
Nashville, TN 37243

**Tennessee State Board of Education**  
c/o Sara Heyburn, General Counsel  
710 James Robertson Parkway  
1<sup>st</sup> Floor  
Nashville, TN 37243

Lindsay Sisco  
Assistant Attorney General  
Civil Litigation and State Services Division  
Tennessee Attorney General's Office  
P.O. Box 20207  
Nashville, TN 37202-0207  
Lindsay.Sisco@ag.tn.gov

This the 15<sup>th</sup> day of September, 2016.

