

STATE OF IOWA
BEFORE THE BOARD OF EXAMINERS FOR MASSAGE THERAPY

IN THE MATTER OF:)	DIA NO. 03DPHMT005
)	CASE NO. MT02-12
NATHAN KIRBY)	
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
RESPONDENT)	DECISION AND ORDER

On July 30, 2003, Iowa Board of Massage Therapy Examiners (Board) filed a Statement of Charges against Nathan Kirby (Respondent) alleging that he has violated Iowa Code section 152C.5 by practicing massage therapy for compensation without a license. A Notice of Hearing was issued setting a hearing date of September 2, 2003. The hearing was continued at the Respondent's request. The hearing was held on December 2, 2003 at 9:30 a.m. in the fifth floor conference room, Lucas State Office Building, Des Moines, Iowa. The following members of the Board participated in the hearing: Howard Sonksen, Public Member, Chairperson; Mary McGuire, LMT; Robert Buchanan, LMT; and Kenneth Lang, Public Member.

The Respondent appeared and represented himself. Chantelle Smith, Assistant Attorney General, appeared for the State. The testimony was recorded by a certified court reporter. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, assisted the Board in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1)(2003).

After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f), to deliberate their decision. The administrative law judge was directed to prepare the Board's decision for their review, in accordance with their deliberations.

THE RECORD

The record includes the testimony of the witnesses and the following exhibits:

State Exhibit 1:	Iowa Code section 152C(2003)
State Exhibit 2:	645 IAC chapter 131

- State Exhibit 3: 645 IAC chapter 134
- State Exhibit 4: Letter dated 3/13/02 (Board to Respondent) (MT 01-008)
- State Exhibit 5: Letter dated 3/13/02 (Board to Respondent) (MT 02-001)
- State Exhibit 6: Proof of Service for Exhibits 4, 5
- State Exhibit 7: Notice of Possible Action and Opportunity for Hearing, 6/3/03
- State Exhibit 8: Answer, 7/15/03
- State Exhibit 9: Notice of Hearing, 7/30/03
- State Exhibit 10: Statement of Charges, 7/30/03
- State Exhibit 11: "Nathan Kirby Massage" card
- State Exhibit 12: "Nathan Kirby Massage" Newspaper Advertisement, 12/19/01
- State Exhibit 13: "The Healing Touch" Telephone Directory Advertisement, 9/02
- State Exhibit 14: "Notice" , 4/12/02
- State Exhibit 15: International Massage Association, "Certificate Of Insurance."

- Respondent Exhibit A: withdrawn
- Respondent Exhibit B: Massage Pamphlets
- Respondent Exhibit C: Correspondence with state
- Respondent Exhibit D: School Certifications, Information
- Respondent Exhibit E: Insurance Certificate, effective 12/10/03; Certificate of Membership in International Massage Association
- Respondent Exhibit F: Lotion
- Respondent Exhibit G: Information on Tax Laws
- Respondent Exhibit H: Notice, 4/12/02
- Respondent Exhibit I: Respondent's notes re: freedom of religion
- Respondent Exhibit J: Gottlieb, Book of Alternative Cures, (Rodale, 2000)
- Respondent Exhibit K: compact disc, "natural massage therapy-solititudes-music for your health"

FINDINGS OF FACT

1. The Respondent resides in Keota, Iowa. He is employed by First Resources, where he works with mentally handicapped persons. The Respondent has also operated several part-time businesses. (Testimony of Respondent) The businesses at issue

in this hearing involve(d) the Respondent's provision of massage services for compensation.

2. The Respondent has never applied for licensure as a massage therapist in the state of Iowa. (Testimony of Audrey Mitchell; Respondent).

3. In 2001, the Respondent attended massage therapy school in Mariposa, California. At the hearing, the Respondent submitted his certificate of completion of 500 instructional clock hours from Ahern's Massage Therapy School, which he attended from July 29, 2001 through August 26, 2001, a total of 29 days. The Respondent's instructional hours included Anatomy/Physiology, Swedish Massage, Shiatsu, Acupressure, Kinesiology, Reflexology, Infant Massage, Ortho-Anatomy, Feng Shui, Opening Your Own Business With Ethics, Reiki, Office Massage, Myofacial Release Therapy, Hot Stone Therapy and Magnetic Therapy.

Dr. Thomas Ahern, Jr., the massage school's owner, testified by telephone and provided a brief description of the curriculum. According to Dr. Ahern, the requirements for practicing massage therapy in the state of California vary from locality to locality. Some cities or counties have no regulations, while others require up to 1000 hours of training. Dr. Ahern is not familiar with licensing requirements for massage therapists in Iowa and would advise students to become familiar with the laws in their own states and to become licensed, if required. Dr. Ahern testified that he is a certified instructor and is certified in all of the modalities that he teaches. While attending his school, students work seven days a week for 13 hours and 20 minutes each day. However, the 500 instructional hours completed by the Respondent in 29 days average out to more than 17 hours each day. (Testimony of Respondent; Dr. Thomas Ahern, Jr.; Respondent Exhibit D)

4. After completing massage school in late August 2001, the Respondent returned to Keota, Iowa with the intention of practicing as a massage therapist. From September 2001 until approximately January 2002, the Respondent provided massage therapy for compensation under the business name of "Nathan Kirby Massage." He admits that when he started this business he was not familiar with the Iowa law governing the practice of massage therapy.

According to a yellow business flyer promoting "Nathan Kirby Massage", the Respondent provided Reiki, Shiatsu, Swedish, Reflexology, Aromatherapy, Myofascial Release, Sports Therapy, Magnetic Therapy, Prenatal Massage, Infant Massage, Office Massage, Lymph Drainage, Acupressure, and Hot Stone Therapy. He offered these services at four locations/salons: Electric Beach in Coralville and Washington, Iowa, Outback Wrap Salon in Wellman, and Karen's Korner in Wayland and also did house calls. The business card included a price list for specific services. For example, a revitalizing office massage was \$10 for 15 minutes, upper body (neck, shoulders, back) was \$20 for 30 minutes, and full body was \$40 for one hour. (State Exhibit 11). The Respondent also placed an advertisement in the Sigourney News Review on December 19, 2001, advertising "Nathan Kirby Massage." The advertisement included the statements "Buy 3-1 Hour Massages Get 1 FREE" and "Buy 5-1 Hour Massages Get 2 FREE." (State Exhibit 12) (Testimony of Respondent; Traci Wenger)

5. Prior to leaving for massage school, the Respondent spoke to Traci Wenger, a salon owner in Washington, Iowa. The Respondent and Ms. Wenger had been acquainted in high school. Ms. Wenger's salon initially only offered tanning, but later added hair, nail technology, and an electric massage chair. The Respondent told Ms. Wenger that he was going to massage school and asked if she would be interested in renting her back room to him for his massage business. A short time later, Ms. Wenger heard that the Respondent was back from California and was practicing massage. She believed that he had only been gone from Iowa for about a week. Several customers came into Ms. Wenger's tanning salon and mentioned that they had massages from the Respondent at Electric Beach, another tanning salon in Washington. One of the customers, a radio station employee, told her that the Respondent also gave him an "adjustment."

Two friends, a chiropractor and a licensed massage therapist, told Ms. Wenger it was not possible to get trained as a massage therapist and licensed in a week. Ms. Wenger contacted the Board and found out that the Respondent was not licensed. She decided to file a complaint with the Board. She provided the Board with the yellow promotional flyer and the newspaper advertisement for "Nathan Kirby Massage." (Exhibits 11, 12). She also called the police department and the county attorney. The Coralville Police Department later filed its own complaint with the Board. (Testimony of Traci Wenger; Audrey Mitchell)

6. Cynthia Gretter also lives in Keota, Iowa and knew the Respondent because he was her son's TaekwonDo Instructor. She had seen the Respondent's yellow business flyer promoting "Nathan Kirby Massage" at a local gift shop. Ms. Garrett was looking for massage therapists willing to donate their time for a fundraiser. She contacted the Respondent, who she assumed was licensed, and also contacted two licensed massage therapists. The Respondent agreed to donate massage services for the fundraiser, and Ms. Garrett scheduled a personal massage appointment with him. When the two licensed massage therapists were told that the Respondent would also be providing massages, they told Ms. Garrett that he was not licensed. Ms. Garrett called the Board to confirm the Respondent's licensure and learned he was not licensed. She called the Respondent, and he told her that he had all of the education but did not have an Iowa license. Ms. Garrett cancelled her personal appointment and told the Respondent he would not be able to donate services for the fundraiser. (Testimony of Cynthia Gretter)

7. On March 13, 2002, the Board sent two certified letters to the Respondent, informing him of the relevant Iowa statutes and rules defining the practice of massage therapy and the penalties for practicing without a license. The Board asked the Respondent to cease any practice of massage therapy in violation of Iowa law and to respond in writing to the allegations that he was practicing illegally by operating businesses in Coralville, Washington, Wellman, and Wayland. (State Exhibits 4, 5, 6; Testimony of Audrey Mitchell) The Respondent did not reply to the Board.

8. The Coralville police department provided the Board with a written "NOTICE" that was dated April 12, 2002, and which had been distributed by the Respondent. The Notice is addressed to "Parents and Guardians" and is signed "Nathan Kirby Located at: Healing Touch, 241 8th Avenue, Wellman, Iowa (319)646-2600." In the Notice, the Respondent states that he had traveled to California to study advanced massage therapy and holistic healing methods. He describes body balancing as a holistic healing method that can treat a number of health conditions, including ADD, ADHD, Down Syndrome, Cerebral Palsy, Gout, Diabetes, Fibromyalgia, Lupus, Neuropathy, Depression, Anxiety, and allergies. He reports that through the use of this method, some people are no longer in need of medication and some have been able to reduce the level of their medications. (State Exhibit 14; Respondent Exhibit H; Testimony of Audrey Mitchell)

9. In September 2002, another complainant sent the Board a copy of the Respondent's advertisement in the Hanson Telephone Directory for "The Healing Touch" in Wellman, Iowa. The advertisement contains the words "HOLISTIC MASSAGE" and included the Respondent's name, address, and listed the following services: Reiki, Shiatsu, Reflexology, Myofascial Release, Lymph Drainage, Acupressure, and Body Balancing. It further stated that gift certificates were available. (State Exhibit 13; Testimony of Audrey Mitchell; Respondent)

10. On June 3, 2003 the Board issued a Notice of Possible Action and Opportunity for Hearing to the Respondent. The Respondent requested a hearing and sent a written Answer to the Board on July 15, 2003. In his Answer, the Respondent asserted that he does not perform massage therapy as defined by Iowa Code, that the name of his business was never Nathan Kirby Massage and that the name was just an error in publishing, and also denied that he operated under the name of "The Healing Touch." However, the exhibits and the testimony clearly establish that the Respondent did advertise and operate businesses under the names of "Nathan Kirby Massage" and "The Healing Touch."

In his Answer, the Respondent also asserted that his education in California was superior to that offered in Iowa, that he has been attacked and harassed by people in competition with him, and that he has never had a client complaint. The Respondent further stated that he no longer has an office and that his clients only come to him for reflexology, Reiki, or prayer sessions. (State Exhibits 7, 8)

11. The preponderance of evidence established that the Respondent has been providing "massage therapy" for compensation in Iowa since September 2001. Three of the Respondent's satisfied clients described the massage services that they have been receiving from him.

a) Mary Lee Ehrenfelt began using the Respondent's massage services two years ago, when a friend gave her a gift certificate, and has continued to receive massages on a regular schedule since that time. Ms. Ehrenfelt pays the Respondent \$40 an hour. Ms. Ehrenfelt, who is a registered nurse, feels that the Respondent's massages are superior to those she has received from licensed massage therapists. She testified that the

Respondent provides "more than just a massage of tissues" and that he manipulates joints to maintain and improve flexibility and mobility. She testified that the Respondent "doesn't just rub your back and arms" but also "stretches the shoulders and arms." She described his technique as "not just superficial" but a "deep muscle massage." In her opinion, the Respondent has relieved the pain she was experiencing in her knee and as a result she no longer sees her physical therapist.

Ms. Ehrenfelt is not concerned that the Respondent is unlicensed and believes that licensure is unnecessary for massage therapists. After she had been seeing the Respondent for about one year, he told her that he was not licensed, but she continued to use his services on a regular basis. She stated that she is aware that he has many repeat clients. (Testimony of Mary Lee Ehrenfelt)

b) Don Herr II began using the Respondent's services approximately 1½ years ago after he suffered a broken neck in a motorcycle accident. His first appointment was within days after he was released from the hospital. Mr. Herr testified that the Respondent massaged his neck and made it feel much better. After the session, Mr. Herr could move his neck more easily and wanted to take off his neck brace, but the Respondent told him to leave it on until he had seen his doctor. Mr. Herr described the services he received from the Respondent as a "deep plentiful massage." Mr. Herr paid the Respondent \$50-\$55 for each massage session. Mr. Herr is not currently receiving massages from the Respondent, but would like to return to the Respondent for massages in the future.

Mr. Herr did not consult his doctor before his first appointment with the Respondent. When Mr. Herr told his doctor that the Respondent was helping him, the doctor said that he could continue with the massages. The doctor did not ask if the Respondent was licensed. Mr. Herr did not know that the Respondent was not licensed, but testified that he was not concerned about licensure. (Testimony of Don Herr II)

c) Bob Freeman has been receiving massages from the Respondent every Wednesday for the past year. He pays around \$50 for each session. Mr. Freeman has received massages in the past from at least six other massage therapists, but testified that the Respondent uses a different style of treatment. He testified that the Respondent directs the massage/pressure to

the area where he is having the problem. He described the Respondent's Reiki method as very warming, soothing, and comforting. Mr. Freeman is not concerned that the Respondent is not licensed as a massage therapist. (Testimony of Bob Freeman)

12. The Respondent presented the testimony of Albert Schatz, a retired professor of Biochemistry and Microbiology. Since his retirement in 1981, Mr. Schatz has become interested in massage therapy. He edits and writes the Journal of Spiritual Bodywork. Mr. Schatz testified that he has conducted "years of research" and has been unable to find any evidence of harm caused by a massage therapist. In his opinion, licensure of massage therapists does not protect the public and the only purpose for licensing statutes is to create a monopoly. (Testimony of Albert Schatz)

13. The Respondent maintains that after he became aware of the requirements of the Iowa law, he restricted his services to reflexology and Reiki, which he believes does not require licensure. The Respondent currently sees clients one day a week from his office in Wellman and no longer advertises his services. In support of his argument that his practice of reflexology does not require licensure, the Respondent points to a definition of "reflexology" found in the "Book of Alternative Cures." That definition provides, in relevant part:

This field of therapy uses specific touch techniques to stimulate "reflex points and areas" on the **feet, hands, and ears**. Reflexologists believe that each of these points corresponds to a specific part of the body...

(emphasis added) (Respondent Exhibit J, pp. 630) The Respondent denies that his services constitute massage therapy as defined by statute, but the testimony of his regular clients contradicts this assertion. They describe "deep muscle massage" techniques, directing of the massage to the area where there is a problem, massage of the neck, back, arms, and knees, and manipulation of joints. The massages described by the Respondent and his clients fall squarely within the statutory definition of massage therapy and involve far more than the stimulation of reflex points on the feet, hands, and ears.

14. The Respondent submitted a Certificate of Liability Insurance for Commercial General Liability insurance for Nathan

and Tiffany Kirby. The policy was to become effective 12/10/03 (eight days after the hearing before the Board). In addition, the "description of operations" section of the certificate includes the following notation: "Massage Therapist - 1 full time." (Respondent Exhibit E)

15. The Respondent became ordained as a minister because he thought "it would get everyone off his back" but testified that the experience has changed him. The Respondent prays for his clients at the beginning of each session, and he believes that he has been "anointed with the gift of spiritual healing." He asserts that requiring him to be licensed as a massage therapist violates his constitutional right to free exercise of religion. (Exhibit I; Testimony of Respondent)

CONCLUSIONS OF LAW

I. Applicable Statutes and Regulations

Iowa Code section 152C.5(2003) provides, in relevant part:

152C.5 Practice or use of title-license required.

The practice of massage therapy as defined in section 152C.1 is strictly prohibited by unlicensed individuals. It is unlawful for a person to engage in or offer to engage in the practice of massage therapy, or use in connection with the person's name, the initials "L.M.T." or the words "licensed massage therapist", "massage therapist", "masseur", "masseuse", or any other word or title that implies or represents that the person practices massage therapy, unless the person possesses a license issued under the provisions of section 152C.3.

Prior to July 1, 2000, licensure as a massage therapist was available but optional in the state of Iowa. Effective July 1, 2000, the legislature enacted the statutory amendments mandating licensure for all persons practicing massage therapy. 2000 Acts, ch. 1185, §6.

"*Massage therapist*" means a person licensed to practice the health care service of the healing art of massage therapy under this chapter. Iowa Code section 152C.1(2)(2003).

"*Massage therapy*" means performance for compensation of massage, myotherapy, massotherapy, bodywork, bodywork therapy, or therapeutic massage including hydrotherapy, superficial hot and cold applications, vibration and topical applications, or other therapy which involves manipulation of the muscle and connective tissue of the body, excluding osseous tissue, to treat the muscle tonus system for the purpose of enhancing health, muscle relaxation, increasing range of motion, reducing stress, relieving pain, or improving circulation... Iowa Code section 152C.1(3) (2003).

The statutory requirements for licensure include completion of a curriculum of massage education at a school approved by the board which requires completion of at least five hundred hours of supervised academic instruction, passage of an examination given or approved by the board, and payment of a reasonable fee. Once a person is licensed, they are required to complete at least twelve hours of continuing education annually. Iowa Code section 152C.3(1) (2003).

The Board of Examiners for Massage Therapy was created pursuant to the provisions of Iowa Code chapters 147 and 152C. The Board is authorized to adopt rules, pursuant to Iowa Code chapter 17A, and to establish a procedure for the licensing of massage therapists. Iowa Code section 152C.3(1) (2003).

Iowa Code section 152C.4 (2003) provides, in relevant part:

152C.4 Practicing as a massage therapist without a license-employment of person not licensed-civil penalty.

1. The board, or its authorized agents, may inspect any facility that advertises or offers the services of massage therapy. The board may, by order, impose a civil penalty upon a person who practices as a massage therapist without a license issued under this chapter or a person or business that employs an individual who is not licensed under this chapter. The penalty shall not exceed one thousand dollars for each offense. Each day of a continued violation after an order or citation by the board constitutes a separate offense, with the maximum penalty not to exceed ten thousand dollars. In determining the amount of the civil penalty, the board may consider the following:

- a. Whether the amount imposed will be a substantial economic deterrent to the violation.
 - b. The circumstances leading to or resulting in the violation.
 - c. The severity of the violation and the risk of harm to the public.
 - d. The economic benefit gained by the violation as a result of noncompliance.
 - e. The welfare or best interest of the public.
2. Before issuing an order or citation under this section, the board shall provide written notice and the opportunity to request a hearing on the record. The hearing must be requested within thirty days of the issuance of the notice and shall be conducted as provided in chapter 17A...

See also 645 IAC 134.2.

II. Analysis

A. The Respondent Practiced Massage Therapy Without A License

The preponderance of the evidence established that the Respondent has offered massage therapy services to the public and has practiced massage therapy for compensation in the state of Iowa from September 2001 to the present. The Respondent is not licensed to practice massage therapy in the state of Iowa, has never applied for licensure, and has never applied for approval of the massage therapy curriculum that he completed in California.

The Respondent has provided various factual and legal defenses to the allegation that he practiced massage therapy without a license. The Respondent's factual defenses are not credible. In his Answer, the Respondent denied doing business under the name of "Nathan Kirby Massage" or the name of "The Healing Touch" and in testimony denied that he holds himself out to the public as a massage therapist. However, the witnesses' testimony clearly established that the Respondent has held himself out to the public as a massage therapist and has practiced under these business names. Paid advertisements and promotional materials distributed by the Respondent clearly identify his business under both "Nathan Kirby Massage" and "The Healing Touch." (State Exhibits 11-15) The Respondent has

practiced massage therapy in at least four salons and in his own office in Wellman, Iowa. In addition, the Respondent submitted a recently issued Certificate of Insurance for his business, which describes his operations as "Massage Therapist - 1 full time." (Respondent Exhibit E).

The Respondent characterizes all of the services that he currently offers as falling outside the statutory definition of massage therapy. However, the testimony presented by the Respondent and his clients clearly established that his services fit squarely within the statutory definition of massage therapy. While the Respondent may have also performed some techniques or services that fall outside the definition of "massage therapy," there is no doubt that he has provided "massage...which involves the manipulation of the muscle and connective tissue of the body,...to treat the muscle tonus system for the purpose of enhancing health, muscle relaxation, increasing range of motion, reducing stress, relieving pain, and improving circulation..." Iowa Code section 152C.1(3) (2003).

With respect to the Respondent's reflexology argument, it is clear that his services went far beyond the practice of reflexology and were not limited to the stimulation of reflex points in the feet, hands and ears. Moreover, it must be noted that there is currently a legislative study group examining the issue of whether reflexology falls under the definition of massage therapy.

B. Tax Arguments

The Respondent submitted copies of Iowa Code section 422.43(11) and 701 IAC 26.47, which are tax laws, although his arguments concerning their relevance to this case were unclear. Iowa Code section 422.23(11) and 701 IAC 26.47 both include "Turkish baths, massage, and reducing salons" in the list of taxable services in the state of Iowa. Iowa Code section 422.23(11) was amended, effective July 1, 1998, to exclude from taxation those services provided by massage therapists licensed under chapter 152C. 1998 Acts, chapter 1163. The Department promulgated 701 IAC 26.47 to implement the statute.

This revenue statute and rule do not provide support for the argument that unlicensed persons may provide massage services in Iowa. Iowa Code sections 152C.1 and 152C.5 (2003) clearly define the scope of massage therapy, limit its practice to

licensed persons, and clearly control who can practice massage therapy in Iowa. Moreover, when the revenue statute was last amended in 1998, massage therapy licensure was still optional, not mandatory.

The Respondent also submitted an undated portion of an informal opinion by Susan Voss from the Department of Revenue's Policy Section Technical Services Division that he obtained from the Department of Revenue website. The informal opinion specifically states that it is not binding on the Department of Revenue. A review of Revenue's on-line library revealed that this informal opinion was provided in response to a letter received by the Department of Revenue in 1992, long before licensure was mandatory for massage therapists and before the statutory definition of massage therapist provided that massage therapy was a "healing art." The informal opinion was given no consideration in this decision.

C. The Complaints Were Not Malicious

The Respondent argued that the Board should have dismissed the complaints against him because they were maliciously filed by persons who are in competition with him. In his exhibits, the Respondent included a copy of 645 IAC chapter 9 concerning complaints and investigations and underlined the provision providing that a person is not immune from civil liability for filing a complaint with malice. 645 IAC 9.1(2). It should be noted that this rule does not require the Board to dismiss a complaint filed with malice, as suggested by the Respondent in his opening statement, rather it provides that a person who maliciously files a complaint may be subject to civil suit.

In any event, the evidence in this record clearly does not support the Respondent's assertion that the complaints were maliciously filed. Licensing boards frequently receive complaints from persons who are in competition with the person named in the complaint; such persons are familiar with the requirements and obligations of the profession and are motivated to seek enforcement of the law. In this case, the preponderance of the evidence demonstrated that those who filed complaints against the Respondent had a factual basis for their complaints and did so in good faith.

D. The Respondent's Training and Competency Is Not At Issue In This Case

The Respondent also suggests that the Board should take no action against him because his training equals or exceeds the training required for Iowa licensure, that he is fully competent to provide massage therapy, that all of his clients have been completely satisfied with his services, and that no one has been harmed. While the Board has questions about how the Respondent could have completed 500 hours of supervised academic instruction in just 29 days, the quality or adequacy of the Respondent's training, his technical competence, and the satisfaction of his clients are irrelevant to the limited issue before the Board, which is whether he practiced massage therapy without a license. The Respondent has never applied for a license in the state of Iowa and has never applied for approval of his training program. Unless the Respondent satisfies the requirements for licensure established by the legislature and is issued a license, he is not legally qualified to practice massage therapy in the state of Iowa, regardless of his technical competence.

E. The Wisdom Of The Licensing Statute Is Not At Issue In This Case

The Respondent also argues that the Iowa statute licensing massage therapists is ill-conceived and unnecessarily burdensome because there is no risk of harm to the public from the practice of massage therapy. While the Board believes that the unauthorized or incompetent practice of massage therapy does present a risk of harm to the public, this political or policy argument should be made to the legislature; the board is obligated to enforce the law that has been enacted.

F. Constitutional Arguments

Finally, the Respondent challenges the constitutionality of the licensing statute on the grounds that it violates the Sherman Antitrust Act by creating a monopoly and that it violates his First Amendment rights to free exercise of religion and commercial free speech.

In order to preserve constitutional issues for judicial review, parties to contested cases must raise the constitutional issues at the agency level, even though the agency lacks the authority to decide constitutional issues. Soo Line R.R. v. Iowa Dep't of Transportation, 521 N.W.2d 685, 688 (Iowa 1994). See also

Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1979) (holding that agencies cannot decide issues of statutory validity). The Iowa Supreme Court has explained the rationale for the exhaustion requirement. Permitting the administrative process to first run its course may eliminate the need for reaching potential constitutional claims. In addition, even facial constitutional issues are more effectively presented for adjudication based upon a specific factual record, and facial constitutional challenges are frequently coupled with claims that the legislation is unconstitutional as applied to the litigant. Shell Oil Co. v. Bair, 417 N.W.2d 425, 430 (Iowa 1987).

Statutes enjoy a strong presumption of constitutionality. In order to prove it unconstitutional a challenger bears the burden of negating every reasonable basis for a statute. Franks v. Kohl, 286 N.W.2d 663, 669 (Iowa 1979). The regulation of health professions, for the preservation and protection of public health, is universally regarded as a duty of the State in the exercise of inherent police power. Because the health professions are invested with a strong public interest, statutes regulating them should be measured against the rational basis standard. State ex rel. Iowa Dept. of Health v. Van Wyk, 320 N.W.2d 599, 605 (1982).

1. Sherman Antitrust Act

The Respondent asserts that the licensing statute for massage therapists creates a restraint of trade or monopoly in violation of the Sherman Antitrust Act. No legal citations were provided to support this contention. This argument is without merit because Iowa Code section 152C falls within the "state action" exemption of the Sherman Act [15 U.S.C. §§ 1,2]. In order to qualify for antitrust immunity, two criteria must be met. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy"; second, the policy must be actively supervised by the state itself." Northwestern Bell v. Iowa Utilities Board, 477 N.W.2d 678, 685 (Iowa 1991) citing California Retail Liquor Dealers Ass'n v. Medical Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Through its enactment of Iowa Code chapter 152C, the Legislature has clearly articulated state policy and has exercised its police power to regulate the practice of massage therapy. The legislature has vested the Board with regulatory authority to establish the licensing procedure in accordance

with the requirements of the statute and to impose discipline or sanctions for violations of the statute or the Board's rules.

2. Free Exercise of Religion

The Respondent asserts that the statute unconstitutionally restricts his free exercise of religion because he prays with each client and because he believes that he has been anointed with the gift of spiritual healing. The licensing statute and this action of the Board only regulate the "physical" services provided by the Respondent that constitute the practice of massage therapy and for which he is paid. The statute does not regulate or prohibit the Respondent's religious or spiritual activities, including prayer.

3. Commercial Speech

The United States Supreme Court has provided the following relevant summary of the commercial speech doctrine:

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions...

In re R.M.J., 455 U.S. 191, 203 (1982)

The Respondent's unlicensed massage therapy practice is unlawful and its promotion by advertising is not constitutionally protected commercial speech. Moreover, the Board did not charge or separately sanction the Respondent for advertising; the sole issue is whether he in fact practiced massage therapy without a license. The Statement of Charges includes references to the Respondent's advertisements, but his advertisements and promotional brochures were considered by the Board because they were relevant to whether the Respondent in fact practiced massage therapy. Therefore, it does not appear that the application of the licensing statute to the Respondent violated any of the free speech provisions of the First Amendment.

III. Civil Penalty

In determining the appropriate amount of the civil penalty the Board considered all of the factors in Iowa Code section 152C.4 and 645 IAC 134.2(1)"d." The Respondent has practiced massage therapy in Iowa for more than two years and continued his practice of massage therapy even after the Board served him with two cease and desist letters, a Notice of Possible Action, and a Statement of Charges. None of the Board's efforts thus far have persuaded the Respondent to stop his unlicensed practice, and the Board is left without recourse other than to impose a civil penalty as an economic deterrent. The Respondent has realized a significant economic benefit from his unauthorized practice. The Board disagrees with the Respondent's assertion that as an unlicensed massage therapist he poses no risk of harm or injury to the public. Given the totality of circumstances, a penalty of \$1,000 is more than justified. If the Respondent continues to practice massage therapy without a license following the issuance of this Decision and Order, he will be subject to additional civil penalties for each day of violation, up to a maximum civil penalty of \$10,000.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the Respondent, Nathan Kirby, shall immediately cease and desist the unlicensed practice of massage therapy in the state of Iowa.

IT IS FURTHER ORDERED that for practicing massage therapy in the state of Iowa without a license issued under Iowa Code chapter 152C, the Respondent shall pay a civil penalty of \$1,000.00. The penalty must be paid within thirty (30) days of the issuance of this final order. If the penalty is not paid within thirty days, the attorney general may commence an action to recover the amount of the penalty, including reasonable attorney's fees and costs.

The Respondent is hereby WARNED that each day the violation continues after service of this Decision and Order of the Board is a separate offense and will subject the Respondent to the imposition of additional penalties up to and including \$10,000.

This Findings of Fact, Conclusions of Law, Decision and Order is approved by the board on December 22, 2003.

Any petition for judicial review of a decision or order of the board must be filed in the district court within 30 days after the decision or order becomes final. A decision of the licensing board is final upon issuance. 645 IAC 11.29.