



AMERICAN
PSYCHOLOGICAL
ASSOCIATION

April 10, 2017

The Honorable Brian Birdwell, Chair
The Honorable Chris Paddie, Vice-Chair
Texas Sunset Advisory Commission
P.O. Box 13066
Austin, TX 78711

Re: 2018 Sunset Advisory Commission Staff Report – Texas State Board of Examiners of Psychologists

Dear Senator Birdwell, Representative Paddie, and Commission members:

On behalf of the American Psychological Association (APA), I would like to share our responses to certain issues and recommendations identified during the previous review of the Texas State Board of Examiners of Psychologists (TSBEP). APA is the professional organization representing more than 115,700 members and associates engaged in the practice, research and teaching of psychology. APA works to advance psychology as a science and profession and as a means of promoting health, education, and human welfare. We work closely with our state affiliates, like the Texas Psychological Association, to further those goals at the state level.

Of the various issues or recommendations outlined in the Commission's sunset review staff report dated March 2018, APA would like to provide its comments on two specific issues or recommendations identified in the report: (1) The Structure of the State's Behavioral Health Licensing Agencies is Antiquated and Inefficient; and (2) Texas Should Adopt the Psychology Interjurisdictional Compact.

We strongly disagree with the first recommendation but agree with the second.

- ***How Should the Texas Board of Examiners of Psychologists be Structured?***

The issue of structuring an oversight body for psychology has been previously raised by the Sunset Advisory Commission in several staff reports issued in 2016-17 as well as proposed legislation introduced in 2017. In the March 2018 staff report, it is recommended that psychology be consolidated with professional counseling, marriage and family therapy and social work under the proposed Texas Behavioral Health Executive Council (TBHEC).

The report specifically points to significant operational problems with the licensing boards for the master's level mental health disciplines – professional counseling, marriage and family therapy, and social work. Examples include chronic staff shortages, backlogs in processing licensing applications and broken disciplinary/enforcement processes. This dysfunction in turn “places the livelihoods of licensees in jeopardy and puts the public at risk.” (See page 1, Sunset Advisory Commission Staff Report, March 2018) As a result, this exacerbates the lack of patient access to care.

750 First Street, NE
Washington, DC 20002-4242
(202) 336-5500
(202) 336-6123 TDD



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However, none of these same complaints are attributed to TSBEP. To the contrary, the report cites TSBEP as offering “a proven foundation that effectively regulates a closely-related behavioral health profession.” (See page 2) TSBEP is not cited as suffering from the kinds of dysfunction attributed to the other mental health professional licensing boards. Nevertheless, this Commission is recommending that TSBEP be consolidated with the other boards as part of the Behavioral Health Executive Council. In doing so, this Commission points to the US Supreme Court’s 2015 decision in North Carolina State Board of Dental Examiners v. FTC¹ as justification.

Ultimately, APA is opposed to consolidating TSBEP with the other licensing boards under the TBHEC for two reasons: (1) there are no operational deficiencies or consumer protection concerns warranting psychology being consolidated under TBHEC; and (2) the Council as currently proposed does not meet the “active state supervision” requirement described in the US Supreme Court’s NC Dental Board decision which is cited as the rationale for creating the Council.

1. *No Consumer Protection Concerns*

To protect the public health, safety and welfare, it is critical that the individuals knowledgeable about the particular profession regulated by a board make decisions about the critical regulatory and professional issues to ensure high quality care for the patients served by the profession. Given that the TBHEC is comprised largely of public members, it is unclear how those public members would be in a better position to determine whether a particular board’s policies or decisions about licensing requirements or professional practice standards may jeopardize public safety or have anticompetitive effect.

Given that psychology has been identified as a positive model of an effective professional licensing board, it seems disingenuous to claim that inclusion of TSBEP under the Council is needed for consumer protection purposes. What is striking is that unlike certain other licensing boards, the psychology licensing board was not cited by the state sunset advisory commission for any significant operational deficiencies. In fact, the Texas State Board of Examiners of Psychologists (TSBEP) was not identified as having been slow to process licensure applications, or to prioritize or resolve licensing complaints. There has been no allegation that TSBEP has not been effectively fulfilling its mission of protecting the public. Therefore, it is unclear why TSBEP cannot retain its status as an independent board with the full expertise and authority necessary to regulate psychology.

It is also interesting to note that there is no analogous recommendation to move or consolidate the Texas Medical Board, which is also a doctoral-level profession and has also been evaluated by this Commission, with other professions under a single agency or oversight body.

2. *Antitrust Liability Concerns*

The report proposes to consolidate all four boards under a single agency to share staffing, resources and regulatory processes. The report suggests that the proposed structure of the Council would allow each

¹ N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 191 L. Ed. 2d 35, 2015 U.S. LEXIS 1502 (2015)

individual professional board to maintain a central role in regulating its respective discipline, but that the Council would have final approval authority over each of the four professional boards as to any changes in scopes of practice, standards of care or other professional matters.

The report cites the US Supreme Court's 2015 NC Dental Board decision as justification for licensing board consolidation under the TBHEC. However, we think that this case does not specifically stand for the proposition that states can easily avoid antitrust liability through board consolidation or reorganization. Rather, the NC Dental Board decision provides that licensing boards may be subject to lawsuits under federal antitrust laws since boards are typically comprised of active market participants. Additionally, the Court did not provide explicit guidance defining what constitutes "active state supervision" granting antitrust immunity.

Consolidating licensing boards for several disciplines under a single Council comprised of representatives from those boards does not necessarily demonstrate "active state supervision." The US Supreme Court's decision in no way suggested that changing a licensing board's composition would satisfy this requirement. In fact, the Federal Trade Commission's *Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*² states that even a licensing board where its majority is not comprised of active market participants can be subject to antitrust liability. Given the expertise that active market participant members of a licensing board bring to bear, the FTC Staff Guidance suggests that it is foreseeable that non-market participant members could defer to the expert members for their knowledge, or the decision-making structure may be such that at least one market participant's vote is needed for the board to act.

The Council as proposed would have one public member and one ex-officio professional representative from each of the licensing boards to serve on the 9-person council. The governor would appoint an independent public member as the final member who serves as the council's presiding officer with the majority of the council being composed of public members. While the number of active market participants is less than the public members on the proposed council, the minority could arguably still exercise enough influence in the decision-making process that Texas might still be subject to antitrust liability.

Because the US Supreme Court did not precisely define what constitutes active supervision, the FTC guidance and other legal commentary urge states to carefully consider whether a state offers the necessary active state supervision over its licensing boards to warrant antitrust immunity and how such supervision is administered. The US Supreme Court has stated that the *supervisor cannot be a market participant and must actually review the substance of the decision* (not just the procedures by which the decision was rendered) with the authority to veto or modify any such decision. Therefore, the Council as proposed would include active market participants. But the report does not clearly describe how the Council would meet the active state supervision requirement as there is no mention of any independent

² https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

oversight to review, approve, veto or reject the Council's decisions or actions.³ In fact, the report (see page 29) states that the Council (comprised of some market participants) "would have final sanction and administrative penalty authority." So, it is not clear that the proposed Council resolves the problems it claims to address.

It is also noteworthy that only certain disciplines have been targeted for consolidation under the proposed Council. Certain boards, such as medicine, dentistry and nursing, are continuing to function as independent licensing boards. It is not clear that those boards are at risk of being consolidated or reorganized to provide for active state supervision in response to the NC Dental Board decision. If Texas is concerned about possible antitrust liability exposure for the boards and commissions, it would seem the state would want to establish an oversight mechanism for all its licensing boards to provide the "active state supervision" needed to shield those boards from antitrust liability. So, it is puzzling why psychology is selected for consolidation when it is a doctoral-level profession like medicine and dentistry (but those disciplines are not flagged for consolidation), when psychology's licensing board is not suffering from operational deficiencies, and the proposed consolidation does not resolve the antitrust immunity issue.

As described in this Commission's report on page 13, we are also unclear how the NC Dental Board decision justifies the actions by TSBEP to overhaul the psychological associate practice requirements to allow licensed psychological associates to practice independently in any setting with the same scope of practice as doctoral level licensed psychologists despite the longstanding history of licensed psychological associates working under the supervision of licensed psychologists. There have been previous unsuccessful attempts through both litigation⁴ and legislation to effect such change. There has been no data or evidence presented demonstrating a "clearly articulated and affirmatively expressed state policy" that justifies this change. After nearly fifty years of working under supervision, master's trained psychological associates are now permitted to practice independently just like

³ See Oklahoma Governor's executive order dated July 17, 2015 authorizing the Oklahoma Attorney General to review all proposed actions and decisions by state licensing boards for possible anticompetitive conduct in response to the US Supreme Court's NC Dental decision. <https://www.sos.ok.gov/documents/executive/993.pdf>

See also California Attorney General's opinion dated September 10, 2015 stating the California's most likely approach in response to NC Dental decision is establishing a state office within the Department of Consumer Affairs responsible for reviewing board conduct. https://oag.ca.gov/system/files/opinions/pdfs/15-402_0.pdf

⁴ See TAPA v. TSBEP et al., No. 03-11-00541-CV (2014) (Trial court and appellate court finding that the Texas Association of Psychological Associates not presented any evidence that TSBEP lacked authority to require supervision for licensed psychological associates).

Psychological associates historically have been required to work under the supervision of licensed psychologists since Texas began regulating psychology in 1969. When Texas enacted the psychology practice act, practitioners with a master's degree were permitted to practice so long as they worked under the direct supervision of a licensed psychologist. The psychology practice act also established the TSBEP to implement and enforce the practice and TSBEP adopted rules specifying that psychological associates could only practice under the supervision of a licensed psychologist. Despite bills having been introduced over the years seeking to remove supervision, including legislation introduced in 2017, none of them had passed the legislature.

doctorally-trained psychologists without providing any substantive evidence demonstrating why this change is necessary or explaining how this significant change would not result in potential harm and confusion to consumers. Therefore, it is unclear how the NC Dental Board decision supports TSBE's actions.

Therefore, APA urges the Sunset Advisory Commission to consider other options, such as the executive order issued by the Oklahoma governor empowering the state Attorney General's Office to review proposed actions and decisions of all state licensing boards, and to allow TSBE to continue as an independent board.

- ***Adoption of the Psychology Interjurisdictional Compact (PSYPACT)***

The Commission's staff report also recommends that Texas should adopt the PSYPACT proposal as part of the state Psychology Practice Act. PSYPACT would establish a lawful regulatory mechanism facilitating qualified, licensed psychologists in states that have adopted PSYPACT to engage in telepsychological practice and creating a more uniform temporary, in-person practice provision across state lines. APA supports this proposal as creating a lawful, ethical means for allowing psychologists to provide services to patients who may be in other jurisdictions while ensuring that psychology licensing boards can effectively protect its constituents in ensuring that those who are providing psychological services either virtually or temporarily are qualified to do so. This compact has already been approved by the legislatures in Arizona, Utah, and Nevada and is awaiting the Governor's signature in Colorado. Enabling legislation is pending in Georgia, Illinois, Missouri, Nebraska and Rhode Island.

Thank you for the opportunity to provide comments on the sunset review process for the Texas psychology practice act. If you have any questions or need further information, please contact Deborah Baker, JD, Director of Legal & Regulatory Policy by telephone at 202-336-5886 or by email at dbaker@apa.org.

Sincerely,



Katherine C. Nordal, PhD
Executive Director for Professional Practice

Cc: Texas Psychological Association