

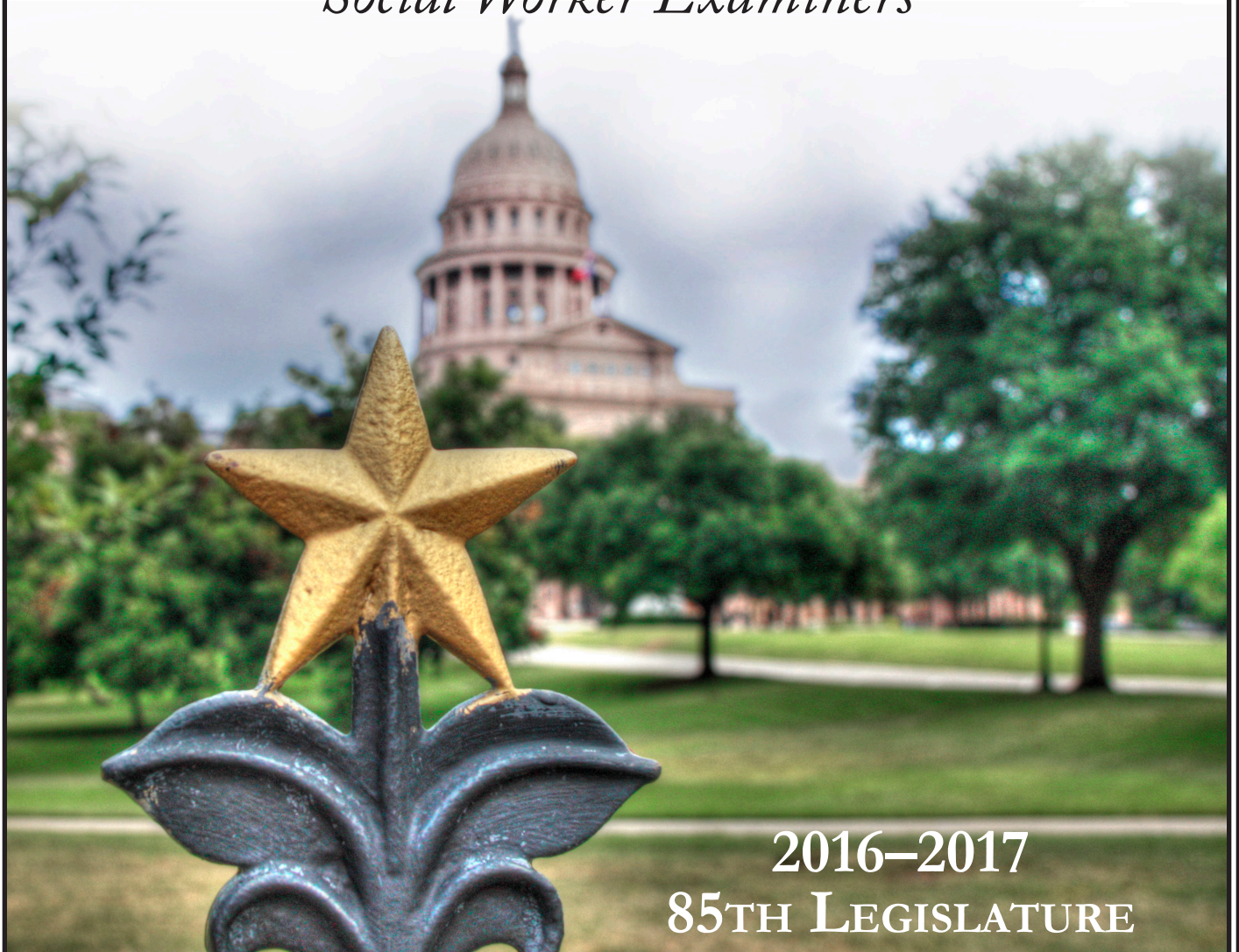
# SUNSET ADVISORY COMMISSION

## STAFF REPORT WITH COMMISSION DECISIONS

*Texas State Board of Examiners of  
Marriage and Family Therapists*

*Texas State Board of Examiners  
of Professional Counselors*

*Texas State Board of  
Social Worker Examiners*



2016–2017  
85TH LEGISLATURE

# SUNSET ADVISORY COMMISSION

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*Cover Photo: The iron perimeter fence was installed in the 1890s, a few years after the completion of the Texas State Capitol. The fence surrounds approximately 22 acres of the Capitol Grounds but only on the east, west, and south sides due to the addition of the Capitol Extension to the north in the early 1990s. Photo Credit: Janet Wood*

**TEXAS STATE BOARD OF EXAMINERS OF  
MARRIAGE AND FAMILY THERAPISTS**

**TEXAS STATE BOARD OF EXAMINERS  
OF PROFESSIONAL COUNSELORS**

**TEXAS STATE BOARD OF  
SOCIAL WORKER EXAMINERS**

**SUNSET STAFF REPORT WITH COMMISSION DECISIONS**

**2016-2017**

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## ***HOW TO READ SUNSET REPORTS***

Each Sunset report is issued *three times*, at each of the three key phases of the Sunset process, to compile all recommendations and action into one, up-to-date document. Only the most recent version is posted to the website. (**The version in bold is the version you are reading.**)

### 1. SUNSET STAFF EVALUATION PHASE

Sunset staff performs extensive research and analysis to evaluate the need for, performance of, and improvements to the agency under review.

FIRST VERSION: The *Sunset Staff Report* identifies problem areas and makes specific recommendations for positive change, either to the laws governing an agency or in the form of management directives to agency leadership.

### 2. SUNSET COMMISSION DELIBERATION PHASE

The Sunset Commission conducts a public hearing to take testimony on the staff report and the agency overall. Later, the commission meets again to vote on which changes to recommend to the full Legislature.

SECOND VERSION: **The *Sunset Staff Report with Commission Decisions*, issued after the decision meeting, documents the Sunset Commission's decisions on the original staff recommendations and any new issues raised during the hearing, forming the basis of the Sunset bills.**

### 3. LEGISLATIVE ACTION PHASE

The full Legislature considers bills containing the Sunset Commission's recommendations on each agency and makes final determinations.

THIRD VERSION: The *Sunset Staff Report with Final Results*, published after the end of the legislative session, documents the ultimate outcome of the Sunset process for each agency, including the actions taken by the Legislature on each Sunset recommendation and any new provisions added to the Sunset bill.

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# — SUNSET COMMISSION DECISIONS





# SUNSET COMMISSION DECISIONS

## Summary

The following material summarizes the Sunset Commission's decisions on the staff recommendations for the Texas State Board of Examiners of Marriage and Family Therapists, Texas State Board of Examiners of Professional Counselors, and Texas State Board of Social Worker Examiners, as well as a modification raised during the public hearing.

These three independent boards are charged with protecting persons receiving behavioral health services. The boards, however, are not independent agencies and have no staff. Instead, each board receives administrative services from the Department of State Health Services (DSHS). Collectively, the boards regulate about 50,000 licensees, many of whom treat vulnerable clients who suffer from mental health disorders or impairments.

Overall, the Sunset Commission confirmed previous concerns that the administrative attachment of the boards to DSHS is not working, and that the boards have failed to effectively regulate their professions, putting vulnerable Texans at risk. In particular, the boards' enforcement processes are broken. Each board takes an average of two to three years to resolve a complaint, and collectively the boards had amassed an alarming backlog of more than 850 complaint cases.

Given the serious, ongoing, and systemic problems identified, the commission concluded these programs cannot continue to function under the existing regulatory structure. When considering the recommendations in the separate *Health Licensing Consolidation Project Sunset Staff Report*, the commission chose to recommend consolidating these boards with the Texas State Board of Examiners of Psychologists and two other occupational regulatory programs at DSHS (the Council on Sex Offender Treatment and licensed chemical dependency counselors) to form the Texas Behavioral Health Executive Council (BHEC). As a consolidated behavioral health umbrella licensing agency, all licensing, investigative, and enforcement matters would be handled in an efficient functional approach to improve licensing and enforcement outcomes. The discussion of Issue 1 below provides additional detail on the structure of BHEC and the continuing authority of the existing boards.

## ISSUE 1

*The Texas Department of Licensing and Regulation Should Regulate Marriage and Family Therapists, Professional Counselors, and Social Workers.*

**Recommendation 1.1, Modified** — This decision was made as part of the consideration of the *Health Licensing Consolidation Project Sunset Staff Report*.

As a modified approach to the staff recommendation, the commission recommends continuing the regulation of marriage and family therapists, professional counselors, and social workers and merging their programs and boards currently housed at the Department of State Health Services (DSHS) with the Texas State Board of Examiners of Psychologists to create the Texas Behavioral Health Executive Council (BHEC), a functionally aligned umbrella licensing agency. The merger would take place no later than September 1, 2018, and have a Sunset date of 2029.

The current governor-appointed boards would remain intact and retain responsibility for developing rules and guiding matters relating to their respective professions. Each board would appoint one of its professional members and one of its public members to serve on the nine-member executive council. The executive council would review and have final approval authority over the rules relating to scope of practice, standards of care, and ethics written by the independent boards, and would have the responsibility to adopt rules relating to BHEC operations and standardized regulatory procedures such as license applications, investigatory practices, and enforcement processes.

## ISSUE 2

### *The Behavioral Health Boards' Dysfunctional Enforcement Processes Fail to Adequately Regulate Licensees and Protect the Public.*

**Recommendation 2.1, Adopted** — Abolish the boards' complaints and ethics committees and ensure board members are not involved in complaint investigations.

**Recommendation 2.2, Adopted** — Ensure each board develops policies for prioritizing complaints and directs staff to prioritize complaint investigations based on these policies. (Management action – nonstatutory)

**Recommendation 2.3, Adopted** — Direct each board to develop policies to settle cases informally. (Management action – nonstatutory)

**Recommendation 2.4, Adopted** — Ensure each board updates its enforcement plan, including appropriate penalty matrices. (Management action – nonstatutory)

## ISSUE 3

### *Key Elements of the Behavioral Health Boards' Statutes, Rules, and Policies Do Not Conform to Common Licensing Standards.*

**Recommendation 3.1, Adopted** — Require BHEC to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.

**Recommendation 3.2, Adopted** — Authorize BHEC to check for disciplinary actions in other states or from other licensing boards as part of the license application and renewal process, and to pursue any necessary enforcement actions based on the results.

**Recommendation 3.3, Adopted** — Remove the “good moral character” standard as a criterion for marriage and family therapist applicants.

**Recommendation 3.4, Adopted** — Remove the statutory limitation currently restricting the boards' authority to lower fees.

**Recommendation 3.5, Adopted** — Remove the statutory requirement that marriage and family therapist applicants have 750 hours of direct clinical services and authorize the board to establish the required hours by rule.

**Recommendation 3.6, Adopted** — Direct each board to standardize conditions for inactive licensees. (Management action – nonstatutory)

**Recommendation 3.7, Adopted** — Direct the board to remove unnecessary and restrictive education requirements for professional counselor applicants for licensure. (Management action – nonstatutory)

**Recommendation 3.8, Adopted** — Direct each board to reduce the burden of supervision requirements on licensees, supervisors, and staff. (Management action – nonstatutory)

**Recommendation 3.9, Adopted** — Direct each board to fully implement expedited processing for military applications and renewals for marriage and family therapists, professional counselors, and social workers. (Management action – nonstatutory)

**Recommendation 3.10, Adopted** — Direct each board to enhance the continuing education provider registry and comply with statute by approving continuing education courses. (Management action – nonstatutory)

## Fiscal Implication Summary

### Texas Behavioral Health Executive Council

Consolidating the five programs from DSHS and the Board of Examiners of Psychologists into the Texas Behavioral Health Executive Council would have an initial negative fiscal impact to the state over the next five fiscal years. The majority of these costs are necessary to transfer and maintain electronic data at the level needed for effective regulation, as well as eliminate the large backlogs of enforcement cases and complaints that have accrued at DSHS. The new agency would have 45.5 full time staff positions. This figure includes the existing staff positions from each consolidated agency and program and three new staff positions to address the backlog of cases. Once the backlog is resolved, these positions would no longer be necessary. Once the merger is complete and fully operational, additional FTE reductions would be expected from efficiencies gained from removing duplication of effort.

#### *Health Licensing Consolidation Project*

Fiscal Year	Cost to the General Revenue Fund	Current Agency FTEs	BHEC FTEs	FTE Change From FY17
2018	\$469,692	42.5	1	+1
2019	\$223,523	0	45.5	+3
2020	\$206,618	0	45.5	+3
2021	\$27,752	0	42.5	0
2022	\$27,752	0	42.5	0

### Behavioral Health Boards

The fiscal impact of the recommendations to improve enforcement processes is difficult to estimate given the extensive waste of resources by the Texas State Board of Examiners of Marriage and Family Therapists, Texas State Board of Examiners of Professional Counselors, and Texas State Board of Social Worker Examiners. Streamlining the enforcement processes and providing staff adequate authority to handle baseless and non-jurisdictional complaints will save significant, but inestimable staff resources.

Requiring fingerprint-based criminal background checks would not have a fiscal impact to the state, but would require applicants and licensees to pay a one-time fee of about \$40 for a fingerprint background

check through the Department of Public Safety. Any increased workload related to background checks could be handled with current resources. Requiring approval of continuing education courses would increase staff workload slightly, but this cost would be offset by efficiencies gained through other recommendations in the report.

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# **SUMMARY OF SUNSET STAFF RECOMMENDATIONS**



# SUMMARY

The Legislature created the Texas State Board of Examiners of Marriage and Family Therapists, Texas State Board of Examiners of Professional Counselors, and Texas State Board of Social Worker Examiners as independent boards charged with protecting persons receiving behavioral health services. The boards are not independent agencies; instead, each board receives administrative services from the Department of State Health Services (DSHS). Collectively, the boards regulate about 50,000 licensees, many of whom treat vulnerable clients who suffer from mental health disorders or impairments. As such, the boards' public protection charge is critical since these behavioral health practitioners apply a considerable amount of judgment in the services they provide, and the authority and trust given to them creates an opportunity for abuse, whether financial, emotional, sexual, or otherwise.

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*The boards have failed to effectively regulate these professions, putting Texans at risk.*

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Overall, the Sunset review found the administrative attachment of the boards to DSHS is not working. Further, their impending transfer in name only to the Health and Human Services Commission (HHSC) next year will change little, if anything. The shortcomings of this system have been highlighted in numerous reports, including the 2015 DSHS Sunset review in which staff recommended transferring these programs to the Texas Department of Licensing and Regulation (TDLR). While the Sunset Commission and the Legislature ultimately transferred 13 occupational regulatory programs from DSHS to TDLR, these three boards were allowed to remain until the completion of their own Sunset reviews. However, the current Sunset review confirmed previous concerns and identified other serious and systemic issues that must be addressed.

The behavioral health boards have failed to effectively regulate these professions, putting vulnerable Texans at risk. The boards' enforcement processes are broken. In fiscal year 2016, each board took an average of two to three years to resolve a complaint, and the boards have amassed an alarming backlog of more than 850 complaint cases from previous fiscal years potentially putting the public at risk. The boards' unusual complaints committee processes fail to safeguard due process or confidentiality, and many stakeholders take exception to the public shaming aspect of these public meetings. The professional counselor board in particular has earned a reputation for its sensationalistic complaints meetings. Beyond the significant issues with the boards' actions, DSHS must prioritize its programs with the highest potential risk to public health. With finite resources, DSHS cannot devote adequate resources to support the boards' missions to protect the public.

Given the serious, ongoing, and systemic problems identified, these programs simply cannot continue to function under the existing regulatory structure. Sunset staff recommends transferring the regulation of marriage and family therapists, professional counselors, and social workers to TDLR's newly

created health professions division where they will receive the expertise and attention needed to fix these longstanding problems. TDLR has established itself as a successful umbrella licensing agency with an effective regulatory model, and has a proven track record of improving licensing and enforcement outcomes for transferred programs while maintaining or reducing costs. Transferring these three behavioral health regulatory programs to TDLR's health professions division will increase responsiveness to licensees and consumers and improve regulation to better protect the public.

The following material summarizes all of the Sunset staff findings and recommendations on the Texas State Board of Examiners of Marriage and Family Therapists, Texas State Board of Examiners of Professional Counselors, and Texas State Board of Social Worker Examiners.

## Issues and Recommendations

### *Issue 1*

#### **The Texas Department of Licensing and Regulation Should Regulate Marriage and Family Therapists, Professional Counselors, and Social Workers.**

Three independent boards administratively attached to DSHS oversee the practice of marriage and family therapy, professional counseling, and social work. The boards and DSHS have failed to effectively regulate these professions, putting Texans at risk. The boards have unacceptable enforcement processes, including a backlog of over 850 enforcement cases and appalling complaint resolution times. Additionally, the boards have not kept pace with occupational regulatory standards. Transferring these boards to the health professions division of TDLR, with its proven track record of improving licensing and enforcement outcomes for other professions, would ensure licensees are more effectively and efficiently regulated and the expectations of Texans are met.

#### **Key Recommendation**

- Continue regulation of marriage and family therapists, professional counselors, and social workers at the Texas Department of Licensing and Regulation.

### *Issue 2*

#### **The Behavioral Health Boards' Dysfunctional Enforcement Processes Fail to Adequately Regulate Licensees and Protect the Public.**

The enforcement processes used by the behavioral health boards have led to unacceptable case resolution times of several hundred days and a backlog of several hundred cases that can endanger the public. A number of board decisions have created roadblocks to efficient and effective enforcement activity, including insufficient complaint dismissal authority for staff. Unconventional approaches to complaint resolution processes, such as involving board members in the investigative process, create unmanageable work for staff and can skew the fairness and objectivity in enforcement processes. The boards' unusual public complaints and ethics committees also undercut due process and confidentiality, both of which would be better protected through appropriate notice of allegations and an informal settlement process. Regardless of board actions, limited resources at DSHS have also proven to be inadequate to support the boards' missions to protect the public.



## Key Recommendations

- Abolish the boards' complaints and ethics committees and ensure board members are not involved in complaint investigations.
- Ensure TDLR develops policies for prioritizing complaints and directs staff to prioritize complaint investigations based on these policies.
- Ensure TDLR updates its enforcement plan, including appropriate penalty matrices.

## Issue 3

### Key Elements of the Behavioral Health Boards' Statutes, Rules, and Policies Do Not Conform to Common Licensing Standards.

Several licensing provisions in the behavioral health boards' statutes, rules, and policies do not conform with model standards or common practices observed in other occupational regulatory agencies, presenting unnecessary hurdles to applicants and potentially reducing consumer safety. The boards rely on outdated modes for criminal background checks and do not proactively ensure out-of-state applicants are safe to practice in Texas. None of the boards has updated rules to reflect expedited licensing for military personnel and spouses. Outdated and absent statutory authority prevent the boards from operating efficiently, and overly restrictive education and experience requirements and bureaucratic supervision requirements add unnecessary burdens to entering the profession.

## Key Recommendations

- Require TDLR to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.
- Authorize TDLR to check for disciplinary actions in other states and from other licensing boards, and to pursue any necessary enforcement actions based on the results.
- Remove the statutory limitation currently restricting the boards' authority to lower fees.
- Direct TDLR to remove unnecessary and restrictive education requirements for professional counselor applicants, and to reduce the burden of supervision requirements on licensees, supervisors, and staff.
- Direct TDLR to fully implement expedited processing for military applications and renewals for marriage and family therapists, professional counselors, and social workers.

## Fiscal Implication Summary

Overall, the recommendations in this report would result in much better regulation for the professions and reduced regulatory costs over time; however, the recommendations would result in a small negative fiscal impact to the General Revenue Fund of approximately \$540,409 over the next five years. The impact comes from initial start-up appropriations to TDLR of at least \$950,565 and eight additional full-time equivalent employees (FTEs) in fiscal year 2018 and \$209,440 and three FTEs in fiscal year 2019 to enhance licensing and enforcement efforts, particularly to clear up the existing large backlog of behavioral health board complaint cases. After these initial investments, the administrative costs for

the behavioral health programs should decrease from the current cost of \$1.4 million to less than \$1.2 million resulting in an annual savings beginning in fiscal years 2020–2022 and continuing thereafter.

The boards generate \$3.1 million in revenue annually, which is more than sufficient to cover TDLR's projected start-up and operating costs. Alternatively, the Legislature could consider covering TDLR's start-up costs by authorizing a temporary surcharge or fee increase on licensees in the transferred programs.

**Issue 1** — Transferring regulation of marriage and family therapists, professional counselors, and social workers to TDLR would result in initial start-up costs to the General Revenue Fund but lead to more efficient long-term regulation and savings, as well as fewer employees over time from efficiencies gained.

**Issue 2** — The fiscal impact of the recommendations to improve enforcement processes is difficult to estimate given the extensive waste of resources by the three current boards. Streamlining the enforcement processes and providing staff adequate authority to handle baseless and nonjurisdictional complaints will save significant, but unestimable staff resources.

**Issue 3** — Requiring fingerprint-based criminal background checks would not have a fiscal impact to TDLR but would require applicants and licensees to pay a one-time fee of about \$40 for a fingerprint background check through the Department of Public Safety. Any increased workload related to background checks could be handled with current resources. Requiring approval of continuing education courses would increase staff workload, which would be offset by efficiencies gained through other recommendations in this issue. TDLR would have sufficient fee authority, but would need a matching appropriation, to recover costs if determined to be necessary, including costs associated with querying the National Practitioner Data Bank.

### ***Behavioral Health Boards***

<b>Fiscal Year</b>	<b>Cost (Savings) to the General Revenue Fund</b>	<b>Change in the Number of FTEs From FY 2017</b>
2018	\$950,565	+8
2019	\$209,440	+3
2020	(\$57,502)	+1
2021	(\$281,047)	-3
2022	(\$281,047)	-3

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**BEHAVIORAL HEALTH BOARDS  
AT A GLANCE  
NOVEMBER 2016**



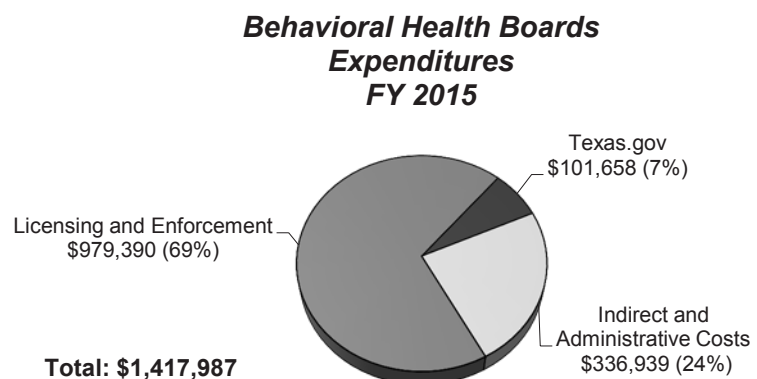
# BEHAVIORAL HEALTH BOARDS AT A GLANCE

The Texas State Board of Examiners of Marriage and Family Therapists, Texas State Board of Examiners of Professional Counselors, and Texas State Board of Social Worker Examiners do not function as independent agencies. Rather, these behavioral health boards are administratively attached to the Department of State Health Services (DSHS), which provides administrative support to carry out the boards' functions. The mission of the boards is to protect public health and safety by licensing and regulating marriage and family therapists, licensed professional counselors, and social workers. To meet this mission, each board carries out the following key activities:

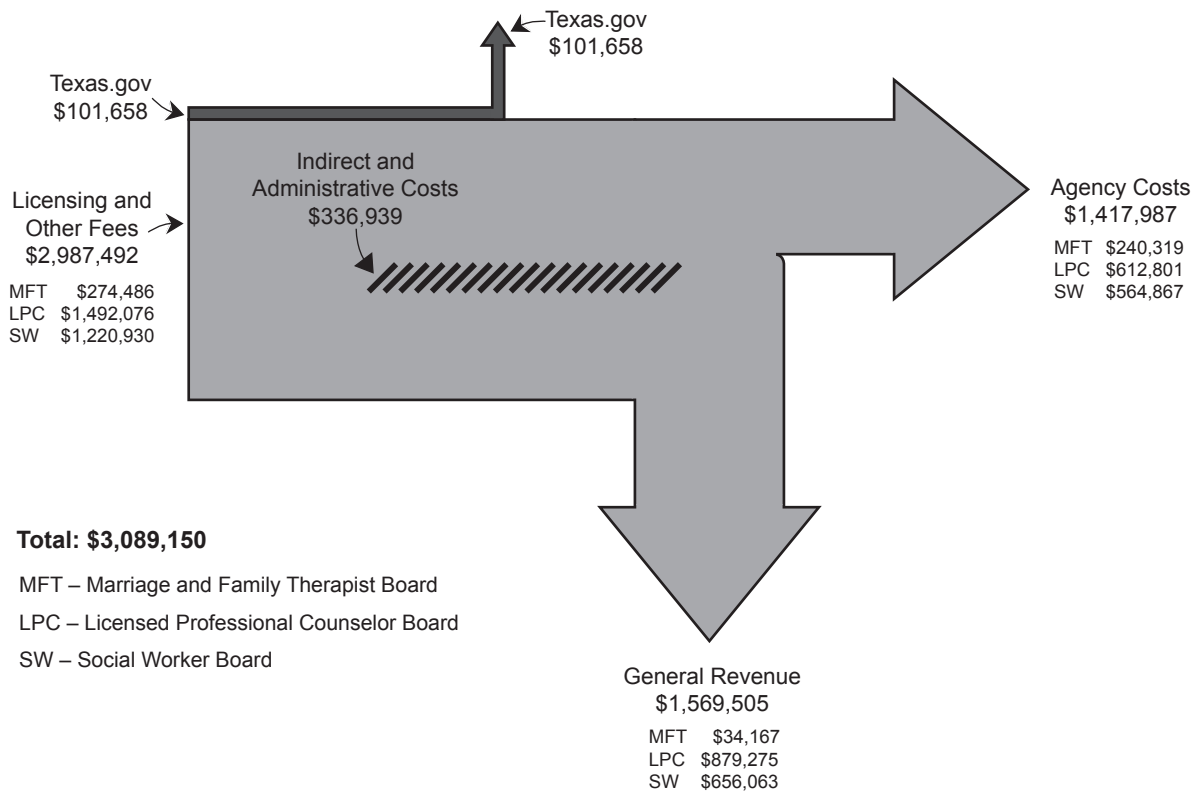
- Issues and renews marriage and family therapist, professional counselor, and social worker licenses
- Investigates and enforces violations of the marriage and family therapy, counseling, and social work practice acts and board rules, and takes disciplinary action when necessary

## Key Facts

- **Texas State Board of Examiners of Marriage and Family Therapists.** The board consists of nine members appointed by the governor. Five members must be current licensees, one of which must be a professional educator, and four members represent the public.
- **Texas State Board of Examiners of Professional Counselors.** The board consists of nine members appointed by the governor. Five members must be licensed professional counselors, three of whom must be in private practice, and one of whom must be a counselor educator. Four members represent the public.
- **Texas State Board of Social Worker Examiners.** The board consists of nine members appointed by the governor. Two must be licensed clinical social workers, two must be licensed master social workers, and two must be licensed baccalaureate social workers. Three members represent the public.
- **Funding.** In fiscal year 2015, the three boards operated on a combined budget of about \$1.4 million. The pie chart, *Behavioral Health Boards Expenditures*, breaks out the boards' overall spending in fiscal year 2015. As shown in the graph on the following page, *Flow of Behavioral Health Boards Revenue and Expenditures*, the boards collected nearly \$3.1 million, including almost \$3 million in licensing and Office of Patient Protection fees in the same year. After accounting for the boards' costs, the boards deposited excess revenue of about \$1.6 million to the General Revenue Fund.



### **Flow of Behavioral Health Boards Revenue and Expenditures FY 2015**



- Staffing.** In fiscal year 2015, DSHS provided the equivalent of 23 full-time employees to perform all licensing and administrative functions for the boards. DSHS assigns one employee to each board, in consultation with the board, to serve as the board's executive director. The other employees are not dedicated to a specific board, but rather perform licensing, enforcement, and administration functions for all three boards. Additionally, DSHS' Professional Licensing and Certification Unit is a member of the Health Professions Council and contributes licensing and enforcement information that is published in the council's annual report. Appendix A, *Health Professions Council*, provides a more detailed description of the council.
- Licensing.** DSHS staff process initial applications and renewals of licenses for the three boards. The table on the following page, *Behavioral Health Boards Licenses by Type*, shows the license types and requirements for each board, as well as the number of licensees regulated by each board at the end of fiscal year 2015.
- Enforcement.** DSHS receives and investigates complaints filed against licensees, and the boards take disciplinary action against individuals found to be in violation of a board's statute or rules. Disciplinary actions can range from administrative penalties to license revocation. In fiscal year 2015, the marriage and family therapist board resolved 28 complaints, resulting in two disciplinary actions; the professional counselor board resolved 104 complaints, resulting in 13 disciplinary actions; and the social worker board resolved 44 complaints, resulting in nine disciplinary actions. Appendix B, *Behavioral Health Boards Enforcement Actions*, provides more detail on these complaints and disciplinary actions.

***Behavioral Health Boards Licenses by Type***

<b>Board</b>	<b>License Type</b>	<b>Requirement</b>	<b>Licensees<sup>1</sup> FY 2015</b>
<b>Marriage and Family Therapist</b>	Marriage and Family Therapist Associate	<ul style="list-style-type: none"> <li>• Graduate degree</li> <li>• 300-hour practicum/graduate school internship</li> <li>• National and jurisprudence exams</li> </ul>	556
	Marriage and Family Therapist	<ul style="list-style-type: none"> <li>• Associate requirements</li> <li>• 3,000 hours supervised experience</li> </ul>	2,955
<b>Professional Counselor</b>	Licensed Professional Counselor Intern	<ul style="list-style-type: none"> <li>• Graduate degree</li> <li>• 300-hour practicum</li> <li>• National and jurisprudence exams</li> </ul>	4,116
	Licensed Professional Counselor	<ul style="list-style-type: none"> <li>• Internship requirements</li> <li>• 3,000 hours supervised experience</li> <li>• Jurisprudence exam, if an exam was not taken within two years of application</li> </ul>	18,427
<b>Social Worker</b>	Licensed Baccalaureate Social Worker	<ul style="list-style-type: none"> <li>• Baccalaureate degree</li> <li>• National and jurisprudence exams</li> </ul>	5,479
	Licensed Master Social Worker	<ul style="list-style-type: none"> <li>• Graduate degree</li> <li>• National and jurisprudence exams</li> </ul>	10,329
	Licensed Clinical Social Worker	<ul style="list-style-type: none"> <li>• Licensed Master Social Worker requirements</li> <li>• 3,000 hours supervised experience</li> <li>• National and jurisprudence exams</li> </ul>	7,989

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<sup>1</sup> The number of licensed professional counselor licensees includes provisional licensees. The number of baccalaureate and master social worker licensees includes temporary licensees.





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# ISSUES



# ISSUE 1

## *The Texas Department of Licensing and Regulation Should Regulate Marriage and Family Therapists, Professional Counselors, and Social Workers.*

### Background

The Texas Legislature has established separate licensing and regulatory frameworks for the practice of marriage and family therapy, professional counseling, and social work. Independent boards oversee each profession and seek to protect the public health and safety by adopting rules, issuing licenses, investigating and resolving complaints, and enforcing their respective licensing acts. However, these behavioral health boards do not function as independent agencies, hire their own staff, or direct the expenditure of funds. Instead, each board has a long history of administrative attachment to other larger organizations. Prior to 2004, the boards were administratively attached to the former Texas Department of Health. Currently, the boards are attached to the Department of State Health Services (DSHS) and receive services from its Professional Licensing and Certification Unit. To help each board accomplish its mission, DSHS provides staff, facilities, and infrastructure to carry out the boards' functions. On September 1, 2017, the Health and Human Services Commission (HHSC) will assume DSHS' role as many DSHS regulatory functions transfer to HHSC's new regulatory division as a result of the Sunset Commission-initiated and legislatively-directed transformation of the health and human services system.

- **Marriage and family therapy.** The Texas Legislature enacted the Licensed Marriage and Family Therapist Act in 1991 under the authority and direction of the Texas State Board of Examiners of Marriage and Family Therapists.<sup>1</sup> The practice of marriage and family therapy involves providing therapy services to individuals, families, or couples, alone or in groups by applying family systems theories and techniques.<sup>2</sup> Practitioners evaluate and remediate cognitive, affective, behavioral, or relational dysfunction in the context of marriage or family systems. In fiscal year 2015, the marriage and family therapist board regulated 3,511 licensed marriage and family therapists and associates.<sup>3</sup>
- **Professional counseling.** The Texas Legislature enacted the Licensed Professional Counselor Act in 1981 under the authority and direction of the Texas State Board of Examiners of Professional Counselors.<sup>4</sup> The practice of professional counseling includes
  - application of mental health, psychotherapeutic, and human development principles to facilitate human development and adjustment;
  - prevention, assessment, evaluation, and treatment of mental, emotional, or behavioral disorders and associated distresses;
  - assessment and evaluation to establish treatment goals and objectives; and
  - planning, implementation, and evaluation of treatment plans using treatment interventions.<sup>5</sup>

In fiscal year 2015, the professional counselor board regulated 22,543 licensed professional counselors and interns.<sup>6</sup>

- **Social Work.** The Texas Legislature initially regulated social workers through certification in 1981. In 1993, the Legislature increased the level of regulation by licensing social workers under the Social Work Practice Act.<sup>7</sup> The practice of social work is the application of social work theory, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, organizations, or communities.<sup>8</sup> The practice may include providing individual, conjoint, family, and group psychotherapy using the Diagnostic and Statistical Manual of Mental Disorders, the International Classification of Diseases, and other diagnostic classification systems in assessment, diagnosis, treatment, and other activities.<sup>9</sup> In fiscal year 2015, the social worker board regulated 23,797 licensed social workers.<sup>10</sup>

## Findings

### Texas has a continued interest in regulating the practice of marriage and family therapy, professional counseling, and social work due to the potential for harm to clients.

- **Potential for harm.** Marriage and family therapists, professional counselors, and social workers provide services directly to the public, including vulnerable populations the state seeks to protect through the regulation of occupations. Many clients suffer from behavioral health disorders or impairments, placing them in an especially vulnerable position. These behavioral healthcare practitioners apply a considerable amount of judgment in the services they provide, often in otherwise unregulated settings. The authority and trust given to these practitioners creates an opportunity for abuse, whether financial, emotional, sexual, or otherwise.

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*The public would benefit from continued regulation of these behavioral health professions.*

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These professionals delve into sensitive topics and their conclusions carry significant weight. Practitioners can treat patients suffering from trauma, abuse, drug or alcohol addiction, or other behavioral health conditions. Practitioner opinions help make decisions that can substantially affect the lives of Texans. For example, courts can direct parties seeking a divorce to obtain counseling services to determine whether reconciliation can be expected and whether future counseling would be beneficial.<sup>11</sup> In child custody cases, courts may use information from behavioral health board licensees in determining which parties should have custody and under what arrangements.

- **Qualified practice.** State regulation lowers the risk of harm to the public by ensuring practitioners are qualified to provide services and by taking enforcement action for violations of the standards of care for those services. Requiring practitioners to demonstrate competency through education, training, and other qualifications helps assure the state and the public that licensed practitioners can safely provide behavioral healthcare services. Regulation also promotes compliance with standards of care by providing a mechanism to investigate, discipline, and potentially remove practitioners who fail to meet those standards.

## **The behavioral health boards have failed to effectively regulate marriage and family therapists, professional counselors, and social workers, putting Texans at risk.**

The Sunset review of the three behavioral health boards identified serious concerns that must be addressed quickly to protect the public and drastically improve regulation and oversight of these behavioral health professions. While many of the concerns stem from the actions of the boards, DSHS' poor administration of these functions and lack of funding and other resources have also played a key role as discussed later in this issue.

- **Broken enforcement process.** As detailed in Issue 2 of this report, the review found the boards' enforcement processes fail to adequately regulate licensees and protect the public.
  - The behavioral health boards have unacceptable complaint resolution timeframes and a languishing backlog of over 850 enforcement cases that create potential dangers to the public.<sup>12</sup> The boards' complaint resolution times ranged from 639 days to 911 days in 2015, but deteriorated rapidly in 2016, ranging from 832 days to 1,107 days.<sup>13</sup> As a result, some complainants and respondents must wait between two to three years to resolve a complaint, which can include allegations of sexual abuse and exploitation, fraud, and failure to report abuse of minors.
  - The boards' poorly designed and implemented complaint processes create unacceptable investigative delays. The boards have not consistently delegated authority to staff to dismiss baseless and nonjurisdictional complaints. Instead, the boards routinely expand the scope of investigations, and send almost every complaint to a quarterly complaints committee meeting that delays the enforcement process and wastes limited investigative resources. Due to their public nature, the review found these complaints meetings do not safeguard due process or confidentiality.
  - The boards' complaint resolution processes result in widely variable enforcement outcomes and potentially inappropriate enforcement actions. None of the boards have developed true sanctioning matrices with enough specificity to guide decision making and ensure similar outcomes for similar offenses.
- **Insufficient licensing protections.** As detailed in Issue 3 of this report, the boards' key licensing practices fail to protect the public and create unnecessary burdens on licensees. Texas had nearly 50,000 people licensed by the behavioral health boards in fiscal year 2015. However, none of the boards use fingerprint background checks, which are the most accurate and comprehensive means to ensure licensees do not have a criminal history that would place a client's health or safety at risk. These licensees often practice in otherwise unregulated locations, including licensees' private offices, and their practices involve contact with vulnerable populations, such as minors, the elderly, and patients with serious mental health diagnoses.

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*The behavioral health boards' dysfunctional complaints processes need a top-to-bottom overhaul.*

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*Using fingerprint-based criminal background checks would better protect the public.*

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While the boards require licensees to self-report discipline by other states, they do not check the National Practitioner Data Bank for confirmation.

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*Regulation  
of health  
professions at  
DSHS is not  
working.*

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- **Independent boards prevent streamlining.** The state's approach of having independent rulemaking boards administratively attached to DSHS is not working. Numerous reports over the years, including previous Sunset reports, have highlighted specific concerns about independent boards administratively attached to an agency. In 2014, echoing the conclusion of a 2001 consultant report that "independent boards, functioning as quasi-agencies unto themselves, yet operating within the structure of a larger agency, are a fundamental organizational mistake," Sunset staff found independent boards at DSHS place undue burdens on the agency and prevent administrative streamlining.<sup>14</sup> The current review of these three behavioral health boards confirmed this conclusion once again. Statutes still do not clearly define the relationship between the boards and DSHS, blurring the lines of authority and accountability in certain circumstances. DSHS employees assigned to these programs essentially serve two masters, reporting to both the independent board and DSHS.
- **Problematic rulemaking focus.** Although administratively attached to DSHS, the independent boards retain full rulemaking authority. The review found instances where the professional counselor board proposed questionable rules that would have benefitted board members alone or unnecessarily increased costs for licensees. In two instances, the board proposed exempting professional board members from continuing education based on their board service, which would have provided professional members with an economic benefit for service. In another instance, the board attempted to raise fees just to make professional counselor fees comparable to other behavioral health occupations in Texas and around the country. The board proposed this fee increase in spite of the fact it already collects significantly more in revenue than is needed for its operations, and despite statutory direction to avoid accumulating an unnecessary surplus.<sup>15</sup> While none of the rules were finally adopted, the proposals indicate misplaced priorities and attempts to place personal benefit or prestige ahead of service to the counseling profession.

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*DSHS does not  
adequately  
address the needs  
of the boards.*

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**The Texas Department of Licensing and Regulation can regulate the behavioral health professions more effectively than DSHS and the boards.**

- **Poor administrative services.** Regulation of health professions is poorly carried out and clearly not a priority at DSHS. Occupational licensing programs bear no direct connection to any of DSHS' larger public health regulatory responsibilities. With finite resources, DSHS prioritizes regulatory programs with the highest potential risk to public health, such as those designed to prevent foodborne illnesses and radiological disasters. As a result, DSHS does not adequately address the needs of the behavioral health boards. For example, DSHS does not devote enough legal resources

to manage the boards' regulatory processes effectively. The review found DSHS' legal division has yet to refer more than a dozen of the boards' serious complaint cases dating back to 2007 to SOAH. In contrast, the Texas Department of Licensing and Regulation (TDLR) has more robust legal resources and the agency's organizational structure allows legal staff to specialize in specific functions like rulemaking and enforcement.

- **Lack of budget controls.** Stakeholders regularly complain that DSHS is too understaffed to adequately handle the boards' responsibilities. In fiscal year 2015, DSHS received funding for the three boards through a single appropriation that also funded 20 other programs at the agency. DSHS uses shared staff to provide services to all of these programs, but does not have budget controls in place to monitor whether existing staff and resources are sufficient to meet any particular board's needs. DSHS does not budget by board, except salaries, and does not know whether expenditures relate to licensing or enforcement activities. As a result, Sunset staff was not able to determine the overall costs of each board's licensing and enforcement activities or gauge the level of expenditures on a per licensee basis, which is one measure of efficiency. For several health licensing programs recently transferred from DSHS, TDLR established sufficient budgets for adequate regulation by considering the number of licensees, complaints received, information technology costs, and staff needed for discrete functions such as licensing, investigation, enforcement, customer service, and human resources for each of the programs.
- **Inaccurate performance reporting.** While the boards do not have specific reporting requirements, as a member of the Health Professions Council (HPC), DSHS provides data on the licensing and enforcement performance of its administratively attached boards for HPC's annual report. From fiscal years 2010 to 2015, Sunset staff found DSHS substantially overstated the number of new licenses issued for the professional counselor board by 5,407 licenses or approximately 36 percent, and understated its licensing activity for the social worker board by 1,586 licenses or approximately -13 percent. DSHS also significantly over counted the number of applications the professional counselor board received by 7,802 applications or approximately 42 percent; however, this data was not published. The erroneous reporting began in September 2011 when DSHS modified report parameters used to generate data for the HPC annual report, and failed to subsequently assess the validity of the results. The reporting issue affected new licensee data for all professions receiving services from DSHS' Professional Licensing and Certification Unit. In contrast, TDLR has specific and standardized performance measures in the General Appropriations Act that receive regular review from the Legislature during the appropriations process.
- **Poor customer service.** DSHS does not have dedicated customer service staff; instead, DSHS staff divide their time between processing applications and responding to customer service inquiries by phone and email. Recently, DSHS reduced its phone service hours to 9 a.m. to 4 p.m. to allow staff more focused time for application processing. According to DSHS' 2015

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*DSHS has not established budget controls to identify resource needs for the behavioral health boards.*

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*DSHS has inaccurately reported key licensing data for the last several years.*

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*TDLR has a proven track record of improving licensing and enforcement outcomes while containing costs.*

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customer survey, 70 percent of marriage and family therapist, professional counselor, and social worker respondents found communicating with DSHS via telephone, mail, or email to be an inefficient process. Less than half found DSHS staff helpful, courteous, and knowledgeable. Survey respondents often commented that DSHS staff were rude and seemed overworked or understaffed. In comparison, TDLR has dedicated customer service staff available by phone, email, and social media from 7 a.m. to 6 p.m. Also, customer service satisfaction is higher at TDLR according to a recent survey. Seventy-four percent of TDLR survey respondents felt they were treated in a friendly and courteous manner, and 66 percent found TDLR employees to be knowledgeable about their program. At TDLR, the majority of respondents reported being transferred to the right department, and 65 percent were satisfied with the resolution they received.

- **Streamlining functions.** TDLR's focus on occupational and small industry regulation has enabled it to effectively and efficiently regulate its programs. With additional health-related programs scheduled to transfer from DSHS no later than 2019, TDLR will oversee 38 licensing programs with over 168 license types and about 700,000 licensees. TDLR has a proven track record of improving licensing and enforcement outcomes for transferred programs, while maintaining or decreasing administrative costs. TDLR could provide the behavioral health licensing programs improved services, institutional stability, administrative savings, and the capacity for greater innovation.
- **Recent healthcare profession transfers.** Recent transfers of healthcare professions to TDLR maintain critical practitioner input, while removing impediments to efficiency and effectiveness in licensing and enforcement processes. To improve services and better protect the public, the Legislature enacted Sunset recommendations to transfer 13 healthcare professions from DSHS to a newly-established health division of TDLR. The Legislature prioritized transfer of several independent boards that operated like the behavioral health boards and the transfer of those boards was completed in October 2016. As part of the transfer, the Legislature converted each independent board to an advisory board to ensure that the efficiencies of TDLR's process could continue to work. The Legislature recognized the ongoing value of healthcare practitioner expertise by adding key safeguards to ensure practitioner input for scope of practice and health-related standards of care and by ensuring that practitioners could provide input regarding general investigative, enforcement, or disciplinary procedures for their professions.

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*TDLR currently regulates several health professions previously overseen by DSHS.*

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### **Other organizational options for the professions are impractical.**

Creating an independent health licensing agency would needlessly create additional bureaucracy. In 2004, Sunset staff recommended establishing a Department of Health Professions Licensing, primarily composed of the health professions currently regulated by DSHS. Sunset staff made this recommendation



before TDLR had established itself as a proven regulatory model. In the decade since, TDLR has developed a strong record of administrative efficiency and effective regulation. Also, creating a separate health professions regulatory entity — or even a behavioral health agency incorporating professions like psychologists — would add a new agency to the state budget requiring a separate appropriation of funds. A new agency would have to obtain all new staff for indirect services, such as accounting, purchasing, human resources, networking, information services, general counsel, and customer service personnel. TDLR, on the other hand, would be able to add to infrastructure the agency already has in place.

## Recommendation

### *Change in Statute*

#### **1.1 Continue regulation of marriage and family therapists, professional counselors, and social workers at the Texas Department of Licensing and Regulation.**

This recommendation would transfer the regulation of marriage and family therapists, professional counselors, and social workers to the health division of TDLR no later than September 1, 2018 to reinstitute effective management of the programs. Transferring these regulatory programs would improve the state's regulation of these professionals while keeping their current licensure intact. TDLR has the tools available to provide efficient administrative support services and provides a secure and knowledgeable agency structure to efficiently administer regulation while increasing responsiveness to licensees and consumers. This recommendation would include the following provisions.

- **Reconstitute the independent boards as advisory committees to fit TDLR's successful administrative model.** Under this provision, each behavioral health board would be reconstituted as a governor-appointed advisory board. The advisory nature is a requirement to match TDLR's operational model while also providing protections against legal accusations of anticompetitive decision making. However, the boards would retain key practice-related responsibilities. While TDLR would gain responsibility for licensing and taking enforcement action against practitioners, the advisory boards would have all practice-related rule development authority. The all public-member Texas Commission of Licensing and Regulation would consider these practice-related rules for final approval and could adopt or return the rules, but not amend them. TDLR would make all final regulatory decisions currently requiring board action, including decisions regarding the establishment of fees.
- **Sunset provisions.** This provision would continue the functions of each behavioral health licensing program and remove the Sunset provision in the enabling statutes of each of these programs, as they would be subject to review under TDLR's existing Sunset provision, currently set for September 1, 2019.
- **Coordinate to provide for a seamless administrative transition.** This provision would require DSHS to provide TDLR access to all systems and information needed to effectively absorb the programs, including licensing, revenue, and expenditure systems; rights to service contracts and licensing agreements; use of online renewal and new application systems; and review and resolution of pending judgments and outstanding expenditures.
- **Legislative issues.** This provision would direct Sunset staff to work with staff from TDLR, DSHS, and the Texas Legislative Council in the drafting of bill language to accurately account for any

other legal and administrative aspects the transfer entails. To support the transition of these boards without any loss of services, the Legislature would need to enact appropriations contingency riders to allow for interagency financial agreements between TDLR and HHSC or DSHS, as appropriate.

In mid-November 2016, Sunset will publish a staff report regarding possible consolidation of several health licensing agencies at TDLR, including these three behavioral health boards. However, given the serious and systemic problems identified in this report, these three behavioral health licensing programs should be transferred to TDLR regardless of the outcome of the consolidation report.

## Fiscal Implication

Overall, the recommendation would result in much better regulation for the professions and reduced regulatory costs over time; however, the recommendation would result in a small negative fiscal impact to the General Revenue Fund of approximately \$540,409 over the next five years. The impact comes from initial start-up appropriations to TDLR of at least \$950,565 and eight additional full-time equivalent employees (FTEs) in fiscal year 2018 and \$209,440 and three FTEs in fiscal year 2019 to enhance licensing and enforcement efforts, particularly to clear up the existing large backlog of behavioral health board complaint cases. After these initial investments, the administrative costs for the behavioral health programs should decrease from the current cost of \$1.4 million to less than \$1.2 million resulting in an annual savings beginning in fiscal years 2020–2022 and continuing thereafter as discussed in the chart, *Comparison of Current Expenditures to Projected Operational Costs*.

### Full-Time Equivalent Employees

Fiscal Year	TDLR FTEs	DSHS FTEs	Change in FTEs From FY 2017
2018	8	23	+8
2019	26	0	+3
2020	24	0	+1
2021	20	0	-3
2022	20	0	-3

### Comparison of Current Expenditures to Projected Operational Costs

	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Projected Operating Costs at TDLR	\$950,565	\$1,627,427	\$1,360,485	\$1,136,940	\$1,136,940
Current Expenditures at DSHS	\$1,417,987*	\$1,417,987	\$1,417,987	\$1,417,987	\$1,417,987
Cost (Savings) to General Revenue	\$950,565	\$209,440	(\$57,502)	(\$281,047)	(\$281,047)

\* HHSC will have responsibility for operating the programs in fiscal year 2018 and will require the existing operating budget to oversee its responsibilities.

The boards generate \$3.1 million in revenue annually, which is more than sufficient to cover TDLR's projected start-up and operating costs. Alternatively, the Legislature could consider covering TDLR's start-up costs by authorizing a temporary surcharge or fee increase on licensees in the transferred programs.

TDLR and DSHS recently completed the Phase 1 transfer of seven DSHS healthcare professions and TDLR is well positioned to build off of previous legislative investments in information technology and additional staff made during Phase 1. The expertise and experience both agencies have gained during the Phase 1 transfer should help to minimize associated costs and disruptions to the agencies, license holders, and the public. As an example, the Phase 2 transfer of six other DSHS healthcare professions is expected to be completed ahead of schedule. In addition, since TDLR would be appropriated the

funding for the programs for the fiscal year 2018–2019 biennium, TDLR and HHSC or DSHS, as appropriate, would enter into an interagency agreement to ensure funding is allocated between the agencies on a pro-rated basis until TDLR assumes full responsibility for the programs.

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- <sup>1</sup> Texas State Board of Examiners of Marriage and Family Therapists, *Self-Evaluation Report* (Austin: Texas State Board of Examiners of Marriage and Family Therapists, 2015), 7.
  - <sup>2</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 502.002(6), Texas Occupations Code.
  - <sup>3</sup> Health Professions Council, *FY 2015 Annual Report*, accessed September 29, 2016, [http://www.hpc.texas.gov/wp-content/uploads/HPCDocs/2015\\_HPC\\_Annual\\_Report.pdf](http://www.hpc.texas.gov/wp-content/uploads/HPCDocs/2015_HPC_Annual_Report.pdf).
  - <sup>4</sup> Texas State Board of Examiners of Professional Counselors, *Self-Evaluation Report* (Austin: Texas State Board of Examiners of Professional Counselors, 2015), 7.
  - <sup>5</sup> Section 503.003, Texas Occupations Code.
  - <sup>6</sup> Health Professions Council, *FY 2015 Annual Report*, accessed September 29, 2016, [http://www.hpc.texas.gov/wp-content/uploads/HPCDocs/2015\\_HPC\\_Annual\\_Report.pdf](http://www.hpc.texas.gov/wp-content/uploads/HPCDocs/2015_HPC_Annual_Report.pdf).
  - <sup>7</sup> Texas State Board of Social Work Examiners, *Self-Evaluation Report* (Austin: Texas State Board of Social Work Examiners, 2015), 7.
  - <sup>8</sup> Section 505.0025, Texas Occupations Code.
  - <sup>9</sup> Ibid.
  - <sup>10</sup> Health Professions Council, *FY 2015 Annual Report*, accessed September 29, 2016, [http://www.hpc.texas.gov/wp-content/uploads/HPCDocs/2015\\_HPC\\_Annual\\_Report.pdf](http://www.hpc.texas.gov/wp-content/uploads/HPCDocs/2015_HPC_Annual_Report.pdf).
  - <sup>11</sup> Section 6.505, Texas Family Code.
  - <sup>12</sup> Backlog of cases from fiscal years 2007 to 2015, as of June 28, 2016 based on DSHS data.
  - <sup>13</sup> Based on DSHS' initial fiscal year 2016 data.
  - <sup>14</sup> Elton Bomer, *Texas Department of Health – Business Practices Evaluation* (Austin: Texas Department of Health, 2001), 63.
  - <sup>15</sup> Section 503.202, Texas Occupations Code.



# ISSUE 2

## *The Behavioral Health Boards' Dysfunctional Enforcement Processes Fail to Adequately Regulate Licensees and Protect the Public.*

### Background

The marriage and family therapist, professional counselor, and social worker boards (behavioral health boards) enforce violations of their practice acts and board rules by investigating and adjudicating complaints and sanctioning violators. Department of State Health Services (DSHS) staff conducts enforcement activities on the boards' behalf with the equivalent of five full-time investigators and one attorney who is also assigned other duties.

In fiscal year 2015, the marriage and family therapist board resolved 28 jurisdictional complaints, with two resulting in disciplinary actions; the professional counselor board resolved 104 jurisdictional complaints, with 13 resulting in disciplinary actions; and the social worker board resolved 44 jurisdictional complaints, with nine resulting in disciplinary actions.

Each board has established a complaints or ethics committee comprised of four board members to resolve complaints. Generally, each committee holds an open, public meeting each quarter to hear a reading of complaint investigation reports, take testimony, and ask questions of investigators, respondents, and complainants. The committee recommends dismissal or disciplinary action, and in some cases asks for further investigation.

### Findings

The behavioral health boards have unacceptable complaint resolution times and a languishing backlog of over 850 enforcement cases which place the public at risk.<sup>1</sup> The boards' complaint resolution times ranged from 639 days to 911 days in fiscal year 2015, but deteriorated rapidly in fiscal year 2016 and now range from 832 days to 1,107 days.<sup>2</sup> The boards' poorly designed and implemented complaint processes create unacceptable investigative delays. The boards themselves take actions that cause significant delays for little or no public benefit. The boards

- routinely expand investigations well beyond the original complaint;
- do not allow staff to dismiss baseless and nonjurisdictional complaints; and
- waste investigative resources by holding quarterly complaints meetings.

The boards' complaints committee meetings do not safeguard due process or confidentiality and depending on the board can, at times, become public shaming sessions. The boards' processes provide insufficient notice of allegations against licensees, involve board members in investigations, and allow for confidential information to be shared in a public setting. None of the boards has developed a true sanctioning matrix to guide decision making and ensure similar outcomes for similar offenses. As a result, the boards' complaint resolution processes result in widely variable outcomes and unconventional

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*All three behavioral health boards take several hundred days to resolve complaints, limiting public protection.*

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enforcement actions. The professional counselor board, in particular, has used nonstandard enforcement processes that clearly waste licensee and DSHS staff time. These problems, some of the worst seen by Sunset staff in some time, are detailed in the following material.

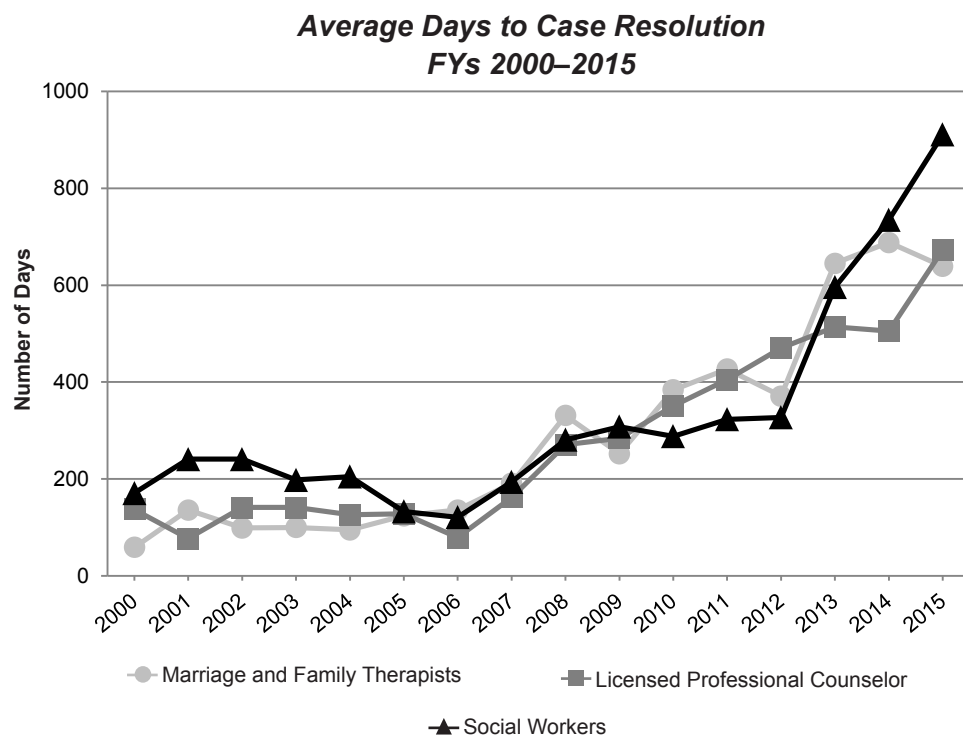
**The behavioral health boards' appalling complaint resolution times and languishing backlog of enforcement cases endanger the public.**

***Average Complaint Resolution Time, FYs 2015–2016***

	FY 2015	FY 2016 <sup>3</sup>
Marriage and Family Therapist Board	639 days	832 days
Licensed Professional Counselor Board	673 days	1,063 days
Social Worker Board	911 days	1,107 days

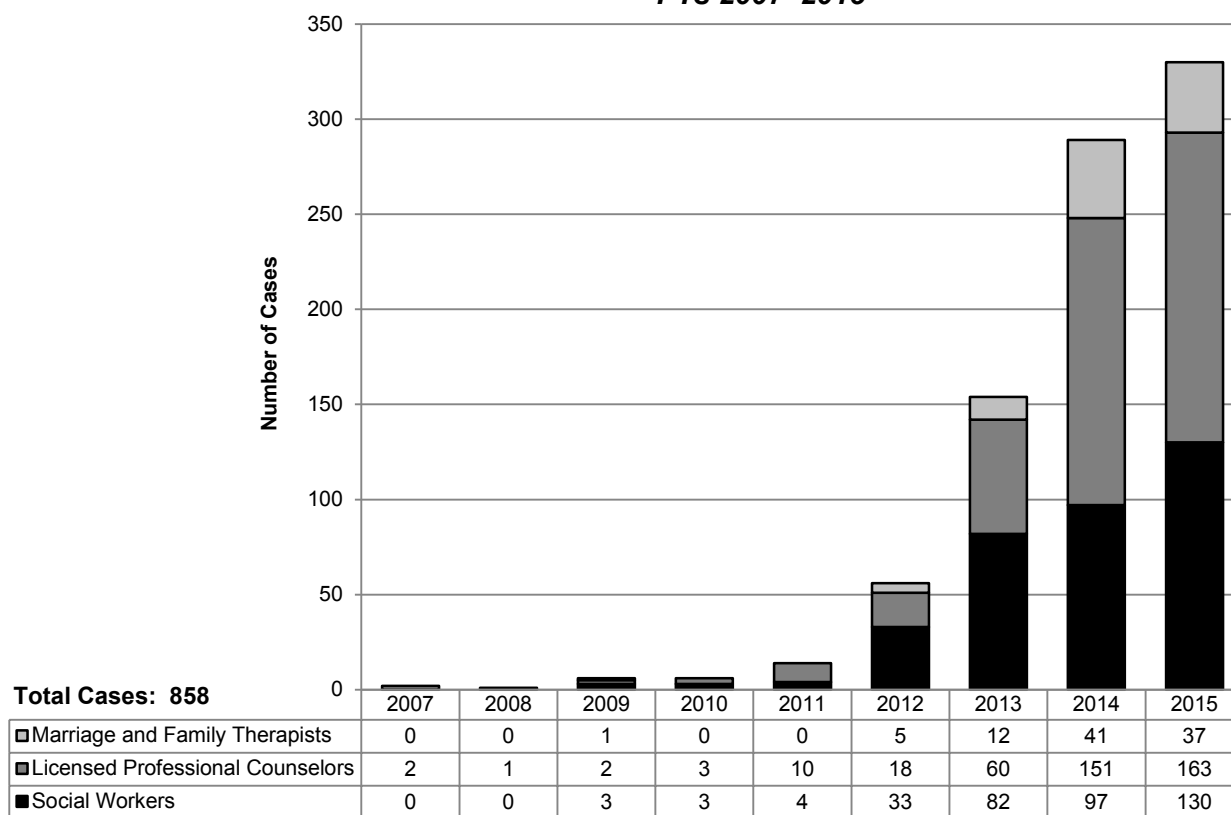
The behavioral health boards do not effectively enforce their statutes and rules. In fiscal year 2015, the boards all took well over a year to resolve complaints. The situation deteriorated further in fiscal year 2016, as shown in the table, *Average Complaint Resolution Time*.

Complaint resolution times for the boards have steadily increased since the mid-2000s, as shown in the line graph, *Average Days to Case Resolution*, which shows complaint resolution times for the boards from fiscal year 2000 to fiscal year 2015, based on data reported annually to the Health Professions Council.



Delays in complaint resolution have produced an enormous and growing enforcement case backlog. As of June 2016, the boards had a combined backlog of over 850 cases, with some cases dating as far back as fiscal year 2007, detailed in the bar graph on the following page, *Enforcement Backlog*.

### Enforcement Backlog FYs 2007–2015



Timely enforcement is critical to the protection and safety of the public. Licensees for all three boards frequently work with vulnerable populations, including minors, the elderly, and patients with serious mental health diagnoses. When serious complaints take multiple years to resolve, the licensee can continue to pose a danger to the public. In one case, a marriage and family therapist associate disregarded instructions of supervisors to report a minor client's suicidal ideation to the minor's parents. Soon thereafter, the minor client committed suicide. While the client's mother filed a complaint against the licensee in 2014, the marriage and family therapist board's ethics committee did not hear the complaint until 2016. In the intervening time, the licensee upgraded from an associate license to a full marriage and family therapist. This enforcement case is ongoing and the licensee continues to work with high-risk clients.

**Actions of the boards, as well as their administrative attachment to DSHS, have contributed to the significant delays in complaint resolution and enforcement action.**

- **Boards require staff to fully investigate almost all complaints regardless of merit or jurisdiction.** As a best practice, most licensing boards give staff the authority to dismiss complaints without involving the board. Social worker and professional counselor staff do not dismiss baseless and nonjurisdictional complaints without prior board review since the boards

*The boards' enormous backlog of cases prevents timely enforcement for even the most serious complaints.*



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*The boards ineffectively use DSHS staff by preventing them from prioritizing complaints and routinely expanding investigations.*

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have not granted staff permission to do so. Staff's authority to dismiss marriage and family therapist cases is largely limited to issuing cease and desist letters, which are first reviewed by the marriage and family therapist board. Further, the boards' complaints committees waste time hearing a large volume of complaints cases that result in findings of no violation or no jurisdiction that should have been dismissed by staff. In one case, the professional counselor board's complaints committee spent an hour discussing a nonjurisdictional case relating to a person licensed by another board. This same committee also sometimes hears ongoing investigation information involving complaints against deceased licensees.

- **Boards regularly expand the scope of investigations beyond the original complaint resulting in an inefficient use of staff resources.** Despite a backlog of cases, the behavioral health boards routinely expand the scope of investigations well beyond the original complaint. The boards generally direct DSHS investigative staff to review the entire client file containing intake documentation, session notes, billing information, and diagnostic codes, not just portions relevant to the complaint. These files can sometimes reach thousands of pages, slowing investigations even further. These expanded file reviews easily become fishing expeditions leading to additional allegations for unrelated paperwork violations. Contrary to common practice among other regulatory boards, the behavioral health boards add these allegations to the open complaint case rather than opening up a separate complaint. The boards' expansive approach creates further delays in enforcement when licensees eventually learn of the additional allegations and ask for more time to prepare a response.
- **Boards have created unconventional complaint committee hearings that take up a tremendous amount of time and resources.** For enforcement cases resolved in fiscal year 2015, Sunset's review of DSHS investigative files determined that 124 days elapsed, on average, between investigation completion and the case's initial complaints hearing.

#### ***Wasted Investigative Resources***

The complaints committees typically hear cases in the order of the signup sheet; as a result, investigators' time is poorly managed. Sunset staff observed one investigator wait several hours to read a single, brief investigative report at the meeting's end.

Each board requires DSHS' investigative staff to attend the day-long complaints committee meetings where investigators often read each full investigation report aloud and respond to questions, as discussed further in the textbox, *Wasted Investigative Resources*. Investigators must spend days preparing for their required presentations.

Taken together, these practices create an overwhelming caseload for DSHS' five investigators. Based on a review of complaints closed in fiscal year 2015, on average 536 days elapsed before DSHS was able to assign an investigator to a complaint. That delay alone represents a significant portion of the lengthy complaint resolution times detailed above, and contributes to a huge case backlog. The delays also make effective enforcement more difficult, since memories fade and information can be harder to find over time.



- **Regardless of the boards' dismal record in carrying out their responsibilities, DSHS' limited resources are inadequate to fully enforce the boards' Acts.** In fiscal year 2015, DSHS administered 74 regulatory programs, including emergency medical services, environmental health, healthcare facilities, and radiation control, plus a range of healthcare professionals. Like all governmental entities with limited budgets, DSHS must focus on high-risk activities when faced with difficult resource decisions. Within its finite resources, DSHS must prioritize regulatory programs with the highest potential risk to public health. Occupational regulation will always receive less attention at DSHS than, for example, inspections of the state's food supply.

In fiscal year 2015, DSHS' office of general counsel had seven attorneys in its enforcement unit to provide services to 74 regulatory programs, with one shared attorney assigned to provide legal assistance to the three behavioral health boards along with other duties. Sunset staff identified more than a dozen aged cases — stretching back to 2007 — where boards have asked for a case to be heard at the State Office of Administrative Hearings, but DSHS' office of general counsel has not docketed the case there. Among the aged cases, three licensees had multiple complaints against them, and 10 of the cases proposed license revocation. Allegations for the aged cases ranged from not providing requested mental health records, entering dual relationships, and failure to maintain professional boundaries, to interfering with a board investigation, harassing a client, engaging in sexual contact with a former client, and not reporting aggravated assault on a police officer.<sup>4</sup>

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*DSHS does not prioritize behavioral health regulations given its limited resources and other high-risk responsibilities.*

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### **The boards' complaints committee hearings do not safeguard due process or confidentiality.**

Contrary to most other occupational licensing boards that hear and resolve complaints through informal settlement conferences, the boards' public complaints committee meetings are an unnecessary intermediary step that lacks fairness. The Sunset review found these meetings endanger due process and confidentiality as described below and can function as unwarranted public shaming sessions, most notably for the professional counselor board. However, by using the same type of committee process, all of the boards are susceptible to this type of behavior.

- **Although attendance is only requested, committee members view it as a requirement.** When a respondent does not attend the complaints committee meeting, instead of taking action based on the evidence before them, the committees will table a matter or issue a subpoena to compel a person to appear so the board can “get their attention.” In fiscal year 2016, the social worker board compelled a licensee's attendance at an ethics committee meeting through a subpoena, even though the licensee had already admitted to the allegations in writing in fiscal year 2013.

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*The boards' complaints committee hearings raise serious due process and confidentiality concerns.*

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*Public complaints committee meetings allow routine disclosure of confidential client information.*

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- **Complaints committee meetings jeopardize confidentiality.** The behavioral health boards' statutes make information gathered as part of a board's disciplinary proceedings confidential, unequivocally stating that information compiled or gathered during the investigation is confidential.<sup>5</sup> Even though DSHS provides committee members extensive case information prior to the meeting, the boards require DSHS investigators to present each investigation publicly. Taking from five to 40 minutes each, investigators read almost word for word from the investigative report, which can include sensitive details about sexual and other ethical allegations against licensees, as well as information about minor clients or client diagnoses. In addition to being confidential under Texas law, some of the information disclosed in these investigative reports may also be confidential under federal HIPAA laws.<sup>6</sup>

While investigators obscure complainant names during their presentation, responding licensees, attorneys, and even board members often mention complainants by name. During public discussion of these allegations, some board members lecture licensees and others hold out allegations as teachable moments for the assembled crowd. The meetings also create a chilling effect for complainants who must be willing to undergo the stressful experience of having deeply personal matters discussed in a public setting. While statute authorizes each of the boards to have a complaints committee and provides that the proceedings are not confidential under the Texas Public Information Act, informal settlement conferences can be held in closed sessions.<sup>7</sup> Sunset staff noted better behavior and more focused discussion during informal settlement conferences, which benefit from not being conducted in front of an audience.

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*Often unaware of all allegations against them, licensees are not prepared to defend themselves at complaints committee meetings.*

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- **Licensees cannot properly prepare for complaints committee meetings.** At the time of the complaints committee meeting, licensees have not yet received a formal notice of violation, the investigative report prepared by DSHS, or evidence against them. Instead, the licensees are only aware of the allegations against them based on the original notice of complaint, which is sent prior to investigation. Because DSHS staff routinely identify other potential violations of board statutes or rules during their investigations, including paperwork and billing concerns, licensees often learn of new allegations against them for the first time as the DSHS investigator reads the report aloud. This approach leaves licensees ill prepared to properly respond. Some licensees — usually those represented by attorneys — request additional time to prepare a response to the newly revealed allegations based on due process. Others provide on-the-fly explanations.
- **Contrary to best practice, some board members are directly involved in the investigative process.** Some committee members use complaints meetings as an extension of the investigative process. They conduct additional fact-finding and analysis on the cases they review, sometimes straying into areas well outside board members' professional expertise such as handwriting analysis. By actively engaging in the investigative process, board members can cloud the neutrality and objectivity needed

for subsequent informal settlement conferences and final board actions. Sunset staff found committee members do not recuse themselves from final actions of the board even when they have previously engaged in complaints committee meetings or informal settlement conferences.

**The boards' nonstandard complaint resolution processes result in unconventional enforcement actions and widely variable enforcement outcomes.**

- **Arbitrary and nonstandard sanctioning.** Agencies should establish a schedule or guidelines for the use of sanctions, often called a penalty matrix, to help ensure disciplinary actions are applied consistently and relate appropriately to the nature and seriousness of the offense. Consistency of a board's actions provides an important safeguard if a licensee should pursue litigation against a board. While the behavioral health boards have established rudimentary guidelines related to violation severity and sanctioning, the guidelines lack sufficient specificity to be effective as detailed in the textbox, *Behavioral Health Boards Severity Levels and Sanction Guide*.

***Behavioral Health Boards Severity Levels and Sanction Guide***

**Level 1:** License revocation – Violations evidence intentional or gross misconduct, cause or pose a high degree of harm to the public, or require severe punishment to deter the licensee, or other licensees.

**Level 2:** Extended license suspension – Violations involve less misconduct, harm, or need for deterrence than Level 1 violations, but require termination of licensure for a period of not less than one year.

**Level 3:** Moderate license suspension – Violations involve less misconduct, harm, or need for deterrence than Level 2 violations, but require termination of licensure for some period of time.

**Level 4:** Probated suspension of license – Violations do not involve enough harm, misconduct, or need for deterrence to warrant termination of licensure, yet are severe enough to warrant monitoring of the licensee to ensure future compliance.

**Level 5:** Reprimand – Violations involve minor or inadvertent misconduct.

Neither board rules nor other materials provide clear examples of violations for each severity level, much less contain a complete listing of offenses. Unsurprisingly, the complaints committees often recommend very different sanctions for similar violations as discussed in the textbox on the following page, *Sunset Case Review*. The boards' rules also do not specify how board members should weigh factors like multiple or repeated violations; low, moderate, or high levels of harm; and number of persons exposed to risk. In addition, none of the boards have set clear standards for mitigating or aggravating factors or defined terms such as intentional or gross misconduct. As a point of comparison, the Texas Department of Licensing and Regulation (TDLR) has developed an enforcement plan for each type of regulated person or entity that lists each individual violation with citations to rule and statute, and a range of applicable penalties or sanctions.<sup>8</sup>

### Sunset Case Review

Sunset staff reviewed more than 50 notices of violation and found inconsistent sanctions for similar violations, particularly by the professional counselor board.

- Four professional counselor complaints cases related to dual relationships. Dual relationships are inappropriate business, social, or professional relationships outside the therapeutic relationship. The complaints committee proposed reprimands in two cases, a two-year probated suspension in the third case, and a one-year probated suspension in the fourth case, even though this licensee had an additional recordkeeping violation.
- Three professional counselor complaints cases related to failure to release records. The complaints committee proposed a \$2,000 administrative penalty in one case, a one-year probated suspension and a \$1,500 administrative penalty in the second case, and recommended a six-month probated suspension and a \$500 administrative penalty in the third case, even though this licensee had billed for services not rendered.

Furthermore, the professional counselor board's complaints committee consistently uses nonstandard enforcement actions that are not contemplated by rule or are simply not appropriate. For example, rather than requiring continuing education, the committee commonly requires licensees to submit five- or ten-page research papers with specific font, cover page, and citation requirements. In some cases, board members have requested additional pages of "homework" when they were not satisfied with the original paper. Board members then grade this "homework."

- **Inconsistent informal settlement conference outcomes.** A Sunset staff review of informal settlement conference outcomes from 2013 to 2015 found that, in every case, the disciplinary outcome of the informal settlement conference was reduced, often excessively and inconsistently when compared to the outcome recommended during the complaints committee hearing. For example, eight license revocation orders went to informal settlement conference during that time — five were reduced to probated suspensions and three were reduced to nondisciplinary actions. Four of those cases involved professional counselors engaged in dual relationships. In the informal settlement conferences that reduced revocations to probated suspensions, the suspensions ranged widely from one to five years. Two of the eight cases involved a failure to report abuse of a minor and one case recommended revocation for sexual exploitation, but was reduced to a nondisciplinary letter of agreement. These across-the-board reductions in sanctions seem to indicate either that the original sanctions recommended by the complaints committee were unreasonable, or that the boards' enforcement process results in few disciplinary actions for even the most serious violations, and that the system may allow licensees to avoid appropriate sanctions.
- **Sanctions for unsubstantiated violations.** All three boards have adopted rules allowing the use of nondisciplinary advisory letters.<sup>9</sup> The complaint committees frequently use these nondisciplinary letters to assign sanctions when they do not believe they have enough evidence to substantiate a violation. While the letters appear advisory on their face, licensees who do not meet the conditions can be subject to further disciplinary action.

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*Sunset staff found inconsistent sanctions for similar offenses, particularly by the professional counselor board.*

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These sanctions, including extensive continuing education and research paper requirements, can be costly and time consuming.

## Recommendations

These recommendations are formatted based on the recommendation in Issue 1 to transfer the regulation of the three professions to TDLR. Should the transfer not occur, the recommendations should apply to DSHS or HHSC, which takes over administration of the boards on September 1, 2017.

### *Change in Statute*

#### **2.1 Abolish the boards' complaints and ethics committees and ensure board members are not involved in complaint investigations.**

This recommendation would abolish and remove statutory and rules references to the boards' complaints and ethics committees. As part of this recommendation, board members would be prohibited from being involved in the investigatory stage of the complaint investigation and resolution process. This recommendation would direct Sunset staff to work with TDLR, DSHS, and the Texas Legislative Council to draft legislation that accurately accounts for any other legal and administrative aspects needed to harmonize complaint investigation and enforcement practices with those used by TDLR.

### *Management Action*

#### **2.2 Ensure TDLR develops policies for prioritizing complaints and directs staff to prioritize complaint investigations based on these policies.**

This recommendation would direct TDLR to develop policies for prioritizing complaint investigations. TDLR should consult the boards in developing these policies. TDLR staff would have clear authority to prioritize complaints and determine the scope of any investigation to allow the agency to focus its investigative resources on the most serious complaints.

#### **2.3 Direct TDLR to develop policies to settle cases informally.**

Under this recommendation, TDLR would develop policies for informal complaint resolution and staff would be authorized to dismiss baseless and nonjurisdictional complaints. The recommendation would provide the agency with clear authority to seek advisory board member or other expert participation in informal disposition of cases as appropriate. Consistent with existing statute, staff would ensure complaints are not dismissed without appropriate consideration and would advise the board of dismissals, including sufficient explanation of the reasoning.

#### **2.4 Ensure TDLR updates its enforcement plan, including appropriate penalty matrices.**

This recommendation would direct TDLR to update its enforcement plan, including penalty matrices, with assistance from the boards. The enforcement plan should clearly describe each violation under statute or rule and the corresponding allowable disciplinary and nondisciplinary actions, including administrative penalties. In addition, the plan should provide reasoning for sanctions, define key terms such as gross misconduct, and weight appropriate factors such as multiple or repeated violations, levels of harm, and number of persons exposed to risk.

## Fiscal Implication

The fiscal impact of the recommendations to improve enforcement processes are difficult to estimate given the extensive waste of resources by the three current boards. Streamlining the enforcement processes and providing staff adequate authority to handle baseless and nonjurisdictional complaints will save significant, but unestimable staff resources. Regardless, additional staff resources may be temporarily needed to reduce the boards' unacceptable backlog of cases.

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<sup>1</sup> Backlog of cases from fiscal years 2007 to 2015, as of June 28, 2016 based on DSHS data.

<sup>2</sup> Fiscal year 2016 data is based on DSHS' initial projections.

<sup>3</sup> Fiscal year 2016 data is based on DSHS' initial projections.

<sup>4</sup> A dual relationship is a situation where multiple roles exist between a therapist, or other behavioral health practitioner, and a client.

<sup>5</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Sections 502.2045(h), 503.2545(h), and 505.2545(h), Texas Occupations Code.

<sup>6</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

<sup>7</sup> Sections 502.2045(i), 503.2545(i), and 505.2545(i), Texas Occupations Code. The filing of formal charges by the board against a holder of a license, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

<sup>8</sup> "Enforcement Plan," Texas Department of Licensing and Regulation, date of last modification not available, <https://www.tdlr.texas.gov/enforcement.htm>.

<sup>9</sup> 22 T.A.C. Sections 801.296(j), 681.204, and 781.603(o).



# ISSUE 3

## *Key Elements of the Behavioral Health Boards' Statutes, Rules, and Policies Do Not Conform to Common Licensing Standards.*

### Background

The mission of the marriage and family therapist, professional counselor, and social worker boards is to protect the public's health and safety by ensuring their licensed professionals are qualified, competent, and adhere to established professional standards. To accomplish this mission, the boards oversee licensing of marriage and family therapists, licensed professional counselors, and social workers, and enforce standards of care and practice by investigating complaints and taking disciplinary action when necessary. In fiscal year 2015, the boards licensed 3,511 marriage and family therapists, 22,543 professional counselors, and 23,797 social workers. The Department of State Health Services (DSHS) provides all administrative services for the boards and licenses applicants, processes renewals, receives complaints, and enforces administrative penalties.

The Sunset Advisory Commission has a long history evaluating licensing agencies, as the increase of occupational licensing programs served as an impetus for the creation of the commission in 1977. Since then, the Sunset Commission has completed more than 100 licensing agency reviews. Sunset staff has documented standards in reviewing licensing programs to guide future reviews of licensing agencies. These standards provide a guide for evaluating a licensing program's structure and are not intended for blanket application. Sunset staff continues to refine and develop standards, reflecting additional experience and different or changing needs, circumstances, or practices in licensing agencies. The following material highlights areas where the boards' statutes and rules differ from model standards and common practices by comparable agencies and describes the potential benefits of conforming to standard practices.

### Findings

#### **Licensing provisions in the boards' statutes and rules do not follow model licensing practices, presenting unnecessary hurdles to applicants and potentially reducing consumer safety.**

- **Insufficient criminal background checks.** Texas had nearly 50,000 people licensed by the three boards in fiscal year 2015. These licensees often practice in otherwise unregulated locations, including licensees' private offices, and their practice involves contact with vulnerable populations, such as minors, the elderly, and patients with serious behavioral health diagnoses. However, none of the boards use the most accurate and comprehensive means to ensure licensees do not have criminal histories that would place a client's health or safety at risk.

To help protect the public's safety, licensing agencies commonly conduct criminal background checks using the Department of Public Safety's fingerprint system, which accurately identifies each individual, provides automatic updates, and uncovers criminal history on applicants and licensees nationwide. The marriage and family therapist, professional counselor,

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*The boards nearly 50,000 licensees do not receive the most comprehensive criminal background checks available.*

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and social worker boards only require applicants and renewing licensees to self-disclose if they have a criminal history. DSHS staff conduct name-based criminal history checks for all new applicants and for 10 percent of renewals. However, reliance on self-disclosure and follow-up with occasional name-based checks does not fully assess an applicant's history to ensure his or her safety to practice, as the system does not capture all local or out-of-state records. Requiring fingerprint checks for initial and renewing licensees would ensure assessment of each licensee's criminal history to better protect the public.

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*Name-based criminal background checks do not fully assess an applicant's criminal history.*

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- **Underuse of outside disciplinary data.** Licensing agencies should consult available enforcement information compiled by national or federal data banks to monitor disciplinary actions against practitioners licensed or seeking licensure in Texas who are also licensed in other states. The intent is to ensure that a licensee's mobility cannot be used to evade discipline. Federal law requires state licensing agencies to report disciplinary actions taken against healthcare providers, including marriage and family therapists, professional counselors, and social workers, to the National Practitioner Data Bank.<sup>1</sup> The data bank provides agencies information necessary to decide if licensees disciplined in other states should be allowed to practice in Texas or if enforcement action is warranted based on violations that reflect a practitioner's inability to safely perform his or her job. Additionally, if an applicant holds another occupational license in Texas, especially another behavioral health-related license, an agency should ensure it knows about any enforcement actions on the individual's other licenses that would merit denial or sanctions on the license with that agency.

Currently, all three boards require licensees to self-report discipline by other states, but do not check the data bank for confirmation before awarding an initial license or renewal. As a result, the boards may award or renew licenses of practitioners who have faced enforcement action in other states, potentially putting Texans at risk. In addition, the marriage and family therapist and professional counselor boards do not have clear legal authority to discipline licensees for the full range of actions taken by other states or other licensing boards for conduct that would be actionable in Texas. Given the growing emphasis on licensure mobility, regulatory agencies should take proactive steps to ensure a licensee cannot evade discipline. Providing clear authority to monitor licensees for adverse actions taken by other states and agencies, and clarifying the boards' authority to discipline licensees based on these actions would better ensure licensees do not pose a risk to the public.

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*The boards do not check national practitioner data banks for enforcement actions in other states, putting Texans at risk.*

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- **Subjective qualifications for licensure.** Qualifications for licensure should not overburden applicants or unreasonably restrict entry into practice. Currently, the marriage and family therapist statute requires applicants for licensure to be of "good moral character."<sup>2</sup> While Texas wants licensees to have good character, the phrase, "good moral character" is a subjective, vague requirement that may be determined inconsistently. Removing the statutory requirement that applicants be of good moral character would be



in line with current law that matches the practice of reviewing an applicant's criminal history and denying licenses based on criminal history related to the actual practice of the profession.

- **Restrictive fee authority.** A licensing agency should have authority to set its own licensing and renewal fees, subject to appropriative authority. Setting a fee floor in statute limits the agency's ability to lower fees in line with the agency's actual cost to adequately regulate the program. The marriage and family therapist, professional counselor, and social worker acts currently include a fee floor, which requires each board to set fees at or above amounts established in 1993.<sup>3</sup> Removing the statutory fee floor would improve fee management authority by ensuring the fees fully fund needed operations while also being fair to licensees.
- **No formal expedited processing and equivalency for military applications.** The standards contained in Chapter 55 of the Texas Occupations Code should guide an agency's application of qualifications related to military service members, military veterans, and military spouses. Chapter 55 specifies that the executive director of a Texas licensing agency may waive any licensing prerequisites if a military applicant has a license in a jurisdiction with "substantially equivalent" licensing requirements.<sup>4</sup> While the marriage and family therapist board recently voted to publish rules for public comment on expedited processing and equivalency for military applications, the professional counselor and social worker boards have not developed clear equivalency standards, leading to confusion among staff and applicants. Additionally, the paper license applications and renewal notices do not provide notice regarding expedited renewal options for military applicants, and the boards lack formal written policies to expedite military applications, though DSHS reports doing so as a standard practice. Clarifying the standards for substantial equivalence and updating paperwork to advise military applicants of expedited processes available to them would ensure adherence to the letter and the spirit of recent legislative actions to increase job opportunities for military service members, military veterans, and military spouses.
- **Lack of inactive status requirements.** Generally, occupational licensing agencies allow licensees to go on inactive status, during which the typical renewal process is suspended for a certain amount of time. Allowing inactive status raises questions about the person's continuing ability to practice and the agency's ability to recover regulatory costs. Considerations to allay these concerns include limiting the time a person may be inactive, tracking persons on inactive status, recovering costs through a nominal administrative fee, and requiring persons returning to practice to meet continuing education requirements during the period of the inactive status. Each board has established an inactive status fee and parameters for inactive status. However, the social worker board does not require any continuing education before reactivating a license. Additionally, the marriage and family therapist board only recently voted to publish rules for public comment to require continuing education or a jurisprudence

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*The boards have not fully implemented an expedited process for military applications.*

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*Standardizing inactive status requirements would help ensure Texans receive quality services from licensees who return to practice.*

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exam before reactivating a license.<sup>5,6</sup> Addressing these deficiencies would make certain licensees are best positioned to provide quality services to the public upon their return to active status.

- **Unnecessary, burdensome, and restrictive education and experience requirements.**

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*Recognizing CACREP-accredited degrees without transcript review would prevent delays in licensure.*

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Degree requirements. Educational requirements should judge an applicant's educational experience fairly and not cause long delays. Occupational licensing agencies typically require applicants to have a specific degree from an accredited school or program to be eligible for a license. Approval usually consists of verification from the school that the applicant has met degree requirements. The professional counselor board does not automatically recognize degrees from any institution, regardless of accreditation status, including programs accredited by the Council for Accreditation of Counseling and Related Educational Programs (CACREP), the national accrediting body for professional counseling degree programs.<sup>7</sup> Currently, about 42 percent of applications the board receives are from graduates of CACREP-accredited counseling programs in Texas. CACREP has more stringent standards than the professional counselor board's current regional accreditation requirements. More than half of out-of-state applicants have graduate degrees from CACREP-accredited programs. In contrast, the social worker board accepts all applicants with a degree from a program accredited by the Council on Social Work Education.

Because the professional counselor board does not recognize degrees from accredited schools, DSHS staff must perform an unnecessary transcript review of many applications to determine whether the applicant has completed all coursework requirements, including several core course components required by board rule.<sup>8</sup> However, course titles are not standardized, and DSHS staff is not qualified to determine whether courses are equivalent or not. As a result, transcript reviews commonly result in deficiency notices that extend licensing timeframes as staff seeks clarification about coursework. Accepting degrees from CACREP-accredited programs and other substantially equivalent programs without a transcript review would remove a redundant requirement and reduce licensing delays as well as the administrative burden on staff that could focus on more critical aspects of the licensing and enforcement processes.

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*Excessive statutory experience requirements create a barrier to licensure.*

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Experience requirements. The statutory requirement that a marriage and family therapist applicant provide 750 hours of direct clinical services to couples or families creates a barrier to licensure. The requirement does not match practices in other states and is not needed to maintain portability and parity of the license. Additionally, both the Texas Association for Marriage and Family Therapy and the Texas Association for Marriage and Family Counselors have previously supported a decrease in the standard to 500 hours. Sunset staff found only 11 states that specifically require direct contact hours for couples and families, versus more general direct contact hours for couples, families, individuals, and children. Removing

this fixed number of hours from statute and allowing the hours to be set by rule would allow for consideration of professional standards and the overall experience needs of the profession.

Examination policies. The professional counselor board accepts the National Counselor Exam as a prerequisite for licensure but does not accept the National Clinical Mental Health Counseling Exam, which is accepted in 37 other states. Currently, 26 states accept both exams. Additionally, TRICARE, the healthcare program for military service members and their families around the world, and the Army Substance Abuse Program use the National Clinical Mental Health Counseling Exam. Accepting both examinations would increase license portability for professional counselors, including military personnel.

Time limits. The professional counselor board rules state an applicant cannot fulfill licensure requirements with a graduate degree or coursework obtained more than 10 years prior to applying for a license, with limited exceptions. The rule restricts entry into the profession and affects applicants who have delayed their careers after obtaining their degrees. The professional counselor board has denied licensure to applicants with older degrees and required applicants to pursue additional coursework prior to granting licensure. Requiring additional coursework leads to economic costs and delays for applicants seeking to enter the workforce and offers no significant protection for the public. Time-limited degrees and coursework are unnecessary because applicants must prove ongoing knowledge of the profession by passing a national exam within five years of application and a jurisprudence exam within two years of application.

- **Disproportionate, cumbersome, and overly bureaucratic supervision requirements.** All three boards require persons seeking licensure and licensees seeking to upgrade their licenses to obtain supervision from a board-approved supervisor.<sup>9</sup> To qualify as a supervisor, a person must be licensed, practice for a specified period of time, complete supervisory training, and may also be required to take supervisor-specific continuing education.<sup>10</sup>

Supervisor eligibility requirements. Each board requires a licensee to have practiced for a different amount of time before being eligible to be a supervisor. Currently, a social worker must have practiced for two years, while marriage and family therapists and professional counselors must have practiced for three years, with certain exceptions. However, due to a recent rule change adopted by the professional counselor board in July 2016, a professional counselor will need to have practiced for five years to become a supervisor beginning in December 2016. More than 2,000 licensees who would have been eligible to become supervisors will now have to work two more years before they will meet this new requirement. A review of the rulemaking process revealed no board justification for the

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*Accepting both national licensure exams would increase license portability for professional counselors.*

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*Recent eligibility changes will prevent thousands of licensed professional counselors from becoming supervisors.*

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change, much less any defined benefit to the profession or the public. The professional counselor board's change limits the supply of supervisors at a time when Texas has an ongoing shortage of mental health professionals.

Supervisory plans. The boards' complex requirements for supervisory plans create unnecessary and time-consuming paperwork for licensees and DSHS staff.<sup>11</sup> A person seeking supervision must develop and submit a separate supervisory plan for each business location where supervision will occur, rather than having a single supervisory plan listing all relevant locations. This practice increases initial paperwork for supervisees and DSHS staff since practitioners often obtain supervision at multiple locations.

Supervisees must submit change forms each time they want supervision from another board-approved supervisor and when they seek supervision at a new business location, if the business moves, or if the business changes its name, even though the supervisee may continue to receive supervision from an existing supervisor. The boards require DSHS staff to review and approve all supervisory plans and change forms. In fiscal year 2015, DSHS received

nearly 4,200 supervisory plans and more than 2,600 change forms. DSHS staff struggle to keep up with the workload. In September 2016, DSHS had a nearly three-month backlog of 340 social worker supervision plans while consumer complaints languished. In contrast, the Texas State Board of Examiners of Psychologists simply allows applicants to submit information about the total number of supervised hours gained at all locations in a single document and does not review and approve change plans.

Supervision verification. The boards' complex bureaucratic requirements for verification of supervised experience create another complicated and time-consuming process for DSHS staff. Once supervision is completed, an applicant must provide separate verification documentation for supervised hours received at each location. DSHS staff must undertake a detailed analysis of many variables to reconcile and approve the applicant's hours in conjunction with the board-approved plan and the complicated and involved arrangement of supervised experience requirements, as detailed in the textboxes, *Supervised Experience Verification* and *Calculating*

### ***Supervised Experience Verification***

The boards allow one supervisor and one location per supervision plan. For each supervision plan, DSHS staff must determine the following:

- Did all parties maintain licensure without disciplinary action?
- Do the supervision plan and the required verification document match for start date, practice location, and supervisor name (as well as full or part-time work, if applicable)?
- Is verification complete, signed, dated, and submitted within 30 days of end of supervision?
- How many months (or pro-rated months, if applicable) elapsed between start and end of supervised experience? Are hours reasonable given the time elapsed?
- Were 3,000 hours of supervised experience obtained within the minimum and maximum number of months? Did supervisee get required direct, indirect, couple and family hours (if applicable)?
- Did supervisee get required minimum supervision hours within minimum and maximum weekly and monthly allowances (as applicable)?
- Does the supervisor recommend full licensure?
- If the supervision plan and verification document do not match, have supervisor and supervisee logs been requested? Are logs sufficient? Do logs match the plan and verification document?
- Do other supervision plans and verification documents (and documentation of excess practicum hours, if applicable) need review to ensure the supervisee fulfilled all minimum requirements?

### Calculating Supervised Experience

	Marriage and Family Therapist	Licensed Professional Counselor	Social Worker
Post-graduate experience requirements	<ul style="list-style-type: none"> <li>3,000 hours within two to eight years, including 1,500 direct clinical services hours</li> <li>750 of the 1,500 hours must be providing services to families or couples</li> <li>500 hours may be conducted via telephonic or other electronic media</li> </ul>	<ul style="list-style-type: none"> <li>3,000 hours within 18 to 60 months, including 1,500 hours of direct client counseling contact</li> <li>300 hours may be conducted via technological means of communication</li> </ul>	3,000 hours within 24 to 48 months for a licensed clinical social worker and a licensed master social worker advanced practitioner or 3,000 hours within 24 to 60 months for Independent Practice Recognition
Supervision requirements	<ul style="list-style-type: none"> <li>200 supervision hours, including 100 hours of individual supervision</li> <li>50 of the 200 hours may be conducted by telephone or electronic media</li> </ul>	<ul style="list-style-type: none"> <li>Four hours of supervision per month while the LPC intern is engaged in counseling</li> <li>50 percent may be conducted through group supervision and 50 percent may be conducted by webcam</li> </ul>	100 supervision hours over the course of 3,000 hours of experience

*Supervised Experience.* In contrast, the Texas State Board of Examiners of Psychologists simply requires an applicant to provide proof of two years of supervised experience in the form of an attestation by the applicant and supervisor as to the total number of supervised hours.

- **No content review for continuing education courses.** Continuing education requirements are designed to ensure licensees keep up with advances in their field. Statute requires all three boards to evaluate and approve continuing education courses.<sup>12</sup> While the boards require continuing education providers to register and pay a \$50 fee annually, DSHS does not conduct a meaningful review of submitted courses that require pre-approval due to staff being tied up with the boards' bureaucratic supervisory and licensing requirements.<sup>13</sup> As a standard practice, DSHS conducts yearly audits of 5 percent of continuing education providers, but typically only reviews sign-in sheets and forms, not course content. As a result, the boards do not have sufficient oversight of the quality of continuing education courses. In contrast, the Texas Department of Licensing and Regulation (TDLR) requires providers that must obtain pre-approval to demonstrate their capability to meet all continuing education and departmental requirements before approving courses.<sup>14</sup>

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*DSHS does not ensure the quality of continuing education courses.*

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In addition, both the marriage and family therapist and professional counselor boards take a nonstandard approach to continuing education by offering continuing education credits to individuals attending the boards' committee meetings — primarily licensing, applications, complaints, and ethics committee meetings. This practice largely benefits people who must attend meetings for business reasons.



## Recommendations

These recommendations are formatted based on the recommendation in Issue 1 to transfer the three areas of regulation to TDLR. Should the transfer not occur, the recommendations should apply to DSHS or HHSC, which takes over administration of the boards on September 1, 2017.

### *Change in Statute*

#### **3.1 Require TDLR to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.**

Under this recommendation, TDLR would systematically phase in fingerprint-based checks through the Department of Public Safety. Applicants and licensees would use the state's fingerprint vendor to collect and submit fingerprints. Prospective licensees would provide fingerprints at the time of application, and existing licensees would provide fingerprints one time according to TDLR's implementation timeframe. Applicants and licensees providing fingerprints would pay a one-time approximate \$40 cost.

#### **3.2 Authorize TDLR to check for disciplinary actions in other states or from other licensing boards as part of the license application and renewal process, and to pursue any necessary enforcement actions based on the results.**

This recommendation would allow TDLR to identify problems and authorize it to take any necessary enforcement action based on actions taken by other states or other Texas licensing boards, so long as the conduct is also a violation of Texas law or board rule. This recommendation would direct TDLR to query the National Practitioner Data Bank when processing initial license applications and renewals for all three boards, and to increase licensing fees if needed to cover the cost of the queries, which would be about a \$2 increase per licensee each year. Using the data bank would ensure TDLR facilitates safe care for Texans receiving behavioral health services.

#### **3.3 Remove the "good moral character" standard as a criterion for marriage and family therapist applicants.**

This recommendation would remove the requirement that persons applying to the marriage and family therapist board for licensure be of "good moral character," a standard that is unclear, subjective, and difficult to enforce. TDLR would continue to receive and review criminal history information to determine the applicant's eligibility for licensure according to requirements in Chapter 53 and Section 502.253, Texas Occupations Code and associated rules.

#### **3.4 Remove the statutory limitation currently restricting the boards' authority to lower fees.**

This recommendation would remove the fee floor currently listed in statute for the three boards to provide greater discretion to TDLR's governing board to set fees, thus giving the agency increased autonomy to lower fees if the cost of administering regulation decreases.

#### **3.5 Remove the statutory requirement that marriage and family therapist applicants have 750 hours of direct clinical services and authorize the Texas Commission of Licensing and Regulation to establish the required hours by rule.**

This recommendation would replace the statutory provision requiring an applicant to have at least 750 hours of direct clinical services to couples or families with a provision that an applicant must have the number of direct clinical service hours as established by TDLR's governing board by rule. This

recommendation would reduce barriers to entry into practice while maintaining portability and parity of Texas licenses. In addition, this recommendation would give TDLR greater flexibility to standardize supervised experience requirements for the behavioral health boards.

## ***Management Action***

### **3.6 Direct TDLR to standardize conditions for inactive licensees.**

This recommendation would direct TDLR, with input from the advisory boards, to improve oversight of inactive licensees in accordance with generally accepted best practices by developing and adopting rules detailing inactive license tracking, time limits, and requirements related to continuing education and jurisprudence examinations during the period of inactive status or upon reactivation of the license, as applicable.

### **3.7 Direct TDLR to remove unnecessary and restrictive education requirements for professional counselor applicants for licensure.**

This recommendation would direct TDLR to accept degrees, without transcript review, from CACREP-accredited schools as well as from schools with substantially equivalent accreditation standards. In addition, this recommendation would remove the requirement that a graduate degree or coursework cannot be obtained more than 10 years prior to applying for a license, and direct TDLR to accept both national counseling exams. These recommendations would improve the fairness, timeliness, and efficiency of the application process for professional counselors.

### **3.8 Direct TDLR to reduce the burden of supervision requirements on licensees, supervisors, and staff.**

This recommendation would replace the burdensome reconciliation process used by the behavioral health boards, while retaining most qualifications for supervisors as well as an initial review of the supervisory plan. Under the recommendation, the supervisor and supervisee would retain records of supervision hours, subject to an audit regimen established by TDLR, and attest to the hours and location where supervisory hours were obtained. Attestations would be included with application materials. Alternately, TDLR could develop an electronic solution for submission, approval, and auditing of supervisory hours. In addition, the recommendation would direct TDLR to use a single supervisory plan for all locations where supervision will occur. The recommendation would direct TDLR to standardize supervisory plan instructions, to the extent possible, to set clearer expectations for supervisors and supervisees. This recommendation would also direct TDLR to reduce the period of time that a professional counselor applicant for supervisor status must have held a regular license to be consistent with requirements for marriage and family therapists.

### **3.9 Direct TDLR to fully implement expedited processing for military applications and renewals for marriage and family therapists, professional counselors, and social workers.**

This recommendation would clearly direct TDLR to revise existing policies, applications, and forms to ensure military service members, military spouses, and veterans applying for marriage and family therapist, professional counselor, or social worker licenses receive expedited processing. This recommendation would direct TDLR to ensure all associated application and renewal forms request the applicant's status as a military member, military spouse, or veteran to ensure expedited processing.

### 3.10 Direct TDLR to enhance the continuing education provider registry and comply with statute by approving continuing education courses.

This recommendation would direct TDLR to implement procedures for approving continuing education providers and courses in line with its current practices to better meet the intent outlined in the enabling statutes of the behavioral health boards. This recommendation would also direct TDLR to discontinue board practices of offering continuing education credits to individuals attending the marriage and family therapist and professional counselor boards' committee meetings to ensure licensees receive high-quality, practical continuing education.

## Fiscal Implication

Requiring fingerprint-based criminal background checks would not have a fiscal impact to TDLR but would require applicants and licensees to pay a one-time fee of about \$40 for a fingerprint background check through the Department of Public Safety. Any increased workload related to background checks could be handled with current resources. Requiring approval of continuing education courses would increase staff workload, which would be offset by efficiencies gained through other recommendations in this issue. The behavioral health boards currently generate sufficient revenue to cover their direct operating costs of \$2.8 million biennially as well as any additional full-time equivalent positions or cost increases related to these recommendations. In addition, TDLR would have sufficient fee authority, but would need a matching appropriation, to recover costs if determined to be necessary, including costs associated with querying the National Practitioner Data Bank.

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<sup>1</sup> Section 1921, Social Security Act (42 U.S.C. 1396r-2).

<sup>2</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 502.252(b)(5), Texas Occupations Code.

<sup>3</sup> Sections 502.153(b), 503.202(b), and 505.203(b), Texas Occupations Code.

<sup>4</sup> Section 55.004(b), Texas Occupations Code.

<sup>5</sup> 22 T.A.C. Section 801.236. The marriage and family therapist board is in the process of publishing rules to require licensees on inactive status to complete continuing education and jurisprudence exams before reentering practice.

<sup>6</sup> 22 T.A.C. Section 781.505.

<sup>7</sup> 22 T.A.C. Section 681.81.

<sup>8</sup> 22 T.A.C. Section 681.82; 22 T.A.C. Section 681.83.

<sup>9</sup> For the social worker board, only applicants seeking to become licensed clinical social workers or those seeking to gain specific recognitions must obtain supervision. For the marriage and family therapist board, a licensed marriage and family therapist associate must obtain supervision to upgrade licensure to a licensed marriage and family therapist. The same is true for a licensed professional counselor intern seeking to become a licensed professional counselor.

<sup>10</sup> 22 T.A.C. Section 681.93; 22 T.A.C. 781.404; and 22 T.A.C. 801.143.

<sup>11</sup> 22 T.A.C. Section 781.402; 22 T.A.C. 781.404; 22 T.A.C. Section 801.142; 22 T.A.C. Section 681.72; 22 T.A.C. Section 681.91; 22 T.A.C. Section 681.92; and 22 T.A.C. Section 681.93. The marriage and family therapist board plans is in the process of simplifying supervisory plan requirements. The rules may serve as a good starting point for simplifying supervision requirements for all three behavioral health boards.

<sup>12</sup> Sections 502.303, 503.356, and 505.404, Texas Occupations Code.

<sup>13</sup> Practice varies by board, but certain entities such as accredited colleges and universities or national and statewide associations do not receive course review by board rule and may receive automatically approved provider status.

<sup>14</sup> 16 T.A.C. Section 59.30.



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## APPENDICES



# APPENDIX A

## *Health Professions Council*

In 1993, the 73rd Legislature created the Health Professions Council (HPC) to increase efficiency across member agencies by providing administrative support services. The council consists of representatives from 12 independent licensing boards and the Department of State Health Services Professional Licensing and Certification Unit (PLCU), as reflected in the table, *HPC Member Agencies*.

### *HPC Member Agencies – FY 2016*

Agency	Licenses (at start of FY16)	Funds Transferred to HPC in FY16
Texas Board of Chiropractic Examiners	6,537	\$20,361
State Board of Dental Examiners	31,280	\$257,118
Texas Funeral Service Commission	4,811	\$43,845
Texas Medical Board	85,244*	\$32,378
Texas Board of Nursing	419,685	\$71,651
Texas Board of Occupational Therapy Examiners	13,985	\$33,527
Texas Board of Physical Therapy Examiners	24,412	
Texas Optometry Board	4,409	\$27,715
Texas State Board of Pharmacy	113,806	\$331,400
Texas State Board of Podiatric Medical Examiners	1,162	\$13,401
Texas State Board of Examiners of Psychologists	9,512	\$52,774
Department of State Health Services – PLCU	175,140	\$11,846
State Board of Veterinary Medical Examiners	9,770	\$31,038
<b>Non-Member Agencies Receiving Limited Services</b>		
Texas Board of Professional Geoscientists receives information technology support services		\$13,000
Texas Board of Professional Land Surveying receives database administration and support		\$11,808
Texas State Board of Plumbing Examiners receives database administration and support		\$130,658
Office of Public Insurance Counsel receives information technology support services		\$6,641
<b>Total</b>		<b>\$1,089,161</b>

\* As of August 31, 2015

- **Funding and staffing.** The council's funding comes from transferred appropriations from member agencies, with each agency paying for services it receives. Council members elect a chair and vice chair to preside over the council for two-year terms. The council has seven employees to perform its

## ***Appendix A***

main functions and occasionally uses staff from member agencies to carry out specific programs. For example, an Optometry Board staff member provides added technology support to the eight smallest member agencies, and a Board of Nursing staff member offers new employee Equal Employment Opportunity (EEO) training to all member agencies.

- **Services.** HPC offers the following services to member agencies:
  - Website, information technology, and document imaging software support
  - Shared regulatory database and database administration
  - Purchasing, payroll, and human resources support
  - Trainings relating to state finance, accounting, auditing, and EEO guidelines
  - Shared toll-free telephone line for consumer complaints

# APPENDIX B

## ***Behavioral Health Boards Enforcement Actions – FY 2015***

	<b>Marriage and Family Therapist</b>	<b>Professional Counselor</b>	<b>Social Worker</b>
Total complaints received	50	235	146
Jurisdictional complaints received	49	201	146
Jurisdictional complaints resolved	28	104	44
<b>Types of Complaints Received</b>			
Abuse/Neglect/Exploitation	0	1	3
Advertising/Mislabeled	1	9	3
Confidentiality	2	17	7
Criminal History	1	4	9
Fraud/Deceit/Bribery	1	9	7
Order non-compliance	1	6	2
Other	1	0	0
Practice without a license	8	11	10
Sexual Misconduct	3	7	4
Standard of Care/Service/Product	9	48	26
Unprofessional Conduct	23	123	75
<b>Total</b>	<b>50</b>	<b>235</b>	<b>146</b>
<b>Enforcement Actions Taken</b>			
<b><i>Disciplinary Actions</i></b>			
Administrative Penalty	0	1	0
Emergency Suspension	0	1	0
Probated Suspension	0	3	6
Reprimand	0	3	0
Revocation	0	0	1
Voluntary Surrender/Surrender	2	5	2
<b><i>Non-Disciplinary Actions</i></b>			
Cease & Desist Letter	3	1	5
Complaint Withdrawn	0	2	0
License Expiration	3	1	0
No Violation/Not Substantiated	11	54	17
Violation Found But Corrected	0	1	0
Warning Letter	9	32	13
<b>Total</b>	<b>28</b>	<b>104</b>	<b>44</b>



# APPENDIX C

## ***Staff Review Activities***

During the review of the Texas State Board of Examiners of Marriage and Family Therapists, Texas State Board of Examiners of Professional Counselors, and Texas State Board of Social Worker Examiners (behavioral health boards), Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency personnel; attended board meetings; conducted interviews and solicited written comments from interest groups, stakeholders, and the public; reviewed agency documents and reports, state statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar state agencies in other states; and performed background and comparative research.

In addition, Sunset staff also performed the following activities unique to the behavioral health boards:

- Conducted an extensive review of DSHS enforcement case files
- Observed complaints/ethics committee meetings for all behavioral health boards. Observed informal settlement conferences held by social worker and professional counselor boards and an executive session held by the marriage and family therapist board
- Attended a Texas Public Policy Foundation event on expanding scope of practice to fill gaps in the mental health workforce
- Attended a Supreme Court of Texas oral argument for ongoing litigation involving the marriage and family therapist board and the Texas Medical Association
- Conducted a survey of licensees and stakeholders and evaluated about 500 responses from professional counseling licensees, 500 responses from students and practitioners of marriage and family therapy, and more than 650 responses from social workers





Sunset Staff Review of the  
*Texas State Board of Examiners of  
Marriage and Family Therapists*  
*Texas State Board of Examiners  
of Professional Counselors*  
*Texas State Board of Social Worker Examiners*

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