

TEXAS STATE BOARD OF PHYSICAL THERAPY EXAMINERS

**Staff Report
to the
Sunset Advisory Commission**

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FOREWORD

The Texas Sunset Act (Article 5429k V.A.C.S.) terminates named agencies on specific dates unless continued. The Act also requires an evaluation of the operations of each agency be conducted prior to the year in which it terminates to assist the Sunset Commission in developing recommendations to the legislature on the need for continuing the agency or its functions.

To satisfy the evaluation report requirements of Section 1.07, Subsection (3) of the Texas Sunset Act, the Program Evaluation section of the Legislative Budget Board has evaluated the operations of the Texas State Board of Physical Therapy Examiners, which will terminate on September 1, 1981 unless continued by law.

Based on the criteria set out in the Sunset Act, the evaluation report assesses the need to continue the agency or its function and provides alternative approaches to the current method of state regulation. The material contained in the report is divided into seven sections: Summary and Conclusions, Background, Review of Operations, Alternatives and Constraints, Compliance, Public Participation, and Statutory Changes. The Summary and Conclusions section summarizes the material developed in the report from the standpoint of whether or not Sunset criteria are being met, assesses the need for the agency or the agency's functions relative to the findings under the various criteria and develops alternative approaches for continued state regulatory activities. The Background section provides a brief history of legislative intent and a discussion of the original need for the agency. The Review of Operations section combines, for the purposes of review, the sunset criteria of efficiency, effectiveness, and the manner in which complaints are handled. The Alternatives and Constraints section combines the sunset criteria of overlap and duplication, potential for consolidation, less restrictive means of performing the regulation, and federal impact if the agency were modified or discontinued. The Compliance Section combines the Sunset criteria relating to conflicts of interest, compliance with the Open Meetings Act and the Open Records Act, and the equality of employment opportunities. The Public Participation section covers the sunset criterion which calls for an evaluation of the extent to which the public participates in agency activities. The final section, Statutory Changes, deals with legislation adopted which affected the agency, proposed legislation which was not adopted and statutory changes suggested by the agency in its self-evaluation report.

This report is intended to provide an objective view of agency operations based on the evaluation techniques utilized to date, thus providing a factual base for the final recommendations of the Sunset Commission as to the need to continue, abolish or restructure the agency.

I. SUMMARY AND CONCLUSIONS

Physical therapy developed as a profession in the United States as a result of injuries sustained by veterans of the two world wars and the growth of the incidence of infantile paralysis. Over time, the practice of physical therapy involved the application of sophisticated techniques and without the proper degree of skill to apply the techniques, the potential for harm to the patient's welfare was increased. Before the late 1960s, all states, except Texas, had begun to regulate physical therapists. The increased potential for public harm and complaints against unqualified practitioners created a concern in Texas that physical therapy be practiced by qualified individuals. In addition, an increasing number of persons were practicing physical therapy without a physician's referral, which constitutes the unlicensed practice of medicine.

In response to these conditions, the Sixty-second Legislature in 1971 created the Texas Board of Physical Therapy Examiners to regulate physical therapists. The board, composed of nine physical therapists, currently regulates 2,197 licensees through its licensing and enforcement functions. Responsibilities include determining qualifications of applicants for licensure and enforcing provisions against the unauthorized practice of physical therapy. Fees collected by the board are deposited in the General Revenue Fund and the board is supported entirely by appropriations from the General Revenue Fund.

Review of board operations shows that its regulatory activities generally serve to protect the public against incompetent physical therapists. In the area of administration, practices are generally conducted in an efficient and effective manner. The review showed that the board has experienced funds management problems in the past but has improved its funds management practices and has

operated within its legislative appropriation since fiscal year 1978. However, two aspects of agency administration could be improved. First, projections of agency expenditures indicate that they will exceed projected revenues beginning in fiscal year 1981. As a general principle, a licensing agency's fee structure should be designed so that it generates sufficient revenue to cover its operating costs. The Act should be amended to allow the board to charge all necessary and reasonable fees to cover its general revenue appropriation. Second, the board pays proctors, who are licensed physical therapists, \$75 to monitor its examination. The board pays significantly higher fees for proctors than other health licensing agencies. Proctors cannot answer substantive questions during examinations. Board expenditures for proctors should be reduced to a level comparable to proctor expenses for other health licensing boards.

With respect to licensing, the review indicated that the licensing process generally functions in a satisfactory manner. However, three aspects of the licensing activity could be improved. First, grounds for refusal to allow an individual to sit for an examination and grounds for removal of a license once issued should be restructured so that provisions meet a two-part test: grounds for disqualification should be clear and related to the practice of the profession and grounds should be stated in terms of a currently existing condition rather than an absolute condition which exists throughout the lifetime of the individual. Some prerequisites for examination and grounds for disqualification do not meet this test. Second, the Act permits renewal of a license which has expired for less than five years on payment of a \$50 restoration fee and \$2 for each year the license was expired without renewal. The Act should be amended so that the delinquency period for license renewal conforms to the Sunset Advisory Commission's approach: cancellation of a license ninety days after the renewal period expires. Finally, the

Act permits issuance of temporary licenses prior to examination to applicants who have qualified for examination and to applicants who have passed the national examination in another state and are waiting for their scores to be reported to the board. Temporary licenses are therefore issued to applicants who have not exhibited competence. Thus, the level of protection provided the public is lessened. The Act should therefore be amended to require individuals who receive temporary licenses to work under the supervision of a licensed physical therapist to help ensure competency. In addition, the agency has in certain instances extended the period of validity of a temporary license to one year without specific statutory authorization. The agency should be given this authority.

With regard to the board's enforcement activities, the review indicated that the board is relatively inactive in the area of enforcement, partly as a result of funding constraints. The board has taken steps to improve enforcement efforts by revising responsibilities of the investigative committee and executive secretary. However, the review identified four concerns in the area of enforcement. First, a number of board rules are not in compliance with the board's enabling legislation or other statutes. For example, several fees in the board's rules are not authorized by law. The board should review and, where necessary, restructure its rules with assistance from the Attorney General's Office so that all rules are authorized and in compliance with statutes. Second, the board has no authority to issue informal and formal reprimands. The review indicated that situations are likely to arise where the use of reprimands would be appropriate. The statute should be amended to provide this authority. Third, the Act at present requires review of board actions in district court by trial de novo. Trial de novo requires all testimony and evidence to be presented anew in district court in the review of a board action. This procedure can hinder the disposition of appeals and possibly make a hearing on

appeal impossible. The "substantial evidence" rule provided in the Administrative Procedures Act should be applied and trial de novo on appeals should be removed from the Act. Finally, the Act prohibits advertising by a licensee. The provision is restrictive. Adoption of the Sunset Advisory Commission's approach is recommended to allow all advertising which is not deceptive or misleading.

In addition to the concerns relating to board operations and procedures, a concern was identified relating to the composition of the board. There are no public members on the board currently. Composition should be changed to provide for six physical therapists and three public members so that the public's viewpoint is reflected in board decisions. The board supports this modification.

Need to Regulate

As in the case of other regulated activities, regulation of physical therapists should be undertaken by the state only when there is a continuing need to protect the public health, safety, or welfare. Prior to the initiation of regulation of physical therapists in 1971, all other states had adopted regulation. Technological advances in physical therapy had dramatically changed the nature of care and treatment.

Since Texas was the only state which did not require licensure, unqualified therapists began to avoid the licensing process in other states by coming to Texas to practice. An increasing number of complaints were made by consumers relating to unqualified practitioners. Also, an increasing number of persons were practicing without a physician's referral, an act which constitutes the unlicensed practice of medicine.

Given these conditions, it appears reasonable that the state undertook regulation intended to ensure the competency of physical therapy practitioners. First, because of the highly technical nature of the skills involved, physicians had

no method of determining qualified practitioners for referrals of patients without licensure. Second, without a requirement for a minimum level of competency, significant harm could result to patients. The potential for harm stems from the complex skills required in physical therapy.

Since the creation of the board, the need to regulate the practice of physical therapy has grown. The increasing complexity of techniques has increased the level of competency required in the practice of physical therapy. The potential for public harm still exists. It can, therefore, be concluded that some form of continuing regulation is warranted.

The review showed, however, that there is no need to continue regulating physical therapist assistants. Physical therapist assistants must work under the supervision of a physical therapist and can perform only those duties that are delegated to them by a physical therapist. In addition, they are prohibited from altering or modifying patient rehabilitation treatment programs that are formulated by the physical therapist. As a result, the danger to the public from the activities of physical therapist assistants does not appear to be sufficient to warrant state intervention.

Alternatives

If the legislature determines that the state's current regulatory method and/or the board should be continued, the following alternatives could be considered.

- 1. CONTINUE THE BOARD AND ITS FUNCTIONS WITH MODIFICATIONS.**

This approach would maintain an independent board to perform licensing and enforcement activities. The review indicated that the following modifications would result in more effective regulation of the profession of physical therapy:

- a) amend the statute to allow the board to charge necessary and reasonable fees to cover its general revenue appropriations (page 15);
- b) expenditures for proctors for the board's licensing examination should be reduced to a level that is comparable to proctor expenses for other health licensing boards (page 16);
- c) the statute should be restructured so that grounds for disqualifying an applicant from sitting for an examination and grounds for removal of a license are: 1) easily determined and 2) are currently existing conditions (page 20);
- d) the statute should be amended so that the delinquency period for renewals conforms to the Sunset Advisory Commission's across-the-board approach (90 days, then license cancellation) (page 20);
- e) individuals holding temporary licenses should be allowed to practice only under the supervision of a licensed physical therapist, and the agency should be given the specific statutory authority to extend the period of validity of a temporary license up to one year (page 21);
- f) the board should take steps to review and, where necessary, restructure its rules with assistance from the Attorney General's Office so that all rules are authorized and comply with state statutes (page 22);
- g) the board should be given the statutory authority to issue informal and formal reprimands (page 22);
- h) the statutory requirement that appeals from board enforcement proceedings be conducted on a "trial de novo" basis should be replaced by the "substantial evidence" approach set out in the Administrative Procedures Act (page 23);
- i) provisions of the agency's statute and rules dealing with advertising should be amended to conform to the Sunset Advisory Commission's approach which prohibits only advertising which is false, misleading or deceptive; (page 23) and
- j) the composition of the board should be modified to consist of six physical therapists and three public members (page 34).

2. REDUCE THE CURRENT SCOPE OF REGULATION.

- a. Eliminate the regulation of physical therapist assistants (page 28).

This approach would continue to provide protection to the public in the most critical area but provide for a less restrictive regulatory scheme. Physical therapist assistants and other supportive personnel working under the supervision of a physical therapist can perform only those duties that are delegated by the physical therapist. In addition, the physical therapist, by statute, assumes responsibility for the activities that he delegates to supportive personnel. Finally, twenty-five states do not regulate physical therapist assistants.

Implementation of this alternative should be accompanied by the internal changes recommended in the preceding alternative.

- b. Require a one-time only certification of physical therapists.

Under this alternative, a qualifying examination and other entry requirements would still need to be satisfied by the applicant. Payment of an annual renewal fee would not be required. While there would be no enforcement activity under this form of regulation, the board has received a relatively low number of complaints and the enforcement activity has been funded at a low level.

Implementation of this alternative should be accompanied with the adoption of items a - c, e and j set out in the first alternative.

3. TRANSFER THE FUNCTIONS CURRENTLY PERFORMED BY THE TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS TO THE TEXAS DEPARTMENT OF HEALTH (page 27).

This approach would combine the regulation of physical therapists into a state agency with generally compatible goals and functions. Both the board and the Department of Health perform health-related functions and are involved in regulatory activities.

A number of benefits could be derived from this merger alternative. Benefits could include utilization of regional offices with inspectors for enforcement, existing support services and administrative structure, data processing services and informational services. Savings could be realized in board members' per diem and travel expenses.

II. BACKGROUND

Historical Perspective

The Texas Board of Physical Therapy Examiners was established by the legislature in 1971 to regulate physical therapists and physical therapist assistants. The reasons underlying initiation of state regulation stem from the development of physical therapy as a profession and conditions in Texas at the time of creation of the board.

Physical therapy developed in the United States as a recognized profession, largely as a result of two world wars and two of the nation's worst infantile paralysis epidemics. The second series of polio epidemics resulted in nearly 58,000 cases in 1952. These circumstances thus created a sharply increased demand for physical therapists and a need for improved techniques of therapy.

With the increased demand for skilled therapists, many persons who lacked appropriate training began to hold themselves out as physical therapists. Finally, as a result of increasing uncertainty about identifying persons who were properly qualified to provide services and treatment, a trend developed in the United States in the middle 1940s toward the licensure of physical therapists. At the end of the 1960s, all states except Texas had adopted regulation and licensure of physical therapists.

Toward the end of the 1960s, circumstances developing in Texas stimulated an interest in licensing physical therapists in the state. Interviews with agency representatives indicated that, since Texas was the only state which did not require licensure, unqualified therapists began to avoid the licensing process in other states by coming to Texas to practice. In addition, there had been an increasing number of complaints from consumers relating to unqualified practitioners. Such com-

plaints were often made to physicians who referred patients for therapy. Finally, an increasing number of persons were practicing without a physician's referral, an act which constitutes the unlicensed practice of medicine. Existing enforcement capacity in this area was seen to need additional emphasis.

As a result of these concerns, the Texas Board of Physical Therapy Examiners was created in 1971 to ensure the availability of qualified persons to practice this technical occupation. The board consists of nine members who are licensed physical therapists. Board members must be Texas residents and physical therapist practitioners for five years immediately preceding appointment. Board members are appointed by the governor to overlapping six-year terms with the advice and consent of the senate. At present the board regulates 1,990 physical therapists and 207 physical therapist assistants.

The board currently operates with a staff of two full-time positions and one part-time contract employee. The board is supported entirely from the General Revenue Fund. The board received appropriations of \$56,972 in fiscal year 1980 to carry out its operations.

Comparative Analysis

To determine the pattern of regulation of the occupation of physical therapy within the United States, a survey of the fifty states was conducted.

The need to regulate the occupation of physical therapy is currently recognized through licensing requirements imposed by all fifty states. From the standpoint of organizational patterns, nine states, including Texas, meet this expressed need through an independent board or commission. For the remaining states, the regulation of physical therapists is carried out through a larger, medically-related board or state agency charged with multiple regulatory functions. Board members are appointed by the chief executive in thirty-six states.

Licensing boards composed entirely of physical therapists administer physical therapy laws in thirteen states, including Texas. In seventeen states, the regulation of physical therapists is achieved through a board consisting of physical therapists as well as public members. While fees are collected by all fifty boards, funding patterns vary across the states. Boards in thirty states, not including Texas, are supported at least partially by the fees they collect. Boards in forty states, including Texas, are funded through the legislative appropriation process. Like Texas, thirty-one of the physical therapy boards receive general revenue funds. In twenty states, not including Texas, physical therapy boards have advisory functions only.

In thirty-two states, including Texas, physical therapy boards conduct investigations in response to consumer complaints. Complaint investigations are conducted by an investigative unit of a centralized regulatory agency in twelve states. In two states, complaint investigations are conducted by the physical therapy board in conjunction with a larger regulatory body. In thirty-six states, including Texas, physical therapy boards have responsibility for conducting disciplinary hearings.

In forty-six states, including Texas, licensure by some form of endorsement or reciprocity is authorized.

All physical therapy boards surveyed indicate the need to perform the basic regulatory functions of administration, testing, license issuance, and enforcement.

III. REVIEW OF OPERATIONS

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the efficiency with which the agency operates; the objectives of the agency and the manner in which these objectives have been achieved; and the promptness and effectiveness with which the agency disposes of complaints concerning persons affected by the agency.

Organization and Objectives

The Texas Board of Physical Therapy Examiners has a legislative mandate to regulate all persons who practice physical therapy and all physical therapist assistants. The board's stated objectives are to license only qualified physical therapists and physical therapist assistants and to ensure that licensees abide by the provisions of the Act. In order to achieve its objectives, the board performs three major functions: administration, licensing, and enforcement.

The board is composed of nine physical therapists appointed by the governor with the advice and consent of the senate for overlapping six-year terms. To be qualified for appointment, individuals must be Texas residents and practitioners of physical therapy for five years immediately preceding appointment. Statutorily required board duties include promulgating rules, reviewing qualifications of applicants, issuing licenses, administering examinations, conducting license revocation and suspension hearings, instituting actions to enjoin violations of the Act and generally aiding in enforcement of the Act.

Exemptions from the provisions of the Act include physicians, dentists, optometrists, chiropractors, occupational therapists, certified corrective thera-

pists, registered nurses, licensed vocational nurses and podiatrists who confine their practices to their professions and to certain other specified categories in their particular spheres of labor.

Staff for the board consists of a full-time executive secretary and a full-time secretary. The board has also contracted for the part-time services of one person who does secretarial and bookkeeping work. Activities generally performed by the staff in the traditional areas of administration, licensing and enforcement include processing license renewals, checking license applications for completeness, evaluating transcripts for compliance with educational requirements, maintaining records, accounting for board revenues and expenditures, assisting in the investigation of violations of the Act and providing secretarial services to the board.

Funding for the board is provided exclusively from appropriations by the legislature from the General Revenue Fund. Revenue received by the board is deposited in the General Revenue Fund.

Evaluation of Agency Activities

As with most other licensing agencies, the operations of the Texas Board of Physical Therapy Examiners can be broken down into three basic activities: administration, licensing and enforcement. Each of these activities were reviewed to determine the degree to which agency objectives have been met. To make this determination, the evaluation focused on whether the board has complied with statutory provisions, whether these provisions facilitate accomplishment of the objectives, whether agency organization, rules, and procedures are structured in a manner that contributes to cost-effective accomplishment of the agency's task, and whether procedures provide for fair and unbiased decision-making.

Administration

The general objective of any administration activity is to provide for the efficient operation of all agency functions. The review of these activities indicated that present administration practices are generally conducted in an efficient and effective manner. Licensee and accounting records are thorough and well-organized and licenses are renewed without substantial backlogs. Board activities and staff duties are clearly defined and agency procedures related to record maintenance and mail processing are adequate. Board member per diem and travel expenses were not excessive in comparison to other health-related licensing agencies.

The agency has, however, experienced several problems in the area of funds management. It received emergency funding from the Governor's Office in fiscal year 1975 and again in fiscal year 1976. In addition, in fiscal year 1977 the board was unable to pay for the cost of its licensing examination and, as a result, its functions were administered by the Department of Health from February 1, 1977 through August 31, 1977. Since fiscal year 1978 the agency has taken steps to improve its funds management practices and has operated within its legislative appropriation. However, the review indicated that there are two aspects of agency administration that could be improved.

The first area relates to the fee structure of the board as displayed in Exhibit III-1.

Exhibit III-1

FEES

<u>Type of Fee</u>	<u>Physical Therapist</u>	<u>Physical Therapist Assistant</u>
Application	\$ 25.00	\$ 25.00
Examination	\$ 50.00	\$ 45.00
Reciprocal License	\$ 30.00	\$ 30.00
Temporary License	\$ 20.00	\$ 12.50
License Renewal	\$ 20.00	\$ 12.50
Renewal of an Expired License - for each year up to five years	\$ 2.00	\$ 2.00
Restoraton fee	\$ 50.00	\$ 50.00

While these fees have produced revenues equal to the general revenue funds received, projections indicate that agency expenditures will exceed revenues generated by as much as \$10,000 per year by 1985 if changes in the fee structure are not made.

As a general principle, a licensing agency's fee structure should be designed so that it generates sufficient revenue to cover its operating costs. Projections indicate that the cost for performing the various activities will exceed the fees charged for these services and that the fees should be raised. In order to give the board the flexibility to adjust its fee structure to cover the cost of its operations as the situation dictates, its statute should be amended to allow the board to charge the necessary and reasonable fees to cover its general revenue appropriation.

The other concern with agency administration relates to agency expenditures for proctors for its licensing examination. At one time, Board members were paid

\$100 to proctor the licensing examination but this practice was discontinued after April 1978. However, the board currently pays its proctors, who are also licensed physical therapists, \$75 to monitor its examination which lasts for approximately nine hours.

The primary function of proctors is to monitor examination candidates to prevent cheating. They are not permitted to answer any substantive questions related to the examination. Thus, the duties of a proctor at the board's examination do not require knowledge of the physical therapy profession.

Comparison of proctor fees paid by the Board of Physical Therapy Examiners with proctor fees paid by other health licensing agencies indicates that the board pays significantly higher fees. Board expenditures for proctors for its licensing examination should be reduced to a level that is comparable to proctor expenses for other health licensing boards. Savings from this action should provide additional funds which could be used in other areas of board operations.

Licensing

The general objective of the licensing activity of the Texas Board of Physical Therapy Examiners is to ensure the minimum competency of physical therapists and physical therapist assistants through an efficient licensing process. To accomplish this purpose, the board is directed by statute to administer an examination to applicants for licensure. The board has also adopted examination guidelines, based on requirements in the law. The board licenses applicants from other states by endorsement if they have passed the national examination with a score that meets standards set by the board. In order to be licensed as a physical therapist in Texas, an applicant must have completed an accredited curriculum in physical therapy education which has provided adequate instruction in the basic

sciences, clinical sciences and physical therapy theory. Within this requirement, the applicant must have completed a minimum of sixty academic semester hours or its equivalent from a recognized college which are acceptable for transfer to the University of Texas, including courses in the biological, social, and physical sciences, or must have received a diploma from an accredited school of professional nursing. With respect to physical therapist assistants, an applicant must have completed a program of at least two years offered by an accredited college, including elementary or intermediate courses in the anatomical, biological and physical sciences and clinical procedures. Applicants in both categories must present evidence of good moral character.

During the period covered by fiscal years 1976 through 1979, the number of licensed physical therapists increased by 325 or 22 percent to 1,834 and the number of licensed physical therapist assistants increased by 104 or 128 percent to 185. Exhibit III-2 shows the licensing activity by year and category.

Exhibit III-2

LICENSES ISSUED 1976 - 1979

	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
<u>Physical Therapist License</u>				
Renewals	1,295	1,499	1,530	1,581
Examination	132	156	172	144
Endorsement	<u>82</u>	<u>90</u>	<u>103</u>	<u>109</u>
	1,509	1,745	1,805	1,834
<u>Physical Therapist Assistant License</u>				
Renewals	55	98	120	150
Examination	24	34	30	31
Endorsement	<u>2</u>	<u>3</u>	<u>2</u>	<u>4</u>
	81	135	152	185
<u>Physical Therapist Temporary License</u>	207	183	152	187
<u>Physical Therapist Assistant Temporary License</u>	<u>35</u>	<u>56</u>	<u>29</u>	<u>39</u>

The review showed that the licensing process generally functions in a satisfactory manner. Computerization of many functions has increased the overall efficiency of the process. The board has also developed thorough procedures for receiving and reviewing applications and examining applicants. Review of procedures to develop and administer the examination showed the processes are appropriate. The pass-fail rates shown in Exhibit III-3 indicate that the examination is neither overly restrictive nor overly permissive.

Exhibit III-3

**LICENSING EXAMINATION PASS/FAIL RATES
CALENDAR YEARS 1976 - 1979**

<u>Type of License</u>	<u>Year</u>	<u>Total Examined</u>	<u>Number Passed</u>	<u>Percent Passed</u>	<u>Number Failed</u>	<u>Percent Failed</u>
Physical Therapist	1976	200	165	83	35	17
	1977	147	131	89	16	11
	1978	229	198	86	31	14
	1979	<u>177</u>	<u>160</u>	<u>90</u>	<u>17</u>	<u>10</u>
	Total	753	654	87	99	13
Physical Therapist Assistant	1976	32	29	91	3	9
	1977	67	50	75	17	25
	1978	42	36	86	6	14
	1979	<u>44</u>	<u>37</u>	<u>84</u>	<u>7</u>	<u>16</u>
	Total	185	152	82	33	18

While the licensing function generally operates well to ensure a minimum level of competency, three aspects of the licensing activity could be improved. The first concern deals with grounds for refusal to allow an individual to sit for an examination and grounds for removal of a license once issued. The statutory framework developed for this agency contains the same confusion of thought and vagueness of terminology found in the statutes of many other licensing agencies.

The statute erroneously requires the board in many cases to act essentially as a court of competent jurisdiction in determining the legal status of an individual

and requires the board to define and apply terms which may have no legal basis. Grounds for disqualification should be structured in such a manner that each of the grounds meet a two-part test. First, the grounds for disqualification should be clear and related to the practice of the profession. Second, the grounds should be stated in terms of a currently existing condition rather than an absolute condition which exists throughout the lifetime of the individual.

Review of the grounds for disqualification to sit for the examination shows that several fail to meet this test. For example, applicants are required to be of "good moral character" to be licensed. In addition, the board may deny a license or suspend or revoke a license for: 1) conviction of a felony or of a crime involving moral turpitude; 2) gross negligence in the practice of physical therapy or in acting as a physical therapist assistant, or 3) for conduct unbecoming a person licensed as a physical therapist or a physical therapist assistant or of conduct detrimental to the best interest of the public. The statute should be restructured so that such provisions comply with the two criteria.

The second concern in licensing deals with the delinquency period for renewals. Licenses expire after a 30-day grace period following the end of the month in which the license was renewable. However, the Act allows a person to renew a lapsed license within a five year period by payment of a \$50 restoration fee and a \$2 fee for each year the license was expired without renewal. Under this approach, a person could be inactive in the field of physical therapy for up to five years and still not be required to exhibit competence to renew a license to practice under provisions of the present Act. Such an approach is not common to other licensing agencies of the state. The statute should be amended so that these restoration provisions are replaced with the Sunset Commission's approach. This approach requires cancellation of a license ninety days after the renewal period

expires with no special restoration provision.

The final concern in licensing deals with the provisions in the Act that permit the issuance of temporary licenses to individuals prior to their taking and passing the licensing examination or to applicants for endorsement who are awaiting their examination scores to be reported to the board. In the case of a candidate waiting to take the examination, the temporary licenses are valid until the next examination and, in some instances, have been extended without specific statutory authority for periods of up to one year. With respect to an individual who is waiting to be licensed by endorsement, the temporary license is valid for sixty days. Individuals who are issued temporary licenses in this manner are permitted to practice physical therapy with the same rights and privileges and under the same conditions as a physical therapist who has been licensed by the board.

The practice of issuing temporary licenses in this manner does not ensure a uniform level of public protection. Consequently, the statute should be amended to require individuals who receive temporary licenses by these methods to work under the supervision of a licensed physical therapist. In addition, the agency should be given the specific statutory authority to permit the use of a temporary license for up to one year where necessary.

Enforcement

The basic objective of the enforcement activity is to protect the public by identifying and, where necessary, taking appropriate action against persons not complying with the provisions of the Act or board rules. The board receives a relatively low number of complaints (thirteen in fiscal year 1978 and fourteen in fiscal year 1979) and has not, for this reason, been provided funds for a full-time investigator although it has hired private investigation firms on occasion. The enforcement efforts have been improved by revising the responsibilities of its

investigative committee and executive secretary and the complaint files have been reorganized and improved. However, the review identified four areas in the area of enforcement that could be improved.

The first concern relates generally to board rules, a number of which are not in compliance with the board's enabling statute or other state statutes. Under agency rules, the board collects several fees that are not authorized by its statute. Attorney General Opinion No. H-443 (1974) states that "unless a fee is provided by law for an official service required to be performed and the amount fixed by law, none can lawfully be charged." Other board rules such as rules prohibiting members from serving more than two terms or permitting the governor, with consent of a majority of the board, to remove a board member for negligence are in conflict with state law. The board also published three rules and an amended rule in 1978 in the Texas Register as proposed rules but did not publish the changes as adopted rules. The rules are therefore not in force because proper procedures were not followed, although they are printed in the board's rules.

To correct this, the board should take steps to review and, where necessary, restructure its rules with assistance from the Attorney General's Office so that all rules are authorized, comply with state statutes and conform with the board's enabling legislation.

The second concern in enforcement deals with lack of board authority to issue informal and formal reprimands. An appropriate range of sanctions should be available to the board for use in justified circumstances. The review indicated that situations arise where the use of reprimands would be appropriate. The statute should therefore be amended to provide this authority.

The third concern in enforcement relates to the provision in the Act requiring review of board actions in district court by trial de novo. Trial de novo requires all

testimony and evidence to be presented anew in district court in the review of a board action. If witnesses or evidence are unavailable, the possibility of long delays exists in the disposition of appeals. The trial de novo provision in the board's statute should be removed, thereby allowing the "substantial evidence" approach set out in the Administrative Procedures Act to be the basis for appeals. This approach permits a court to review the record of a board hearing as a basis for a ruling, thereby helping to expedite disposition of appeals of board actions.

The final concern in enforcement deals with the prohibition in the Act against advertising. A license may be denied, suspended or revoked if the applicant or licensee has been guilty of advertising. This provision is unnecessarily restrictive and should be changed to prohibit only that advertising which is false, deceptive, or misleading, as recommended by the Sunset Commission.

Summary

The Texas Board of Physical Therapy Examiners consists of nine members appointed by the governor for six-year terms with the advice and consent of the senate. The board is directed by statute to regulate physical therapists and physical therapist assistants through the licensure of qualified applicants and the enforcement of provisions of the Act.

Board operations can be divided into three activities: administration, licensing, and enforcement. With regard to administration, the agency has had some funds management problems in the past. It has received two emergency appropriations from the Governor's Office and its functions were temporarily administered by the Health Department in fiscal year 1977. However, since fiscal year 1978, the board has stayed within its legislative appropriation. Two concerns were noted with the agency's administration. Revenue and expenditure projections

indicate that the board will spend more than it will collect from fees beginning in fiscal year 1981. As a result, the board's statute should be amended to allow it to charge the necessary and reasonable fees to cover the amount of its legislative appropriations. The second concern with agency administration relates to the amount the board pays proctors for its licensing examination. The review indicated that the board's proctor expenses were significantly higher than proctor expenses paid by other health licensing agencies. Consequently, the board's expenditures for proctors should be reduced to a level that is comparable to other health licensing agencies.

With regard to the licensing activity, three areas could be improved. First, grounds for refusal to allow an individual to sit for the examination and grounds for removal of a license once issued should meet a two-part test. Grounds should be clear and related to the practice of the profession and should be stated in terms of a currently existing condition rather than an absolute condition which exists throughout the lifetime of the individual. Some of the grounds in the Act do not meet this test. The statute should be restructured so that such provisions comply with the criteria.

Second, the Act should be amended so that the delinquency period for license renewal conforms to the Sunset Advisory Commission's approach requiring cancellation of a license ninety days after the renewal period expires. The Act currently permits renewal of a license within a five year period on payment of a \$50 restoration fee and \$2 for each year the license was expired without renewal.

Finally, the Act permits issuance of temporary licenses prior to examination to individuals who have qualified for examination and to individuals who have passed the national examination in another state and are waiting for the scores to be reported to the board. Temporary licenses permit practice by individuals who

have not exhibited competence. The Act should be amended to permit individuals who receive temporary licenses to practice only under the supervision of a licensed physical therapist. In addition, the agency should be given the specific statutory authority to permit the use of a temporary license for up to one year if necessary.

With regard to enforcement, the review identified four concerns. First, the board has established fees in its rules and adopted other rules that are not authorized by the Act. The board should take steps to review and, where necessary, restructure its rules with assistance from the Attorney General's Office so that all rules are authorized and comply with statutes.

Second, the Act at present does not provide authority for the board to issue informal and formal reprimands. The statute should be amended to provide this authority so that an appropriate range of sanctions is available to the board.

Third, review of board actions in district court by trial de novo should be removed from the statute. Trial de novo requires all testimony and evidence to be presented anew in district court. The procedure could hinder the disposition of appeals. The "substantial evidence" rule provided in the Administrative Procedures Act should be applied on appeals.

Finally, the Act and rules should be amended to conform to the Sunset Advisory Commission approach to allow advertising practices which are not deceptive or misleading. Current provisions in the Act prohibit advertising.

IV. ALTERNATIVES AND CONSTRAINTS

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the extent of overlap and duplication with other agencies and the potential for consolidation with other agencies; an assessment of less restrictive or alternative methods of performing any regulation that could adequately protect the public; and the impact in terms of federal intervention or the loss of federal funds if the agency is abolished.

Consolidation Alternatives

Organizational structures in other states were reviewed to identify consolidation alternatives with potential for use in Texas. The review indicated that all fifty states license physical therapists. Texas and nine other states regulate physical therapists through independent boards. Among the forty states that have consolidated the regulation of physical therapy, seventeen use an "umbrella" department of occupational licensing, thirteen states have consolidated this function with state boards of medical examiners and seven states regulate physical therapists through a state department of health. Three states have placed the regulation of physical therapists in a variety of other agencies such as the Department of Education.

Since Texas does not have a department of occupational licensing, the two feasible consolidation alternatives found in other states that also exist in Texas are the Department of Health and the Board of Medical Examiners. To determine the feasibility of these options, each agency was reviewed to determine whether its goals and functions were reasonably compatible with those of the Board of Physical Therapy Examiners.

Analysis of organizational alternatives available in Texas shows that the Department of Health best satisfies the requirements of closely related operations with identifiable benefits resulting from consolidation. The department regulates certain health-related occupations through administration, examination, licensing and enforcement functions. In addition, there is historical precedent for this consolidation alternative. In fiscal year 1977, the expenditures of the Board of Physical Therapy Examiners were anticipated to exceed its legislative appropriations and, as a result, its functions were carried out through the Department of Health for seven months of that year.

Benefits to be derived from combining regulation of physical therapists with the Department of Health can be identified through a review of the functions performed by the agency. The department has regional offices throughout the state which could provide a mechanism for handling physical therapist-related complaints and enforcement duties. These offices are currently staffed with personnel who perform health-related inspections. In addition, the department has a data processing division which could provide computer services necessary for regulation of physical therapists, as well as a public health education unit which could provide informational material to physical therapists and the public.

Regulatory Alternatives

Need for State Regulation

The Board of Physical Therapy Examiners regulates both physical therapists and physical therapist assistants. The need for state regulation was examined separately for these two groups.

With respect to physical therapists, the review indicated that they establish and modify patient rehabilitation treatment programs. In addition, physical

therapists are professionally responsible for the activities of supportive personnel under their direction. The duties of a physical therapist, therefore, require a considerable amount of trained professional judgment. If these activities were performed by untrained and incompetent individuals, severe harm to the public could result. Thus, there is a need to continue regulating physical therapists.

Physical therapist assistants, on the other hand, are persons who work under the direction and supervision of physical therapists. They are prohibited from altering patient rehabilitation treatment programs that have been formulated by a physical therapist. In addition, the physical therapist remains professionally responsible for the duties delegated to a physical therapist assistant. This direct chain of responsibility provides an adequate level of protection to the public through reliance on the professional attitude of the physical therapist. If properly exercised this chain of responsibility can take the place of the current regulation of physical therapist assistants. Eliminating the current regulation would also place Texas with approximately half of the fifty states which do not regulate physical therapy assistants.

Other Methods of Regulation

There is a continuing need to provide state regulation for physical therapists. This group is currently regulated through licensure in Texas. All fifty states were reviewed in order to identify alternatives to the licensing of physical therapists.

The review showed that all states regulate physical therapists through licensure. However, two other regulatory methods are commonly used for other occupations. These methods can therefore be considered as possible alternatives for the regulation of physical therapists. The first alternative is certification. Under this method, the authority to practice physical therapy would be conditional on an individual passing a one-time "certifying" examination. Registration is the

other alternative form of regulation. Registration permits an individual who wishes to practice physical therapy to be "registered" with the state, without regard to qualifications.

Before these regulatory alternatives can be considered as a reasonable alternative to current regulation in Texas, the option should offer approximately the same degree or a greater degree of public protection as the current method and should be less restrictive than the present system.

The review indicated that registration, while less restrictive than the current licensing scheme, offers significantly less protection to the public since there are no qualifying requirements to help ensure competency. Certification, on the other hand, appears to provide a level of public protection similar to that now available. Under certification, a qualifying examination and other entry requirements would still need to be satisfied by the applicant. While no enforcement activity is attached to certification, the present regulatory method has operated with little emphasis on enforcement and the board receives relatively few complaints. With regard to restrictiveness, certification would be somewhat less restrictive to physical therapists than the current licensing form. Currently, physical therapists must renew their license annually for as long as they practice the occupation. Certification would cause a significant drop in revenues as physical therapists would not be required to pay annual renewal fees and the licensing agency would lose information that is currently gathered through licensing. It was concluded from the review that certification would produce the same level of protection that has been offered with the current regulation due to the low level of funding provided for the operation of the agency.

Summary

A review of the consolidation alternatives found in other states was conducted to determine the potential for combining the regulation of physical therapists and physical therapist assistants with the functions of another agency. Forty states regulate the process through an agency charged with multiple responsibilities. These agencies include "umbrella" licensing agencies, state departments of health, and state medical boards. Among these alternatives, the Department of Health appears to be the most reasonable alternative for consolidation. Both the department and the board perform health-related functions and are involved in regulatory activities. In addition, there is historical precedent for this approach since the board was placed under the administrative control of the Department of Health in fiscal year 1977 for a period of seven months.

The review concluded that there is a potential for public harm if physical therapists were not regulated. Physical therapists are trained to establish and modify patient rehabilitation treatment programs. In addition, they are professionally responsible for treatments administered by personnel working under their supervision. However, since physical therapist assistants must practice under the supervision of a physical therapist who remains professionally responsible for all aspects of the treatment program and since assistants are not permitted to alter treatment programs established by the physical therapist, there is no need to continue regulating them.

With respect to regulatory alternatives, certification of physical therapists would provide a less restrictive method of maintaining a level of public protection similar to that provided under the current licensing scheme. While the certification method has no enforcement component, the agency receives only a small number of complaints and the enforcement efforts undertaken by the board have been minimal due to the low level of funding.

V. COMPLIANCE

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the extent to which the agency issues and enforces rules relating to potential conflict of interest of its employees; the extent to which the agency complies with the Open Records Act and the Open Meetings Act; and the extent to which the agency has complied with necessary requirements concerning equality of employment opportunities and the rights and privacy of individuals.

In its efforts to protect the public, the agency's operations should be structured in a manner that is fair and impartial to all interests. The degree to which this objective is met can be partially judged on the basis of potential conflicts of interest in agency organization and operation, as well as agency compliance with statutes relating to conflicts of interests, open meetings, and open records.

Conflict of Interest

Board members, as appointed state officers, are subject to statutory standards of conduct and conflict-of-interest provisions (Article 6252-9b, V.A.C.S.). A review of the documents filed with the Office of the Secretary of State indicates that board members and the executive secretary have complied with the filing requirements set out in the state's general statutes concerning conflict of interest. Board members are notified of the filing requirements. In addition, the executive secretary informs newly appointed board members of their obligations under the Ethics and Financial Disclosure Act by providing them with a copy of provisions dealing with standards of conduct for state officers and employees.

Open Meetings - Open Records

Meetings and activities conducted by the Texas Board of Physical Therapy Examiners show general compliance with the requirements of the Open Meetings Act and the Open Records Act. Board minutes and interviews with board members and board personnel demonstrate that the board generally follows proper procedures relating to executive sessions.

In general, the board has followed proper notification procedures in the adoption of its rules. However, in one instance in 1978, the board adopted three rules and amended another without notifying the Texas Register of adoption of this action. As a result, these changes were not published in accordance with state requirements and technically are not in effect.

Employment Policies

The board has two exempt positions and no classified positions. The board does not have an affirmative action plan or a formal grievance procedure. The Governor's Office of Equal Employment Opportunity indicated that this is characteristic of other agencies of similar size. However, the board does file notices for job openings with the Texas Employment Commission. No grievances have been filed with the board.

Summary

The board is in general compliance with the statutory requirements relating to conflict of interest, open meetings and open records. However, in one instance, rules adopted by the board were not published as adopted rules in accordance with state requirements. With respect to the board's employment policies, the board does not have an affirmative action plan or a formal grievance procedure. This policy is consistent with other boards and agencies with small staffs.

VI. PUBLIC PARTICIPATION

The review under this section covers the sunset criterion which calls for an evaluation of the extent to which the agency has encouraged participation by the public in making its rules and decisions as opposed to participation solely by those it regulates and the extent to which the public participation has resulted in rules compatible with the objectives of the agency.

The extent to which the agency has involved the public in agency rules and decisions can be judged on the basis of agency compliance with statutory provisions regarding public participation, the nature of rule changes adopted, the availability of information concerning rules and agency operations, and the existence of public members on the commission.

Agency Activities

The review indicated that the board has proposed and adopted rule changes twice during the last four years. The board complied with the public notification requirements found in general state law. However, board minutes indicate that there were no members from the general public in attendance at the public hearings.

Board efforts to inform the general public, applicants for examination and licensees of its operations are confined to providing copies of the board's statute and rules on request at no charge. In addition, the board is currently attempting to establish a consumer advisory council. The purpose of the council is to provide the general public an opportunity to discuss any issue relating to physical therapy as it impacts the consumer. Since council members will not receive per diem or travel reimbursement the level of participation on the council will likely be diminished. Thus, the council's ability to represent the public viewpoint will be reduced.

Public Membership

The statutory composition of the board does not provide for any members from the general public. Thus, the ability of the board to provide for formal representation of the public viewpoint in board deliberations and policymaking is eliminated. In order to ensure the public's viewpoint in board activities, the statute should be amended so that one-third of the board's members be representatives of the general public.

Since the board presently has nine members, it would not appear feasible to add additional members. A more desirable alternative would be to replace three of the licensee members with public members as the terms of present members expire. This approach would achieve the desired one-third public membership without increasing the size of the board or removing present members during their term of appointment. In addition, the approach is generally consistent with the agency's recommendation of placing three public members on the nine-member board.

Summary

The board has complied with the public participation requirements found in general state law. However, public input into board deliberations has been minimal. To help ensure that the public's point of view is properly represented, three public members should be placed on the board replacing present members as their terms expire.

VII. STATUTORY CHANGES

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are whether statutory changes recommended by the agency or others were calculated to be of benefit to the public rather than to an occupation, business, or institution the agency regulates; and statutory changes recommended by the agency for the improvement of the regulatory function performed. In the period covering the last four legislative sessions, the review focused on both proposed and adopted changes in the law. Prior to that period, the staff review was limited to adopted changes only.

Past Legislative Action

The enabling legislation of the Texas Board of Physical Therapy Examiners has been amended three times since its enactment in 1971. In 1973, the board was given the authority to stagger the renewal of licenses (S.B. 831, Sixty-third Legislature). Then, in 1975, the Sixty-fourth Legislature made several significant changes in the board's Act in Senate Bill No. 634. The board was given injunctive authority to enforce the Act, and a penalty of \$50 for each day's violation was provided in the bill. In addition, the board's fee structure was changed in the following respects: 1) the license fee for physical therapists and physical therapist assistants was eliminated and a \$25 application fee was established for both categories; and 2) other fees were raised significantly to the level currently set out in the statute--an examination fee of \$50 for a physical therapist license applicant and \$45 for a physical therapist assistant applicant. Finally, the board was made subject to the provisions of the Sunset Act in 1977 in Senate Bill No. 54, Sixty-fifth Legislature.

Proposed Legislative Action

Five bills affecting the board's operations were unsuccessfully proposed during the last four legislative sessions. In 1973, House Bill No. 654, Sixty-third Legislature, would have created a board consisting of three members of the Texas Chapter of the American Physical Therapy Association, three members of the Texas Association of Physical Therapists Inc. and three physical therapists not affiliated with any professional association. House Bill No. 654 also would have reduced the qualifications for board membership and licensure and would have removed the board's authority to deny, suspend or revoke a license for practicing physical therapy other than upon the referral of a licensed physician, dentist or chiropractor.

The remaining four bills would have eliminated the board as a separate and independent state agency. Senate Bill No. 875 of the Sixty-fourth Legislature (1975) and House Bill No. 1415 of the Sixty-sixth Legislature (1979) would have transferred the board's functions to the Health Department and continued the board with advisory duties only. The remaining two bills, House Bill No. 1977 of the Sixty-fifth Legislature (1977) and Senate Bill No. 816 of the Sixty-sixth Legislature (1979), would have placed board functions in a department of occupational regulation.

The board recommended a series of modifications of the Act in its self-evaluation report. The recommended modifications included the following:

- restructure the board to include six physical therapists and three consumer representatives;
- establishment of a fee for taking the examination a second time;
- modification of some grounds for the board to deny, suspend or revoke a license relating to provisions that are difficult to define and apply;

- removal of the examination prerequisite for applicants to present evidence of "good moral character."
- define and limit the title of "Physical Therapist Assistant" and possibly "Physical Therapy Aide"; or
- clarify or revise provisions on definitions, exemptions, board duties, physical therapist and physical therapist assistant licenses, reciprocal licenses and license renewal.

Summary

The board's enabling legislation has been amended three times since its adoption in 1971. Authority to stagger the renewal of licenses was given to the board in 1973. In 1975, various licensing fees were increased and injunctive authority was provided. The board was made subject to Sunset Act provisions in 1977.

Five bills were unsuccessfully proposed in the last four legislative sessions. Two bills would have transferred the board's functions to the Health Department and continued the board with advisory duties only. Two bills would have placed the board or its functions in a central department of regulatory agencies. The fifth bill would have created a board consisting of representatives of two associations and physical therapists not affiliated with any professional association, reduced qualifications for board membership and licensure and removed the board's enforcement authority for practicing physical therapy other than upon the referral of a licensed physician, dentist or chiropractor.

The board recommended major modifications of the Act in its self-evaluation report. Recommended modifications included: a nine-member board consisting of six physical therapists and three consumer representatives; establishment of a fee for a second examination; a requirement for continuing education or a specified amount of direct patient care for license renewal; modification or removal of some

grounds for the board to deny, suspend or revoke a license; and clarification or revision of certain definitions and exemptions.