



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

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December 13, 2016

The Honorable Larry Gonzales, Chair  
Sunset Advisory Commission  
PO Box 13066  
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Chairman Gonzales and Members of the Sunset Advisory Commission,

Thank you for the opportunity to provide a written response after the public hearing on December 8, 2016. First, on behalf of the Texas State Board of Examiners of Marriage and Family Therapists, I would like to thank each of you for your dedicated service to Texas, for your thoughtful deliberation on a wide variety of structural issues impacting the regulation and licensing of Marriage and Family Therapists, and for your continued interest in effectively meeting the growing mental health challenges confronting far too many Texas citizens.

After time of reflection and discussion with colleagues, we more clearly understand the need for improving processes, maximizing efficiencies, and protecting the health and safety of the public through appropriate licensee regulation. The TSBEMFT has always agreed with the majority of the recommendations offered in the Sunset Staff Report, and our board has initiated several changes, some prior to the publication to the Sunset Report, and others afterwards. As volunteers appointed by the Governor, we are individually and collectively committed to implementing other structural or rule changes that will result in a more efficient and responsive regulatory agency in the future.

The data clearly demonstrates that something is not working, and we agree that the complaints backlog is absolutely unacceptable. For the past few years, we have been led to believe that the primary source of the problem was resource related and trusted that our staff and investigators were doing the very best with what they had. As Mr. Romig pointed out, neither DSHS or TSBEMFT could pinpoint the exact source of where the problem started or what all of the factors are; and yet we agree changes need to occur for our licensees and the public, particularly with regard to how complaints are investigated and adjudicated. I now understand that the TSBEMFT has the power to make some of these changes, which can be acted upon at our next meeting in January. As the Chair, I have already asked our Executive Director and staff to change processes to enable us to hear more cases in January, and we will implement the informal peer review process on the 72 cases that are currently awaiting investigations. I have also directed staff to provide reports each meeting about the status of the backlog and the progress that is being made.

We agree that the current enforcement processes are not working. We understand and agree that we should implement the following recommendations from the Sunset Commission:

- informal peer-review processes that reflect common enforcement standards with appropriate penalty matrices;

- updating statutes, rules, and policies to conform to common licensing standards, including conducting criminal background checks of all licensure applicants and licensees, utilizing the National Practitioner Data Bank, removing statutory language that is unclear or subjective and difficult to enforce;
- removing the statutory limitation that restricts the board's authority to lower fees;
- removing statutory language that creates barriers to licensure;
- making changes that reduce the burden of supervision requirements;
- expediting processing for military applicants;
- enhancing the continuing education provider registry and approving continuing education courses; and
- increasing board member training.

It is our greatest hope that you hear cooperation from our board in addressing all of these issues. Additionally, we hope that you hear collaboration, with all of the mental health boards being willing to work together.

The Board also clearly understood the Commission's frustration that the most concern has been on the placement of our boards instead of on the issues identified by Sunset Staff Report. It was hoped during public testimony to address your concerns about the issues, and I regret that I was not able to do that more effectively. As Chair, I welcome the opportunity to have an open conversation with you about the various recommendations as well as being part of a constructive solution to safeguarding the public through effective and efficient regulation, while ensuring a healthy supply of qualified mental health practitioners. Please understand that when we ask for our boards to remain independent, we do so in complete agreement with the Commission that our processes and policies must change. Independence to us means peer to peer review and ability to control our rule-making process by professional and public board members instead of an advisory board of public members.

While we agree with many of the Sunset Staff recommendations, there are still some structural issues where we feel that implementing such changes will have some adverse consequences. For example, we are concerned with the sweeping of current board members, as we believe all institutional knowledge would be lost. We are also concerned and do not agree with the Sunset Staff recommendation to fund any move through the increase in professional fees, as reimbursement rates have not kept pace. Our collected fees pay for the existence of our board, and we respectfully ask that our professional fees be fully used for our boards and not parceled out to programs not associated with mental health.

It is our prayer that the Commission sees the wisdom of a common agency dedicated to mental health with well-functioning, independent boards, sharing resources and staff with the Psychology, Professional Counseling, Social Work, LCDC and Sex Offender Treatment boards. We believe that such an approach would enable Texas to efficiently do more to enhance its mental health infrastructure by streamlining and making use of economies of scale. We want to offer assurance that we can be trusted with the opportunity to make the changes that improve licensing and regulation in ways that best protect and serve Texans. I welcome the opportunity to visit directly with you to address concerns. Again, we are grateful for your dedication to serve the most vulnerable of Texas.

Sincerely,

Jennifer Smothermon, MA, LMFT-S, LPC-S, RPT-S  
Texas State Board of Examiners of Marriage & Family Therapists, Chair



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November 16, 2016

Ken Levine, Director  
Sunset Advisory Committee  
P.O. Box 13066  
Austin, TX 78711-3066

Dear Mr. Levine:

On behalf of the Texas State Board of Marriage and Family Therapists, I would like to thank you and your staff for the work on the Sunset Advisory Commission Staff Report 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 Work Examiners. Our board appreciates the opportunity to work with the Sunset Review Staff during this important process. The Sunset Advisory Staff Report reflects many hours of hard work. Every agency can benefit from both self and external evaluation. Review processes and structure can lead to productive change, and if not diligent, counterproductive change. The Sunset Advisory Staff has highlighted some valid areas that can and should be improved through legislative action, by the governing agency, and by the board.

We agree that the licenses for LMFT, LPC, and LMSW/LCSW benefit and serve the needs of Texans, and therefore, the legislature should pass legislation to continue the licenses. We disagree that Texas' mental health needs are best served by transferring the three boards from the current location and the future location within HHSC. Therefore, we disagree with any recommendation that includes transferring the three boards to TDLR as part of the solution.

**However, if the TDLR transfer is removed, we agree with the following recommendations:**

- 1.1 Continuing the regulation of MFTs, LPCs, and Social Workers, with each board retaining independent status;
- 2.2 Improving the process for prioritizing complaints and investigations;
- 2.3 Developing policies to settle cases informally;
- 2.4 Expanding appropriate penalty matrices to facilitate greater consistency in enforcement;
- 3.1 Requiring fingerprint-based criminal background checks;
- 3.2 Checking the National Practitioner Data Bank as part of the application and renewal process. Efforts should be made at the national level to encourage participation by all states;

- 3.3 Removing the “good moral character” phrase from governing statute;
- 3.4 Removing the statutory limitation related to fees;
- 3.5 Removing the statutory requirement for 750 hours of direct LMFT experience with couples or families, and instead handle that issue within the rules;
- 3.6 Standardizing conditions for inactive licensees. TSBEMFT is already working on changing those rules in the same direction;
- 3.7 Removing unnecessary and restrictive education requirements;
- 3.8 Reducing the burden of supervision requirements. TSBEMFT is working on changing those; and there is room to make the process even more efficient;
- 3.9 Fully implementing expedited processing for military applications and renewals; TSBEMFT is working on this; and
- 3.10 Enhancing the continuing education provider registry.

**We respectfully disagree with the following recommendation:**

- 2.1 Abolishing the boards’ complaints and ethics committees and ensuring board members are not involved in the complaint investigations. This recommendation adds an additional layer of bureaucracy and disconnects the profession from monitoring itself.

We sincerely appreciate your staff’s efforts on behalf of Texas citizens. Please find the board’s response to the Sunset Staff Report outlined and attached to this letter. The board looks forward to the Sunset Advisory Committee hearings and the ongoing opportunities for improvement. Thank you again for your efforts on behalf of the citizens of Texas.

Sincerely,

Jennifer Smothermon, MA, LMFT-S, LPC-S  
Texas State Board of Examiners of Marriage & Family Therapists, Chair

The board agrees with many of the recommendations that are provided in the report and has concerns with others. Often times, the solution to one problem leads to another. Some of the suggestions made in the Staff Report do highlight dilemmas but offer only “First Order Change” options rather than real systemic changes (Watzlawick, P., Weakland, J., & Fisch, R. (1974). *Change: Principles of problem formation and problem resolution*. New York: NY: W.W. Norton). It is deeply concerning that the writers of the Staff Report do not offer praise for the citizens of Texas who volunteer to work a minimum of 12-15 days each year as governor-appointed board members who serve the public. Sadly, there is no mention of how hard the staff within the Professional Licensing and Certification Unit has worked with very limited resources. The board found it troubling that Sunset Staff provided one combined report on all three boards, even after they were asked to provide individual reports, which might have served to highlight the specific areas of concern and areas of improvement within each board. While the boards share most of their staff, the intricacies of the boards, the decisions that they make, and the licensees whom they represent are different. It should be noted that throughout the report, actions of one board unjustly implicate all three and that, although Sunset staff was asked to provide examples from all three boards to support their claims, they refused to do so. As the report points out, it is true that the Professional Licensing and Certification Unit of DSHS has not been adequately funded or staffed to meet the needs of the programs served. Funding cuts over the last 15 years have lead to many of the problems highlighted in the Staff Report.

*Issue 1 The Texas Department of Licensing and Regulation Should Regulate Marriage and Family Therapists, Professional Counselors, and Social Workers.*

While we heartily agree that the regulation of marriage and family therapy should continue, we strongly disagree that the public will be better protected by removing the independent status and regulating authority of the board and moving to TDLR. The board consists of 9 members, including 5 professional members who hold a minimum of a master’s degree and licensure, and 4 public members. The Commission of Licensing and Regulation, comprised of only public members, does not have the knowledge and expertise necessary to adequately regulate professionals who must have at least a master’s degree to practice. An independent licensure board is essential for the continued growth and expansion of high quality and cost-effective mental health care in Texas. As the costs of health care have continued to increase, marriage and family therapists have served as qualified and cost-effective mental health care providers who have contributed to containing health care costs and ensuring access to mental health care for citizens who would otherwise not be able to receive needed care. Independent regulation is a cost-effective policy structure for the State of Texas as a means to protect the public and enforce licensing standards, while actively monitoring the entrance of qualified LMFTs in the state for provider stability, which is needed to meet the growing demand for mental health care services. The uniqueness of the family systems approach by LMFTs requires a rigorous set of standards and board oversight to ensure that untrained and unethical practitioners are held accountable and prosecuted, and that the public is protected from unregulated practitioners who could create danger for vulnerable clients. Abolishing independent licensing boards potentially hinders parity and portability of the license in a season when Texas is facing a mental health care crisis and needs more, not less, qualified mental health professionals. While on the surface a move to advisory boards may appear to be a productive change, it is in reality adding a new level of bureaucracy that will hinder the regulatory process. The advisory boards will make

recommendations to the Commission, which may either accept the changes or send them back to the advisory board for modification. Regulation and public protection does not need to be hindered even further by slow processes.

Instead, the board requests that the behavioral health boards retain status as independent boards and be moved to the Health and Human Services Commission (HHSC). As TDLR is presently highlighted as a model of a high-functioning regulator agency, it could easily serve as the model for HHSC. We believe this would be easily accomplished if HHSC was funded and staffed proportionally to TDLR. We agree that there should be diligent coordination to provide for a seamless administrative transition, which in fact is already underway with DSHS to HHSC. The boards generate \$3.1 million in revenue annually, which is more than sufficient to cover HHSC start-up and operating costs. Conversely, it should be noted that transferring the boards to TDLR would cost Texans a minimum of \$.5 million, while TSBEMFT presently operates at no cost to the state.

In response to the findings cited under Issue 1, it is puzzling that the report criticizes the board for failing to regulate the profession, while at the same time criticizes the board for vigorously enforcing the law, violating due process and shaming licensees. Indeed, it is difficult to ascertain if Sunset staff believes the board to be too lenient or too strict. The board agrees that the complaints resolution timeframes are unacceptable. This delay has been created in large part by the lack of funding and resources provided to the Professional Licensing and Certification Unit of DSHS. During the recession, hiring freezes left the department with a handful of investigators to process hundreds of complaints. Significant improvements have been made, and the board is confident that if the legislature provides sufficient support to HHSC, the delays in investigations will be solved completely. At the present, there are 72 MFT cases in investigations; there are no MFT cases awaiting SOAH. The data provided under Issue 1 is not specific only to TSBEMFT and does not accurately reflect the complaints resolution and investigative data relevant to this board.

We agree that the board should delegate sufficient authority to the Executive Director to dismiss baseless and non-jurisdictional complaints and have already put this into policy, prior to the writing of the Sunset Report. We disagree that the complaints meetings of this board are “public shaming sessions;” we believe that this language was included in the staff report for shock value or may be an example of the actions of one board implicating all three of the boards. When asked for further clarification and specific examples of how this board has engaged in public shaming sessions, the Sunset staff was not able to provide specific examples. In fact, stakeholders, licensees, members of the public, complainants, and even respondents often remark during public comment how compassionate, beneficial and fair the complaints committee and complaints processes are. Their comments in no way align with unsupported allegations of public shaming. We agree that confidentiality should be maintained as much as possible throughout the complaints process; policies have been implemented to safeguard confidentiality, and efforts should continue. The board refers to and applies the rules outlined in Subchapter L of 801 throughout the process of decision making and sanctioning. The committee members carefully and thoroughly review all of the information provided by the investigators before the meetings occur, determining specific rules that are in violation, considering the relevant factors outlined in rules in 801.301, and determining sanctioning based on the rules outlined in 801.302.

The committee has developed a worksheet that guides the process and outlines the various levels and sanctioning guide. The board agrees that development of further matrices would be beneficial.

We agree that fingerprint background checks should be utilized and that the National Practitioner Data Bank should be confirmed prior to the issuance of a new license to ensure higher levels of public protection. We have been in discussion at the national level to encourage other state boards to participate in the data bank as well. We disagree that a licensee's private office is not a regulated location of practice; the board regulates the activities of LMFTs regardless of their specific location of practice and requires licensees to report changes of practice addresses to the board.

We agree that statutes should be enacted to clearly define the relationship between the boards and the department, making clear the lines of authority and accountability in certain circumstances. The need for this clarity is the burden of the Legislature and does not prove that independent boards prevent streamlining. The Staff Report pointed to incidents in which one of the behavioral health boards proposed questionable rules that benefitted the board members alone or unnecessarily increased cost for licensees; however, it should be noted that there is no evidence that the MFT board engaged in such rule-making.

*Issue 2 The Behavioral Health Boards' Dysfunctional Enforcement Processes Fail to Adequately Regulate Licensees and Protect the Public*

The logic used to support the claim that the Boards have failed to protect the public, and that the cause is due to slow complaints resolution timeframes, is perplexing. The specific data presented in the Staff Report has usefulness when the goal is to justify transferring the Boards to TDLR. It would be very interesting to see data objectively presented without a goal in mind. It seems that there is a slant to the data presented which suggests an underlying philosophy of the document where quick regulation with minimum of board involvement and absolutely no teaching is privileged. It is accurate to say that the MFT board has taken a hands-on, educational and prescriptive approach to regulating the profession. The problem with Issue 2 is that it is offered without needed data to substantiate the report's claims. Charts were provided for average days for case resolution and current backlogs. However, there were no charts for the same time-span for levels of agency funding, number of investigators, number of complaints, number of staff members assigned to serve each board, or the number of licensees for each board. Additional information is both relevant and necessary and was most likely gathered by Sunset staff. Indeed the outcomes and recommendations of the Staff Report might be very different if the additional data was examined and taken into objective consideration.

The outcome of Issue 2 changes dramatically when the issues are viewed through the lens that the Staff Report offers early in the document: "...DSHS' poor administration of these functions and lack of funding have also played a key role as later discussed in this issue." The board appreciates that Sunset Staff recognized that the lack of funding plays a key role in performance, yet the report never again talks about the impact of funding except to point out that DSHS doesn't do a good job of tracking how personnel costs are used. In the opening pages of the Staff Report, Sunset Staff describes how the three combined boards collect \$1.6 million in excess of

expenses to run the boards. It makes little sense then to claim that the boards are run inefficiently. Instead, the authors could have praised the boards for their efficiency in utilizing their resources and re-investing the extra fees to serve the General Fund. The board believes that the \$1.6 million will be well-spent to hire sufficient staff to carry out investigations and improve service to customers at HHSC.

In response to the claim that boards regularly expand the scope of investigations beyond the original complaint resulting in allegations to paperwork violation, we assert that accurate record keeping and billing procedures are considered necessary by the Federal and State government to maintain safe standards, which protect the public and meet minimum standards as outlined by HIPAA. Much of the time, the complainants are unlicensed individuals who do not know the nuances of the profession or the governing rules, and therefore, they do not accurately cite rule violations in their complaints. The criticism offered by Sunset staff could be reframed into a compliment: in an effort to protect the public, the boards are conducting thorough investigations of complaints. Before the Sunset Staff published the draft of their report, they were aware that the complaint that they cited on page 21 of the Report as an example of untimely enforcement had already been settled through due process by the MFT board at the Informal Settlement level; the Sunset Staff were witnesses of the resolution and did not include that information in their report.

Regarding “wasted investigative resources,” during the process of the Sunset Review, the Ethics Committee changed procedures and no longer hears cases in the order of sign up. It is surprising that Sunset Staff did not report this change, as they were witnesses to the change of procedure that was publicly brought to the attention of all those present at the meeting. Investigative staff have been given the option to have all of their cases grouped together to allow the investigators the flexibility to return to their work. The board values other ideas to streamline their processes and improve public protection. The Sunset Report places the board in a double-bind with criticisms about response times and criticisms about the amount of time the committee meetings take. In order to adequately respond to complaints in a manner that protects the public, there are times when committee meetings may run long. Staff has been given the authority to dismiss baseless and non-jurisdictional complaints, and MFT complaints hearings typically run for 3-4 hours, not all day. The Sunset staff was present for the first meeting after new committee assignments were made that was abnormally long and that had extenuating circumstances surrounding a particular complainant; both the board chair and the committee chair addressed the issues with the Sunset Staff; this is not reflected in their report.

The complaints hearings are subject to the Open Meetings Act; the board agrees that efforts to ensure confidentiality should increase, but boards’ complaints and ethics committees should not be abolished in this effort, thereby throwing the baby out with the bathwater. It is highly unlikely that a commission made up of only public members will understand the nuances of all of the professions and will be fully aware of minimum competencies and best practices in each profession. The MFT Ethics committee goes to great effort to give the licensee both the right and opportunity to represent themselves and to have legal representation, to call witnesses and to both speak to and provide the committee with additional resources. Taking away the complaints hearings altogether will serve to limit due process, not add to it. The Informal Settlement Conference is an important appeals step that costs significantly less than referring cases to

SOAH. The allegations that board members are directly involved in the investigative process and stray into areas outside of their professional expertise do not apply to the MFT board. The board agrees that more formal sanctioning matrices would be beneficial and is hopeful that TDLR will be willing to share their knowledge and expertise with other state departments. And the board contends that the matrices should offer discretion to the committee hearing the complaint; current guidelines allow the board to consider relevant factors such as likelihood of repeated offense, harm to the public and requisite deterrence. The MFT board goes to great length to issue consistent sanctions for similar violations by applying the relevant sanctioning guides in the rules and referring to precedent. The MFT board has sought out and applied sanctioning tools that are recommended by the Council on Licensure, Enforcement and Regulation (CLEAR), that are approved by the Office of the Attorney General and that are utilized by other MFT boards around the nation; this directly contradicts Sunset staff's claim that the board uses nonstandard enforcement actions. The board denies issuance of subpoenas to compel persons to appear before the Ethics committee; in fact, the committee makes a determination on all of the cases presented in the meeting based on the facts provided by the investigator's report.

The report rightly indicates that disciplinary outcomes are reduced in Informal Settlement Conference; this is because the board has no authority to increase sanctions at the Informal Settlement level. Historically, the board has sought resolution at the Informal level in efforts to protect the public. The Staff Report rightly points out that cases were not being referred to SOAH and those that were taken to SOAH often went through infinite appeals, allowing guilty licensees to practice for years without consequence; this is not an action of the board. The Informal Settlement Conference directly supports due process; jumping directly to Informal Hearings will serve to send more cases to SOAH, leading to ongoing appeals and greater expenses.

We disagree with recommendation 2.1 abolishing the boards' complaints and ethics committees to ensure that the board members are not involved in the complaint investigation. The board agrees that most of the Management Actions would be beneficial to existing boards and their complaints processes. The board contends that it would not be cost-effective only to settle cases informally or to simply seek advisory board or expert opinions in informal disposition.

### *Issue 3 Key Elements of the Behavioral Health Boards' Statutes, Rules, and Policies Do Not Conform to Common Licensing Standards*

The board agrees that requiring fingerprint-based criminal background checks of all licensure applicants and licensees would help ensure knowledge of criminal history and better protect the public. The board agrees that the agency should make use of the National Practitioner Data Bank. The board agrees that the statutory requirement for an MFT applicant to be "of good moral character" is subjective and has hindered the licensing process in a few cases; it should be noted that the original intent in including the language in statute included public protection and interest. The board agrees with removing the statutory limitation currently restricting the boards' authority to lower fees; however this can easily be accomplished under HHSC and is not reason to move to a regulatory body that is incongruent with the standards of the mental health field.

While the board agrees that the statutory requirement that MFT applicants have 750 hours of direct clinical services should be removed, the board believes that an independent board made up of professional and public members should determine minimum standards to practice marriage and family therapy rather than delegating that responsibility to a licensing agency. The board agrees with standardizing conditions for inactive status and has already proposed rules regarding license tracking, time limits and requirements related to continuing education and jurisprudence examination during inactive status and upon reactivation of the license. The Sunset Staff rightly details issues with the verification process of an LMFT Associate's supervised experience. At the writing of the report, the MFT board had already taken steps in rule changes to rectify the issue; designating a specific number of direct practice hours under supervision, including the number of hours with couples and families, supports public protection by ensuring adequate clinical training and experience prior to full, independent licensure. The board agrees with the need to expedite licensure for military applicants and has already proposed rules for publication addressing these issues. The board agrees that continuing education courses should be more carefully reviewed, and the Professional Development Committee of the MFT board is presently examining issues of ongoing professional competency, drawing on resources from CLEAR and other evidence-based practices of other professions and states.

Direct access to mental health care is of paramount importance to public health in Texas. MFTs have been practicing independently for nearly 25 years in Texas and serve as a vital role in integrative health care. In order to maintain the independent practice of MFTs throughout the state, the board believes that statutory and rule changes that clarify the definition of the practice of marriage and family therapy and include language that specifically allows MFTs to use assessment and evaluation tools to continue to provide diagnostic codes are of vital importance.

In conclusion, the board would like to respectfully reiterate objections to being moved to a regulatory board that is governed solely by public, non-licensed members at a time where the mental health needs of the state and the nation are so prominent. The board is well aware of the mental health crisis as reported by the DSHS Report on Texas Mental Health Shortage (2014) and believes that the concerns outlined in the Sunset Staff Report can be resolved successfully by maintaining an independent MFT board under the current administrative hierarchy with adequate funding by the Legislature. The board would like to express gratitude to the Sunset Commission for their time and investment in careful review of the behavioral health boards.