



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

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November 30, 2016

Ken Levine, Director  
Sunset Advisory Committee  
P.O. Box 13066  
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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 your work on the Health Licensing Consolidation Project. Our board appreciates the opportunity to work with the Sunset Review Staff during this valuable process. The Sunset Staff Report on the Health Licensing Consolidation Project reflects many hours of hard work. Every agency can benefit from both self and external evaluation. Review processes and structures 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 respectfully disagree that Texas' mental health needs are best served by abolishing independent boards and creating advisory boards under TDLR Health Professions division.

Excluding the transfer to TDLR, we agree with the following recommendations:

- improvements should be made to ameliorate complaint resolution timeframes;
- finger-print based criminal background checks should be required;
- unnecessary barriers to licensure should be removed;
- process for prioritizing complaints and investigations should be improved;
- appropriate penalty matrices to facilitate greater consistency in enforcement should be expanded;
- and resources to enhance effectiveness and customer service should be allocated to the agency.

We sincerely appreciate your staff's efforts on behalf of Texas citizenry. 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 Commission 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 Texas State Board of Examiners of Marriage and Family Therapists (TSBEMFT) is an independent board, served by five professional and four public members. This collaboration provides the board and the citizens of Texas the wealth of experience of five professional members. One professional member is on her second term of service, two have finished over five years on the board, and two other professional members are in the first three years of participation. The public members have served the board ranging from one to nine years and include experience as an attorney, a high level corporate manager, and other members with a range of experience and views that insist on “a bottom line” that serves the citizens of Texas with simplicity and clarity. Public members serve as chair of the Ethics/Complaints and Professional Development Committees, and the former chair of TSBEMFT was a public member. This structure of TSBEMFT and like structures in the other behavioral health boards has served and protected the public in Texas for decades. “Texas”, as TSBEMFT is referred to in the Association of Marriage and Family Therapy Regulatory Boards (AMFTRB) meetings, is considered a national leader in the field of marriage and family therapy training, practice, and marriage and family therapy regulation. TSBEMFT participates at the national level at AMFTRB annually and has been instrumental in shaping AMFTRB positions on licensure portability and tele-practice. We, the TSBEMFT Board, know the national trends for marriage and family therapy licensing boards. That trend is to regulate licensees through independent licensing boards, not advisory boards. That experiment has been tried, also to cut costs, and was reversed in a neighboring state. That state has gone back to an independent board for licensed marriage and family therapists (LMFTs) because the shift to an advisory board proved to be problematic. It is perplexing that the Sunset Staff reports that the independent structure of the state’s behavioral health licensing agencies is antiquated and inefficient, while praising the Texas Medical Board as an independent licensing board and agency. 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 Texas Department of Licensing and Regulation (TDLR).

Marriage and family therapists use a systemic view to treat couples and families, a professional skill set that requires extensive, systems-focused academic preparation and post-degree supervision. The typical member of the public does not understand this, and an all public board simply will not have the systemic background and education to regulate LMFTs in Texas. The uniqueness of the family systems approach used 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. The professional associations that value the use of systemic marriage and family therapy include the Texas Association for Marriage and Family Therapy and Texas Association for Marriage and Family Counseling. Both organizations send members to board meetings to participate in public comment opportunities in board meetings, and members of TSBEMFT have made annual presentations at both organization’s annual conferences to provide ethics training and updates on the rules for MFT licensees.

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 Sunset Staff report acknowledges that under-funding and limited staffing at DSHS are problematic. The Sunset Commission can encourage legislation to fund TSBEMFT and the other behavioral health boards at the level of funding collected through the current fees. TSBEMFT and the other boards do not control level of funding and therefore are powerless to address the issues cited by the Sunset Staff as evidence for the boards’ ineffectiveness. Instead, it is clear that the review of the behavioral health boards was conducted with the bias of abolishing the independent boards in favor of consolidating under TDLR instead of offering objective information based on the facts. Sunset Staff declined to offer crucial facts from the past 15 years. The Sunset

Staff was asked to include 15 year information about levels of funding, numbers of DSHS/PLCU staff each year including investigators, and crucial data regarding numbers of licensees and complaints during that time span. With that data, it is highly likely that the Sunset Commission could make the conclusion that DSHS staff has worked miracles with ever-shrinking funding and staff positions. What the Staff Report failed to offer to the Commission is the data that matches what our boards observed: that in the last five years continued funding cuts correlated highly with the perfect storm of license application and investigation delays, the resultant licensee service complaints, and a back-log of applications. Licensees facing delays were averaging ten minutes per call, to the point where 1.5 staff positions per day were needed to answer phone calls. Workers at DSHS/PLCU were diverted from processing new applications to answer the phone calls.

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.

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 speed with which Texas can respond to shifts in the profession. Rather than being a national leader for LMFT portability and the regulation of tele-practice, Texas will be relegated to the back row. 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 will not be well-served by further slowing the process.

Sunset Staff acknowledges that regulation of health occupations, and more specifically mental health occupations, differ from other areas of regulation, so much so that TDLR would need to create a separate health division. Ironically, this supports the argument that placing the behavioral health boards under TDLR is not a good fit and likely will be a burden to TDLR and eventually to the Texans we are pledged to serve.

Instead, the TSBEMFT requests that the behavioral health boards retain status as independent boards and be moved to the Health and Human Services Commission (HHSC) as scheduled. In the same fashion that DSHS has been praised for supporting movement of a number of licensing boards to TDLR, so should TDLR be tasked with sharing insights with DSHS on how to increase functionality and efficiency in regulating the behavioral health boards. Again, we believe the recommendation of the Sunset Commission for adequate legislative funding will facilitate board operations. We request that HHSC be funded and staffed proportionally to TDLR. 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. If remaining under the current umbrella at DSHS/HHSC is not feasible, the board requests that a separate umbrella agency be created to regulate the behavioral health boards and additional health boards that may be transferred to TDLR. This agency could oversee roughly 60,000 licensees, giving the agency increased economies while not over burdening TDLR with mental health professions that it was not designed to regulate. Indeed, the Psychology Board is already functioning as such an agency and would be an appropriate agency to host the independent behavioral health boards. From this platform, administrative structures and information technology could easily be shared, consolidating operations to take advantage of economies of scale.

A number of Sunset Staff recommendations are well-received by TSBEMFT. 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 over the past 15 years. 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 the board, the delays in investigations will be solved completely. 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. We strongly suspect that data presented in the Staff Report was collected and delimited in a way to justify transferring the Boards to TDLR.

We agree that the behavioral health boards 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 agree with prioritizing high-risk complaints. TSBEMFT has a long-standing history of directing investigators to prioritize investigations that pose the greatest risk to the public; we believe this is a critical component of the investigative process. If improvements in this area need to be made, they can very easily be made at the staff level and do not require the transfer to another agency to be accomplished.

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. Presently, complaints hearings are subject to the Open Meetings Act; the TSBEMFT agrees that efforts to ensure confidentiality should increase, but boards' complaints and ethics committees should not be abolished in this effort, thereby eliminating an invaluable resource to the public while attempting to address one issue. Without a constant professional presence on the ethics complaint regulating committee, licensees will lose their right to present their case before a panel of professional peers. It is not likely that a commission made up of only public members will understand the nuances of all of the mental health professions, nor is it likely that an all-public member group will be fully aware of minimum competencies and best practices in each profession. Systems are already in place for anonymous complaints, and staff and board members are diligent to keep complainant information anonymous in these instances. However, it is inherent in the investigation process that the respondent is asked to produce client records when it is relevant to the complaint; this records request almost always alerts the respondent that there is a particular issue with a particular client. During complaints hearings, the board and staff intentionally do not use names or identifying information of either party in efforts to maintain confidentiality.

We agree that fingerprint background checks should be utilized and that the National Practitioner Data Bank should be consulted prior to the issuance of a new license to ensure higher levels of public protection. This is easily addressed through statute and/or rule change. We have been in discussions at the national level, at AMFTRB, to encourage other state boards to participate in the data bank as well. Our board has reached out to neighboring states and found that presently only Arkansas is utilizing the National Practitioner Data Bank. 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.

Transferring the various licenses to TDLR will not remove duplication in licensing and enforcement as the Staff Report suggests. All of the licenses are separate and have distinct licensing requirements. Although some ethical issues are standard across disciplines, there are specific requirements for each license that will need to be taken into consideration in the enforcement process. The same number of applications will be

processed and licensees regulated, regardless of which agency serves as the host. Moreover, independent licensing boards are not creating duplicative processes; each board is simply licensing and regulating a smaller number of licensees than one consolidated board would handle. Presently, staff are shared among the behavioral health boards within PLCU, with the exception of the executive directors. TDLR would require the same numbers of employees to regulate a similar number of licensees. It is difficult to see how administrative costs will be lowered by moving to a different agency; to the contrary, when TDLR takes over independent board functions, costs will permanently increase for the state. Essentially, Texans will be paying state employees to do the jobs that expert volunteers are presently doing at no cost to the state or tax-payers, beyond travel, lodging, and meals for board meetings. The report claims that TDLR will save administrative costs, while suggesting that licensing fees should increase as a result of the transfer. Licensees should not be responsible to cover the cost of the transfer. Increased licensing fees will simply lead to increased fees for mental health services, which will ultimately drive up the cost of mental health care during a time of mental health crisis in Texas.

The Staff Report claims that TDLR has a proven track record of improving licensing and enforcement outcomes, yet seven of the 13 transferred healthcare professions (all unrelated to mental health) were just moved to TDLR in September of this year. It is impossible to know if the transfers will lead to improved outcomes at this point. Again, arguments offered in the Staff Report point to the problem that the Staff Report was written with the end goal of transferring to the behavioral health boards to TDLR.

The Staff Report claims that TDLR has greater capacity to innovate, using the example of the TDLR website. While the board does not argue that TDLR has a creative web design, the examples of innovation listed are all things that the TSBEMFT either currently offers or could easily improve under an umbrella behavioral health agency. The report claims that TDLR gives each program a coordinated voice for needed improvements, yet abolishing the independent board structure removes the voice of the professions in regulating these occupations. The Sunset Staff report claims that the advisory boards will operate similarly to the independent boards, while condemning independent boards as an organizational mistake. The report suggests that TDLR will contract with experts in the fields about making regulatory decisions. In the present model, the Governor's Appointments Office conducts extensive research on board candidates, and the Senate confirms their decisions; the contracted experts will not be so thoroughly chosen and vetted.

By definition, advisory boards provide non-binding strategic advice to the management of an organization. The informal nature of advisory boards prohibits the board members from having any authority over organizational matters. Advisory boards simply offer advice and expertise outside of the agency. In business corporations, advisory board members receive compensation for committing to their positions. This gives incentive to advisory board members to offer expert advice and to ensure that requests for their input are taken formally. Sunset Staff have informed TSBEMFT that board members will cease to receive remunerations for the cost of travel to board meetings. Counter to the argument in the Sunset Report, there is not a trend in the field of marriage and family therapy regulation to move towards advisory boards. Conversely, most states have independent boards in place, understanding that bigger isn't always better. 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, and removing professionals from self-regulation is a move away from professionalism. Sunset Staff claims that TDLR will gain necessary training and expertise to regulate and make decisions about mental health professions, but at what cost to the state and to the public? The Sunset Report claims that expert consultants will be hired by TDLR, while experts are presently serving on independent boards as volunteers. Hiring consultants to do the job of the independent board members is by no means a cost-savings.

It appears as if the move to TDLR is also motivated out of an overreaction to the *North Carolina Dental Board of Examiners vs. Federal Trade Commission* case. While it is important for states to take notice of the Supreme Court decision, it is necessary to look at the similarities and differences in organizational structure prior to making sweeping decisions and expensive changes that may be unrelated to the board in question. The North Carolina State Board of Dental Examiners was made up of six dentists and one hygienist who were elected to the board by dentists, and one public member. The Supreme Court determined that when a controlling number of a board consists of active market participants, the board must be actively supervised by the state. In Texas, the behavioral health boards consist of the more balanced five professional members and four public members who are appointed by the Governor and confirmed by the Senate. Public members may chair the boards and committees, and the committees consist of a mix of both professional and public members. Currently public members of TSBEMFT chair the Ethics/Complaints committee and the Professional Development committee, and our previous board chair was a public member. Texas has a system of checks and balances in place, and the Supreme Court decision did not indicate that all public member commissions should govern professions or that advisory boards are preferred over independent boards.

The Sunset Report suggests that current independent board members will be transferred to advisory board members under TDLR until a majority of new advisory board members are appointed by the Governor and qualified. It takes the Appointments Office months or even years to find and make new appointments. All independent board members will attest to the learning curve that new board members experience. And the collective knowledge and experience of current board members is invaluable to regulation of the professions.

To summarize, there is no evidence that TDLR will improve regulation of behavioral health professions in Texas. The newly created health division has no experience or history of success for working with mental health professions. Removing decisions about professional ethics from independent boards creates risk to the public. The ethics of mental health care are not relegated to a simple set of rules for an all-public member commission to follow. It is not feasible to write rules that address every ethical dilemma; for that reason, professional judgment is critical in the complaints process to best protect the public and regulate the profession. While the recommended transfer to TDLR may have some administrative benefits for the state, it will not ultimately best serve public health or the citizens of Texas.

We respectfully reiterate objections to being moved to a state agency where the regulatory process will be governed solely by public, non-licensed members at a time where the mental health needs of the state and the nation are so prominent. TSBEMFT 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 TSBEMFT board 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.