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Executive Council of Physical Therapy and Occupational Therapy Examiners

Texas Board of Physical Therapy Examiners
Texas Board of Occupational Therapy Examiners

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November 30, 2016

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

Dear Mr. Levine,

The purpose of this letter is to respond to the Sunset Advisory Commission Staff Report on the Health Licensing Consolidation Project (**consolidation staff report**). Specifically, this letter provides our position on the issue and recommendation of the consolidation staff report. The response is addressed from the viewpoint of the Executive Council of Physical Therapy and Occupational Therapy Examiners (**Executive Council**), and it may or may not apply to the other nine agencies also included in the report.

Agency Response to the Issue: The Independent Structure of the State's Health Licensing Agencies is Antiquated and Inefficient.

Bottom Line: We certainly agree with the consolidation staff report's opening sentence, which states that "Texans want, and deserve, a lean, high-quality state government." We believe the Executive Council has supported this goal since its inception. However, the Executive Council of Physical Therapy and Occupational Therapy Examiners, Texas Board of Occupational Therapy Examiners, and Texas Board of Physical Therapy Examiners do not concur with the recommendation to transfer 10 health occupational licensing programs to the Health Professions division at Texas Department of Licensing and Regulation (TDLR) and reconstitute the associated regulatory boards as advisory boards.

The Executive Council is also a consolidated agency, comprised of the PT Board and the OT Board, which operates along functional lines for programs of licensure, enforcement, and administrative services with equal or greater efficiency and cost-effectiveness than every other health licensing agency in the state. As stated best on page 1 of the 2016-2017 Executive Council of Physical Therapy and Occupational Therapy Examiners Sunset Staff Report (**Sunset agency report**):

"However, one reason the executive council has flown under the radar is that it has been a stable, well-run agency, with an experienced, capable staff."

"The oversight structure, with separate boards for physical therapy and occupational therapy and an executive council made up of members of the two boards and chaired by a member of the public, may be a bit unwieldy, but provides a synergy that benefits the regulations."

"Ultimately, the cost of transferring these regulations to TDLR, largely to upgrade computer systems, and the ongoing effort by both TDLR and the medical board to assimilate 17 regulatory programs from DSHS, tipped the scales in favor of recommending continuing the agency with its current structure, and avoiding the upheaval inherent in such a transfer."

What changed in the intervening four months between the release of one report and announcement of the other? That question is not answered in the consolidation staff report.

Oversight of the two boards rests in the Executive Council, which is comprised of a majority of public members and a presiding officer appointed by the governor. The Executive Council benefits as a member of the Health Professions Council, which was legislatively created to allow health licensing agencies to share common administrative activities and expertise while maintaining autonomy for licensing and enforcement. The Executive Council was created in 1994, and this is its first Sunset review since 1993. Below is a comparison of key statistics between what the agency looked like then and now, and shows the increase of the supported population in relation to the increase of agency employees:

Key Statistics:	**FY1994**	**FY2016**
FTEs	**18**	**20**
Physical Therapists and Assistants (active)	7,566	26,038
Occupational Therapists and Assistants (active)	3,459	14,904
Facilities Registered	0	4,395
Actual Funds Available for Expenses	$731,018	$1,188,819
Deposited to General Revenue	$1,369,492	$5,869,374

The majority of our comments are from the Sunset agency report and comparable performance measure statistics. While the Sunset staff who reviewed agency operations in 2015-2016 spent many months and man-hours interacting with, researching, and analyzing the operation and functions of the agency and two boards, we were **never** contacted by, nor ever had any interaction with the Sunset staff responsible for the consolidation staff report. The Executive

Council was not informed of the "postponement" of Decision 4.1 until it was brought up during the decision hearing on 22 August.

We believe that the Sunset staff selected facts to support the consolidation staff report's arguments to include the Executive Council in the transfer recommendation, and we will point out those discrepancies and provide additional facts to further disprove their arguments. The consolidation staff report introduction states that "When it comes to licensing many of our health professionals, the reality is we have a slow, inefficient structure…", and then goes on to laud TDLR's "advantage of economies of scale." **Yet the consolidation staff report never demonstrates proof of these two statements through examples, comparable statistics, and performance measures as they apply to the Executive Council**. Consequently, we believe that the inclusion of the Executive Council in this consolidation staff report is supported by neither the staff report nor the data they chose to compare.

We disagree with many of the blanket statements in the consolidation staff report; the following comments are a sampling:

Page 1: "No true system of licensing exists."
This is an incorrect statement. The Executive Council has a very detailed, documented, and cost-effective licensing system. We are sure that the other health licensing boards also have a licensing system. The fact that the systems may vary from agency to agency is irrelevant if they provide a cost-effective and efficient process that ensures qualified applicants are licensed. The report does not prove or even address this statement further in the document.

"Corporations would never structure their business this way."
There are two points. Governments are not businesses, though they may share common goals, such as running efficiently. Indeed, the purpose of state licensing agencies is to protect the public; their focus is not on profit, as might be the case for a corporation, though their aim is similarly to run in a cost-effective manner. To show how the goals of the two entities differ, take customer service. That is a primary focus of the Executive Council and something the agency does well. A review of the customer surveys that go back through the years backs this claim. However, this is not a primary goal of a typical corporation.

The Executive Council is internally organized much like TDLR, e.g., with functional areas, although on a much smaller scale. It does however, also consider itself innovative by utilizing accepted business organization practices, which it first implemented in FY2000 and has improved upon since. Research would find other Texas health agencies that have similar goals and internal functions. Likewise, no corporation that wishes to maximize efficiency would apply speculation and random statistics to decimate a division such as the Executive Council that was performing well above the assimilating agency or division. Reasons to follow.

The agency takes its financial guidance from the biannual Appropriations Act instead of from business models. An applicable section in the Act states in *Special Provisions Relating to All Regulatory Agencies*, "Sec. 2., Appropriations Limited to Revenue Collections. It is the intent of the Legislature that fees, fines, and other miscellaneous revenues as authorized and generated by each of the following agencies cover, at a minimum, the cost of appropriations made above and elsewhere in this Act to those agencies as well as an amount equal to the amount identified in the informational item" "Other direct and Indirect Costs Appropriated Elsewhere in this Act." A related extract appears in the Sunset agency report: "The agency generates revenue through fees far in excess of what is needed to cover agency expenditures. As shown in the chart, *Flow of Executive Council of Physical Therapy and Occupational Therapy Examiners Revenue and Expenditures*, the executive council generated revenue of almost $5.5 million mainly from licensing and facility registration fees and a small amount of appropriated receipts. After accounting for the agency's costs and payments to Texas.gov and the Health Professions Council, excess revenue of more than $3.9 million was deposited to the General Revenue Fund."

"Texas is far behind most states that have consolidated their health occupational licensing in various forms. Health occupational licensing also lags behind…"

If the expected end result of licensing board consolidation is greater efficiency, the data of the three largest state consolidated agencies shown below are poor examples of efficient operations. These are states that have merged all of their licensing boards into one large bureaucratic organization. Of interest is the difficulty in obtaining information about these three consolidated agencies' outcomes and either their success or lack thereof. Frequent anecdotal remarks from licensees transferring from these states to Texas are **never** complimentary about the quality of services provided by these three state agencies.

Average Licensing Cost for Individual License – FY2015	
New York	$106.49
California	$96.95
Florida	$50.65
TDLR	$44.00
Executive Council	$30.16

On the chart on page 3, *Health Licensing Agencies Under Sunset Review—FY 2015*, under the columns "Licenses and Registrations" and "Staff," we noticed that the number of licensees for PTs and OTs are broken out separately and do not include facility registrations. This is the only time where this split between the two boards occurs in the document with no explanation for doing so. As an agency that supports over 43,000 PT and OT licensees and 4,400 facilities, its regulated population is almost double the size of the next smaller agency in the chart. Further, this chart shows nothing about efficiency; it only addresses licensee population size.

As mentioned on page 4 of the consolidation staff report, 22 health licensing agencies were consolidated into DSHS in 2004 to "provide an opportunity for efficiency and improved services. In 2015, Sunset staff found DSHS struggled to effectively regulate health professions with its broad array of other high-priority responsibilities" and recommended their merger into TDLR instead, transferring them in two groups staggered by time. In other words, the 2004 consolidation was not successful, and the decision was made to double down on another consolidation effort in 2015. To date, there has been no data on how the efficiencies and improved services have been realized for the second transferred group, and minimum data available (and none shared) for the first group.

Agency Response to Consolidation Staff Report Recommendation 1.1, Change in Statute, Transfer 10 health occupational licensing programs to the Health Professions division at TDLR and reconstitute the associated regulatory boards as advisory boards.

Consolidation Staff Report Findings

The independent board structure creates common problems and inefficiencies for small agencies.

It was difficult addressing the issues found in this report due to over generalization, i.e., the recurrent use of "many," "some," "a few," "often," "a majority," "potentially," "several," etc., in referring to the agencies included in the consolidation staff report. After reading the report, we have to assume the Executive Council was included in the consolidation group for two reasons. First because of an **arbitrary, but unexplained**, cut off at 25 employees, and second, based on two statements on page 1 and 2, "The place to start this effort in the area of health occupational licensing is with small, inefficient and, in some cases, quite problematic agencies....Although not every small board exhibits problems at this level, the ***overall inefficiency is endemic***." "Due to their small staff size, even well-performing agencies pose a risk since they are but ***one retirement or a complicated lawsuit away from calamity***." In other words, the Sunset staff who prepared the report, contradicting the Sunset agency report, believes the Executive Council is both inefficient and one negative event away from a major disaster. Furthermore, these serious deficiencies can only be solved by folding the agency into TDLR.

About half of the report is spent discussing how TDLR goes about its business, how well it does it, and the many benefits that will accrue to the merged agencies. We will not comment on how well TDLR performs its mission except to recognize that it appears to be a very well-run agency. The Executive Council is not adverse to the concept of consolidation as it is a consolidated agency, albeit smaller and leaner, and it uses a different administrative model than TDLR's. We will compare TDLR's (and other large states' umbrella organizations) statistics and performance measures to those of the Executive Council, which we believe is also a highly efficient agency. Nowhere but in this consolidation staff report has **the Executive Council ever been described as inefficient and one step away from disaster**.

Despite all the generalities in the report supporting the Sunset staff opinion to merge the Executive Council into TDLR, there are six central claims in the consolidation staff report that we can address, which are listed below. The first four claims are found on the chart *Key Problems Shared by Small Health Licensing Boards,* which appears on page 5 of the consolidation staff report; the remaining two claims are repeated throughout the report.

1. Limited or no fingerprint background checks
2. Lacking consistency in penalties
3. Cost due to lack of economies of scale
4. Turnover poses high risk to agency functions
5. Lawsuits (anti-trust issues and general litigation)
6. Efficiencies (statistics and performance measure comparisons)

In the chart noted above, the areas marked with a "✓"are described as *Key Problems Shared by Small Health Licensing Boards*. The "✓"s marked under the *Physical and Occupational Therapists* are either incorrect or misleading. First, we do not believe they are all applicable to our agency, and secondly, we do not believe assimilation into an umbrella organization is the only way to correct these "problems." The areas marked with a "✓" under Physical and Occupational Therapists were:

1. Limited or no fingerprint background checks – Several years ago, the PT and OT boards were advised by the agency Attorney General counsel that they did not have the statutory authority to conduct fingerprint background checks on licensees. Consequently, both boards addressed this as an issue in the agency Self Evaluation Report and requested that the Sunset Commission recommend to the Legislature the necessary changes to their practice acts (PT Issue 19, OT Issue 20). Sunset recommendation 3.3 in the Sunset agency report will correct this.

2. Lacking consistency in penalties – Consistency in penalties was not an issue given in the Sunset agency report. That report found no such inconsistencies. There was no basis for inclusion in this category, and in fact the recent board sunset review found only the need for a formal, published matrix chart instead of a rolling 5-year history of penalties currently in use by the boards. Moreover, while it is not formally published, this history chart is available to anyone who requests to see it. The Sunset agency report recommendation "3.4 requires the boards to develop a disciplinary matrix" to comply with the Sunset staff recommendation. A proposed disciplinary matrix is on the two boards' agendas at their January meetings as rule additions.

3. Cost due to lack of economies of scale – This was not addressed as a problem in the Sunset agency report. Instead, when looking at the possibility of merging the PT and OT boards into another entity, the report stated:

Page 28: "The state has regulated physical and occupational therapy with conjoined boards under the independent structure of the executive council since 1993. This independent status provides for focused regulatory attention on these disciplines with needed expertise from practitioner board members in developing rules and regulations and enforcing requirements on violators. **The executive council and PT and OT boards operate cost-effectively and appropriately and meet their mission**. The agency has maintained an experienced, professional leadership core and has been able to meet most of their legislative performances measures while generating more than three times in revenue than what the agency requires to operate."

Page 30: In determining if the PT and OT boards should transfer to TDLR, "Based on TDLR's estimates, and consultation with Legislative Budget Board staff, Sunset staff has determined that such a move would not result in a reduction in personnel or a cost-savings, undermining a major rationale for doing so. Specifically, TDLR indicates that it would need the same number of employees as the executive council and a one-time cost of about $440,000 to pay for transferring the licensing data from the executive council to one of TDLR's licensing systems. Thereafter, annual costs would be approximately the same. Without achieving cost savings or improving the quality of regulation, the justification for such a transfer and the upheaval it would cause is greatly diminished."

The economy of scale argument is also not relevant with regard to the agency licensing and investigation divisions. In an efficient, streamlined agency such as the Executive Council, which makes a major effort to pare employment down to the minimum number needed to effectively execute agency functions, the agency does not require separate individuals for administrative functions as might be the case in agencies without an emphasis on cross-training. Accordingly, the agency does not have a separate position for duties that may not necessitate the hiring of an FTE, such as for human resources, records retention, etc. Each staff member has diversified responsibilities. Furthermore, agency staff members are cross-trained in other staff members' duties. As a result, the majority of agency functions may be executed by more than one staff member.

Page 40: Recommendations – "4.1 This recommendation would continue the Texas Board of Physical Therapy Examiners and Texas Board of Occupational Therapy Examiners under the administration of the Executive Council of Physical and Occupational Therapy Examiners until 2029."

There is no mention of a further consolidation than that already achieved by the Executive Council.

4. Turnover poses high risk to agency functions – All state agencies have a risk to internal functions caused by high turnover, to include the Executive Council and TDLR. The side bar on page 8 that stated that "Almost 30 percent of the Executive Council...staff qualify for retirement" is no longer correct; it should now read 15 percent instead of 30 percent. Three employees retired and were replaced between the time the Sunset agency staff report and the consolidation staff report were written. The agency utilizes a hiring strategy for replacing retiring employees and promotion from within, which has proven very successful. The PT and OT board coordinators (2 of the 3 senior level staff positions) retired and were replaced within the 24 months prior to the agency Sunset Review with absolutely no negative impact. Examples of more recent success with the agency retirement succession plan since the publishing of the Sunset agency report are: Assistant Licensing Manager began training and job shadowing for Office Manager position six months prior to position holder's retirement, new Assistant Licensing Manager hired with the expectation of potentially being promoted to Licensing Manager three months prior to position holder's retirement, and replacement Junior Accountant hired and trained three months prior to position holder's retirement. While the agency has had retirements and staff departures many times over the years, with a good plan in place, each successive year we have increased our efficiency through careful management and good planning.

As stated above, the only specific mention of the Executive Council in the whole consolidation staff report was the sidebar on page 8, which stated that "Almost 30 percent of the Executive Council of Physical Therapy and Occupational Therapy Examiners' staff qualify for retirement."

A very similar statement was echoed in the TDLR 2017-21 Strategic Plan, which on their page 7 states:

"We face multiple challenges related to workforce:
- **30% of our workforce will be eligible for retirement in the next five years**, resulting in the loss of valuable institutional and technical knowledge.
- Budget restraints continue to limit our ability to offer competitive salaries and to recruit and retain key employees.
- There is an ongoing decline in qualified applicants for many of our technical programs."

We have solved the problem with turnover or retirement of staff just as we are sure TDLR has a plan in place to do the same.

5. Lawsuits – The inflammatory use of the word lawsuit is a veiled reference to the North Carolina Dental Board's antitrust lawsuit. We specifically requested that the AG's office evaluate the Executive Council for risk of a similar event. Their response was that the public member majority composition of the Executive Council does provide multi-level active oversight of the two boards' actions.

Other potential lawsuits. The Executive Council was last sued in 1995, defending against two whistleblower lawsuits, and was represented by AG legal counsel from the General Litigation Division. Both lawsuits were successfully defended. There have been none since, but if they do arise, we will take the same course of action and expect to incur the same cost; i.e., a significant amount of time spent by the Executive Director and Office Manager.

6. Efficiencies – The numbers speak for themselves. Following is a cost effectiveness comparison of the Executive Council performance measure results with those of TDLR (if available):

	ECPTOTE FY2016 actual	TDLR Est. 2016 from LAR
Average Licensing Cost for Individual License Issued (All license types combined)	$42.04	$ 44.00
Average Time for Individual License Issuance	2.44 days	5 days
Average Time for Individual License Renewal	1.00 days	-
% of Licenses Who Renew Online	95%	94.1%
% of New Individual Licenses Issued Online	96%	81.0%
% of New Individual Licenses Issued within 10 days	97%	95.0%
% of Indiv. License Renewals Issued within 7 Days	100%	99.5%

Average Licensing Cost for Individual License – **FY2015**

TDLR	$44.00
Executive Council	$30.16

To make these numbers more meaningful and to emphasis the importance of performance measures, here is a hypothetical example if the Executive Council was merged into TDLR. The average time for license issuance by TDLR is 5 days, while the average time for the Executive Council is about 2.5 days. It will therefore require an additional 2.5 days for TDLR to issue a license. That number is significant because it means that a license applicant is not working and providing services to the citizens of Texas for 2.5 days while waiting for a license. Multiplied by the 4,000 new licenses issued last year, that is 10,000 days or 27.4 man-years that the citizens of Texas are untreated. This is not evidence of "achieving a more streamlined, cost efficient process" than what exists today in the Executive Council.

We found it difficult to obtain what should be easily available and applicable statistical information on comparable performance measures in other states. One interesting fact we did find out about Florida, which has one of the four largest state consolidated agencies, was that their current licensing strategic planning goal is:

"By December 31, 2018, reduce the average time to issue a license by 25% from 65 days (2015) to 49 days." This is an improvement over their 95 day average in 2004.

The consolidation staff report also cites long complaint investigation and resolution timelines, lingering unresolved sexual misconduct complaints, and discouraging patients from filing complaints on licensee. None of these issues applies to the Executive Council. In fact, the assumption that TDLR's handling of agency functions would "improve licensing and enforcement outcomes and better protect the people of Texas" might apply to some of the agencies cited, but not to this one. Appendix B of the consolidation staff report clearly shows the contrary: inclusion of the agency into the TDLR umbrella would achieve the opposite result. The agency's average time to resolve complaints is listed at **127** days; the TDLR average is **217** days, which is almost **twice** the time the Executive Council needed to resolve complaints. The average time for the other 7 agencies is more than double the TDLR average.

Additional performance measure data compares enforcement FTEs, receipts, closures and numbers of disciplinary actions. In FY2015 the Executive Council averaged **256** receipts and **219** closures per enforcement FTE. TDLR averaged **52** receipts and **66** closures per enforcement FTE. The Executive Council's investigators received approximately **five** times the TDLR average number of cases and closed more than **three** times as many investigations. And lastly, the agency executed 93 disciplinary actions, while the other seven agencies averaged less than half as many.

In summation, this report actually finds that the inclusion of this agency under the TDLR umbrella would achieve the opposite of its stated goal of achieving a more streamlined, cost efficient process. The Sunset Advisory Commission's own agency staff report (just completed after a year of intensive review) found the Executive Council "has been a stable, well-run agency, with an experienced, capable staff... [and that the current structure] provides a synergy that benefits the regulations. Ultimately, the cost of transferring these regulations to TDLR...and the ongoing effort by both TDLR and the medical board to assimilate 17 regulatory programs from DSHS, tipped the scales in favor of recommending continuing the agency with its current structure, and avoiding the upheaval in such a transfer." Also on the subject, the

Sunset agency report determined “Without achieving cost savings or improving the quality of regulation, the justification for such a transfer and the upheaval it would cause is greatly diminished.” This is a completely opposite statement from the consolidation staff report, Fiscal Implications: “The service improvements will be immediate and actual monetary savings will begin in year four and continue to grow into the future.”

And finally, to again quote from page 1 of the Sunset agency report, when explaining how the Executive Council had escaped Sunset review for 23 years, “However, one reason the executive council has flown under the radar is that it has been a stable, well-run agency, with an experienced, capable staff”.

If you have any questions, or if I have not responded adequately, please contact me at 305-6955 or john@ptot.texas.gov.

Sincerely,

John Maline
Executive Director