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November 16, 2016

The Honorable Larry Gonzales, Chair
Sunset Advisory Commission
Robert E. Johnson Bldg., 6th Fl.
1501 N. Congress Ave.
Austin, Texas 78701

Re: Agency Response to Sunset Staff Report

Dear Chairman Gonzales:

The Texas State Board of Examiners of Psychologists (Board) reviewed and considered the Sunset Advisory Commission Staff Report (staff report) issued on November 2, 2016 at its regularly scheduled meeting on November 10, 2016. Following a thorough discussion of the report, and after taking into consideration input received from agency staff, licensees, stakeholder associations, and members of the public throughout the review cycle, the Board presents the following responses to those issues identified in the staff report.

Issue No. 1: The Board's Oral Exam is an unnecessary requirement for licensure.

Staff Report Recommendation: Eliminate the statutory authority for the psychology board to administer an oral exam.

Summary of Agency Response: While the Board disagrees with several of the findings which form the basis of this recommendation, the Board ultimately takes no position on this recommendation.

Discussion: The Oral Exam identifies those candidates who do not possess entry level skills necessary for independent practice, and ensures they seek further training in areas of deficiency before becoming licensed for independent practice. By way of example, each Oral Exam requires the candidate to have basic skills in 10 areas of review, including handling crisis situations, attendance to cultural issues, developing and proposing a plan of action or intervention, identifying problems in a hypothetical situation with ongoing developments, and demonstrating awareness of personal limitations and freedom from dysfunctional characteristics. No other licensure requirement assesses these kinds of skills, and absent an assessment of these skills, the potential for harm from ill equipped candidates dealing with fragile or vulnerable populations is self-evident. While the Board understands the staff position set out in the report, the Board believes several of the staff findings regarding the Oral Exam fail to acknowledge significant counterpoints.

333 Guadalupe, Suite 2-450, Austin, Texas 78701
(Administration) 512-305-7700 (Enforcement) 512-305-7709 (TDD) 1-800-735-2989
(Fax) 512-305-7701 <http://www.tsbep.texas.gov>

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First, the Board does not believe that the current education, training, and written exam requirements fully test entry-level competency for independent practice as averred in the staff report. Variations in psychology education and training programs, as well as variations in the scores received on written exams from applicants coming from the same program, indicate that the quality of training and education received in psychology programs varies significantly, as does an individual's ability to implement same. The Board believes that relying upon a patchwork of training and educational programs to ensure minimal entry-level competency will expose the public to a greater risk of harm than what the Legislature has expressed a desire for in the past. Additionally, the Examination for Professional Practice in Psychology (EPPP), a written exam which all psychologists must take and pass before becoming licensed, was intended to evaluate the knowledge that the most recent practice analysis has determined as foundational to the competent practice of psychology; it was not intended to evaluate the same skills as the Oral Exam. And while the staff report points to the Oral Exam's high pass rate as a reason to eliminate the exam requirement, the Board believes the exam's 10-15% failure rate illustrates the continuing need for a statewide benchmark when evaluating competency for entry level independent practice, a point discussed in further detail below.

Second, the oral exam is no less consistent at evaluating a candidate's entry-level competency than other long-standing and widely accepted exams utilized in other professions. One example that several of the Commission members are probably familiar with is the essay portion of State Bar exam. A candidate's score on a particular bar exam essay question is dependent upon the judgment of a single attorney grader. And while subjectivity cannot be completely removed from exams in professions such as law and psychology, the Board believes that it has developed and structured its Oral Exam in a manner to guard against potential bias. This is the reason why examinees are evaluated by two examiners during an Oral Exam, with the option for a retest before two new examiners in the event of a split decision. In fact, the high pass rate for the Oral Exam tends to reinforce the view that the exam is administered in a consistent and fair manner. If this were not the case, one would expect to see a higher failure rate or number of split decisions between examiners.

Lastly, the burden imposed by maintaining the Oral Exam becomes much less significant when viewed against the potential harm avoided by preventing incompetent and unprepared individuals from practicing with a vulnerable population. While only 10-15% of candidates fail the Oral Exam, it is not difficult to imagine, nor does it require rank speculation to envision the significant and far reaching harm one of these ill-prepared candidates could cause if they were to fail to recognize or respond incorrectly to a crisis situation, e.g. suicidal or homicidal thoughts in a teenager. The resulting harm from a psychologist's inability to recognize or handle crisis situations correctly is not limited to his or her patient alone, but will most likely be felt by relatives and other members of the community as well. That being said, the Board understands the need to field as many mental health care providers as possible due to the provider shortage in this state. The agency is simply concerned about the potential for a reduction in the quality of care provided and harm to the public should the Oral Exam be eliminated from its licensing standards. The unique focus of the Oral Exam serves as a last line of defense against individuals who have the requisite knowledge of psychological principles, but who cannot effectively apply that knowledge when delivering services to the public.

Nevertheless, the Board takes no position on the staff recommendation, but respectfully requests that the Commission keep the aforementioned points in mind when deciding whether or not to adopt the staff report recommendation. In the event the Commission does adopt the staff report recommendation, the Board respectfully requests that it also adopt that portion of the recommendation allowing the Board to retain the ability to adopt new or different competency exams in the future.

Issue No. 2: Requiring a Year of Post-Doctoral Supervision is an Unnecessary Hurdle to Licensure, Potentially Contributing to the Mental Health Care Provider Shortage in Texas.

Staff Report Recommendation: Remove the statutory requirement for psychologists to earn half of their supervised work experience after receiving their Ph.D.

Summary of Agency Response: The Board reluctantly disagrees with this recommendation.

Discussion: While the Board understands and appreciates the forward looking nature of this recommendation, and believes that Texas is on track to play a more prominent role when it comes to the regulation of the profession, it is concerned about the negative impact and disparate treatment that such a change would have on licensure mobility. First and foremost, as pointed out in the staff report, 15 states no longer require any post-doctoral supervised experience before seeking licensure as a psychologist. That means however that the remaining majority of states, together with most of the Canadian provinces, still require post-doctoral experience before a person can become licensed as a psychologist. If the Commission were to adopt this recommendation, any increase in licensure mobility achieved through other staff recommendations would be lost, and reciprocity would only be possible with those few jurisdictions no longer requiring post-doctoral experience for independent licensure. That is assuming of course, all other aspects of the two jurisdictions' laws are substantially similar. Thus, our citizens would not enjoy the same opportunity for mobility as those from jurisdictions still requiring a year of post-doctoral experience. While the Board believes this to be an unintended consequence of this recommendation, the Commission should consider whether the elimination of the mandatory post-doctoral year of supervised experience would in fact operate to restrict licensure mobility for Texans rather than enhance it, when deciding whether to adopt this recommendation.

Second, eliminating the requirement for the post-doctoral year of supervised experience may place an undue burden on the training programs. If this recommendation were implemented, individuals will undoubtedly seek to acquire all of their supervised experience through their training program. Such a shift in public expectation and demand would likely impose a significant burden on the state's universities and training programs. With several of its members serving or having served in faculty and training roles within a university or training program setting, the Board is keenly aware of the capacity and demands on training programs across the state and has significant doubts about their ability to meet this increased demand. The Board therefore respectfully requests that the Commission keep this concern in mind when considering this recommendation.

Third, the Board does not believe this recommendation will result in a significant reduction in the amount of supervised experience sought through post-doctoral settings. Separate and apart from the formal internship, doctoral training programs simply do not offer significant opportunities for students to acquire supervised experience acceptable for licensure purposes. Much like the doctoral programs themselves, the nature and quality of supervised experience provided within each program varies widely. And while many students receive more than one year (1,750 hours) of supervised experience as part of their doctoral program, not all of that experience is of the nature and quality necessary to ensure professional maturity and experience with issues related to third-party payors and government funded programs. Thus, while the recommendation offers the potential for prospective licensees to acquire most, if not all of their supervised experience during their doctoral program, limitations of and variances between doctoral programs and the supervised experience provided therein will most likely result in individuals still having to seek supervised experience in a post-doctoral setting.

Lastly, the Board is concerned that this recommendation is likely to have the opposite of its intended effect, and actually worsen the state's provider shortage. Post-doctoral fellows provide a significant amount of mental health services, very often to underserved populations. In fact, given that the post-doctoral year may be the last time that some psychologists see low income clients, eliminating that year may serve to further reduce the availability of mental health services for a vulnerable population. Despite being an unpleasant reality, the Board believes the Commission should be aware of this aspect when deciding whether to adopt this recommendation.

In conclusion, while the Board acknowledges and agrees with the objective behind the recommendation, the agency believes the likely negative effects from this recommendation will outweigh the perceived benefits at this time. Additionally, the Board believes that, despite the recommendation, prospective applicants will still need to obtain a significant portion of the supervised experience needed for licensure through a post-doctoral setting. Thus, the Board must respectfully disagree with this recommendation.

Issue No. 3: Key Elements of the Board's Licensing and Regulatory Functions Do Not Conform to Common Licensing Standards.

Staff Report Recommendation at issue (No. 3.9): Direct the board to prohibit a board member from participating in both the investigation and resolution of a complaint.

Summary of Agency Response: The Board respectfully disagrees with the recommendation that it should eliminate its enforcement committee, but otherwise agrees with the remaining recommendations.

Discussion: While the Board understands and agrees with the need to keep the investigative and disciplinary activities of the agency separate, the Board believes disbandment of its Enforcement Committee would result in the loss of a highly efficient enforcement mechanism. The Enforcement Committee is primarily used for those tasks set out in the third paragraph below, but it is also used for providing agency staff with guidance in cases requiring professional expertise during the initial phases of the investigation. By way of example, agency staff are sometimes faced with complaints seemingly lacking any genuine issue of material fact in connection with the professional services rendered, or have a question about a very narrow issue in a complaint. In those instances, staff will sometimes consult with the Enforcement Committee to determine whether their inclination was correct or to gain further insight into aspects of the profession relevant to the complaint before them. However, the committee is provided with only very general information in these types of situations. If the committee were eliminated, agency staff would be required to retain a professional reviewer to meet these needs, something that the Board believes amounts to overkill for the complexity of the issues involved. The agency typically reserves the use of its professional reviewers for those complaints requiring an expert opinion or testimony to determine whether the conduct in question met the minimum standard of care. Because the number of reviewers available or willing to review certain issues for the agency is limited, the Board questions whether this would be the most judicious use of its professional reviewers.

Second, it is important to understand that pursuant to agency policy, board committees may not instruct agency staff to take any sort of action unless the Executive Director concurs. In the event of a conflict between the committee and the Executive Director over actions to be taken, the matter must be brought before the full board for a decision. This important limitation is set out in the Board's *Policy Concerning Committee Chairs*. Thus, the Board believes it has sufficient safeguards to prevent a "runaway" committee or any undue involvement in the investigative process by a committee. However, to further

bolster the integrity of its committees and enforcement process, the Board intends to develop and implement a rule on recusal of board members as recommended in the staff report.

Third, the Board maintains its Enforcement Committee to ensure that only those respondents eligible to receive an agreed order by mail do so; that any disposition offered in an agreed order by mail comports with the Board's schedule of sanctions; and that the licensees selected to conduct professional reviews on behalf of the Board are appropriately qualified and competent to do so. Each of these Enforcement Committee functions is set out in agency policy. If the committee were eliminated, agreed orders by mail would not be reviewed for compliance with the Board's rules and policies until presented to the full board for consideration. This could result in wasted time and effort on the part of staff if the full board felt that order did not sufficiently comport with the law or its policies. Additionally, without an Enforcement Committee, staff may not be able to determine whether a candidate possesses the appropriate and relevant professional training, development, and background needed to assist the board as a professional reviewer. This vetting process is essential to ensure the agency's professional reviewers possess the generally recognized knowledge and competencies necessary to recognize minimum standard of care violations.

The Board would like to take this opportunity to emphasize that it can certainly envision scenarios where a committee or its members could exert improper influence over an investigation, and it is not the Board's intent by and through its position here to be dismissive of the concerns expressed in the staff report. The Board is simply concerned about losing a long standing enforcement tool that has proven to be useful in ensuring consistency and efficiency in its enforcement process. Thus, the Board would ask the Commission to take these factors into account when deciding whether to adopt the recommendation that the Board eliminate its Enforcement Committee.

Lastly, the Board needs to point out a potential drawback to the recommendation to eliminate the provisional license (see staff report recommendation 3.3), and respectfully requests that the Commission make some provision for those licensees holding a provisional license should the recommendation become law. While psychologists recently received statutory authority to delegate and bill for the services of their supervisees with the passage and amendment of Chapter 501, Subchapter H of the Occupations Code, it remains to be seen whether Sections 501.351 and 501.352 of the Psychologists' Licensing Act will be viewed as the functional equivalent to the provisional license when it comes to seeking reimbursement from third-party payors. If third-party payors fail or refuse to reimburse services delivered by an individual with provisional status, rather than a provisional license, the recommendation could result in less reimbursement for mental health services, thereby exacerbating the state's provider shortage. Again, the Board agrees with the staff report recommendation in this regard, but felt compelled to point out this potential drawback to the Commission. Finally, the Board would also like to request that the Commission make some provision for those licensees who hold a provisional license at the time this recommendation becomes law. This Board, or any agency for that matter, would struggle with how to handle a class of licensees who either suddenly lost their ability to practice in a regulated profession, or were left without a clear path to full licensure as a psychologist. Thus, the Board respectfully requests that the Commission take these concerns into account when deciding whether to adopt recommendation 3.3.

Issue No. 4: Texas Should Continue Regulating Psychologists, but Decisions on the Structure of the Texas State Board of Examiners of Psychologists Await Further Review.

Staff Report Recommendation 4.1: Continue the regulation of psychologists, but postpone the decision on continuation of the Texas State Board of Examiners of Psychologists until completion of the Sunset reviews of other health licensing agencies.

Staff Report Recommendation 4.2: Update the standard across-the-board requirement related to board member training.

Summary of Agency Response 4.1: The Board agrees with that portion of the recommendation regarding the continuing need to regulate the profession of psychology, and looks forward to submitting a separate response concerning the issue of consolidation once it has had an opportunity to discuss and review the staff consolidation report.

Summary of Agency Response 4.2: The Board agrees with the recommendation regarding board member training.

Discussion: The Board currently provides its members with training upon their appointment to the Board. This training consists of in-person training at the Board's office, whereby new board members are trained on matters such as the Open Meetings Act, the Public Information Act, rulemaking, the application and licensure processes, the disciplinary and enforcement processes, the various board committees and their functions, the division of responsibilities between board members and staff, agency policies, when recusal is appropriate, agency budgets, as well as the day-to-day operations of the agency. Thus, the Board believes it should be able to modify its current training procedures with relative ease to meet the requirements of this recommendation.

Issue No. 5: A Recent Court Decision Opens the Door to Unlicensed Practice of Psychology.

Staff Report Recommendation: Direct the Texas State Board of Examiners of Psychologists to develop proposed definitions of the practice of psychology.

Summary of Agency Response: The Board agrees with this recommendation in general, but disagrees with the recommendation that it be required to develop two additional versions of the definition.

Discussion: Following the court's decision in *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. Tex. 2016), the Board approved the formation of an ad hoc committee to assist it with preparing a revised definition for the *practice of psychology*. Because of the complexity of this task and potential implications for the practice of psychology, both in the private sector and the public schools, the Board elected to utilize an ad hoc committee whose membership consisted of representatives from the Texas Psychological Association and the Texas Association of School Psychologists, an at-large psychologist member selected by the Board Chair, and a law professor from Texas Tech University with extensive experience in mental health law. This entirely volunteer ad hoc committee worked extensively with the Board's Executive Director and Board Chair to develop a revision to Section 501.003 that would address the court's concerns in the *Serafine* opinion. The committee came up with a draft revision to Section 501.003 and the Board sought public comment on that revision when it was published on the Board's website on June 7, 2016. The Board also emailed a link to the proposed revision to each licensee for whom it had an email address, as well as each of the following entities requesting their input.

- American Psychological Assoc. (APA)
- Association of State and Provincial Psychology Boards (ASPPB)
- Texas Psychological Assoc. (TPA)
- Texas Assoc. of Psychological Associates (TAPA)
- Texas Assoc. of School Psychologists (TASP)
- Texas Assoc. of Behavioral Analysis (TXABA)
- National Register of Health Service Providers in Psychology
- International Coach Federation
- International Association of Coaching
- Texas Physical Therapy Assoc. (TPTA)
- Texas Occupational Therapy Assoc. (TOTA)
- Texas Medical Assoc. (TMA)
- National Assoc. of Social Workers, Texas Chapter (NASW)
- Texas Assoc. of Marriage and Family Therapists (TAMFT)
- Texas Counseling Assoc. (TCA)
- Assoc. for the Treatment of Sexual Abusers (ATSA)
- National Alliance on Mental Illness (NAMI) (both state and national organizations)
- Hogg Foundation for Mental Health
- American Board of Professional Psychology (ABPP)
- Texas Educational Diagnostician Assoc. (TEDA)
- Academic Language Therapy Assoc. (ALTA)
- Federation of Associations of Regulatory Boards (FARB)
- Texas Medical Board (TMB)
- National Autism Association of North Texas
- Behavior Analyst Certification Board
- Autism Speaks
- Mental Health America of Texas
- Disability Rights Texas
- Association of Psychology Postdoctoral and Internship Centers (APPIC)
- Society for Industrial and Organizational Psychology (SIOP)

When the comment period closed on August 5, 2016, the Board had received numerous comments from different individuals and entities interested in the issue. The Board then took all of these comments, including several additional recommendations from the ad hoc committee, into consideration when it adopted the final version of the revision at its November 10, 2016 meeting. A copy of the Board's recommended changes to Section 501.003 of the Occupations Code is attached hereto for the Commission's review and discussion.

While the Board understands the need for public involvement in the lawmaking process, the Board believes it has taken a very transparent and reasonable approach in developing its proposed revision to Section 501.003, and is confused about what more can be accomplished if this recommendation were adopted. On a more practical note, the Board struggles with the reality of being required to submit two additional practice definitions by January 31, 2017, when the development of the Board's current revision took approximately five months to complete. Moreover, while some measure of development of alternate definitions may be possible in such a short time period, this recommendation would place the Board in the awkward position of having to develop and present alternate definitions which, in its view, have not been

adequately vetted or which do not adequately define the practice of psychology. Thus, the Board respectfully disagrees with that portion of the recommendation requiring it to develop two additional definitions.

The Board hopes that its response to this particular recommendation is not taken as disrespectful in nature, because that is certainly not the intent. The Board is simply faced with responding to a recommendation that all would agree represents a sound approach to governing, but that also fails to take into account the substantial efforts already made by the Board when developing its revised practice definition. And while the Board believes its past efforts, together with the opportunities for public input inherent in the Sunset review and legislative processes, provide the public with ample opportunity to make their voices heard on this matter, the Board stands ready to comply with the recommendation should it be adopted.

Additional Agency Requests Not Addressed in Staff Report

The Board certainly understands the need to prioritize when addressing change within a governmental organization, and the Commission and its staff are probably no exception to this rule. Thus, the Board did not begin this process with a view that all of its requested changes would be implemented. However, there were two requested changes in particular that were not included in the staff report that the Board, and more importantly its staff view as being both helpful and of no cost to the state. First, the Board had requested on pg. 44 of its self-evaluation report, that Section 501.207(a), Occupations Code be amended to include the Board's General Counsel as one of the individuals who may issue a subpoena on behalf of the agency. Second, the Board had requested on pg. 52 of that same report, that Section 501.154, Occupations Code be amended to remove the requirement that an annual roster be printed and mailed to each licensee. The rationale for both of these changes are set out in the agency's self-evaluation report, so they will not be restated here, but the Board respectfully requests that the Commission include these requested changes in the agency's sunset bill.

Conclusion

The Board would like to thank the Commission staff for the time and attention they have shown in conducting this review. Additionally, the Board's staff would like to express their appreciation for the professionalism and courtesy they were shown by the Board's review team, Robert Romig and Julie Davis. While it is doubtful any agency would say they enjoy the review process, both Mr. Romig and Ms. Davis showed a great deal of adaptability and understanding when working with the Board's staff, and for that we are all grateful.

Should you have any questions or concerns regarding this response, or need additional information or responses prior to the December 8th and 9th hearings, please do not hesitate to call or write.

Sincerely,



Darrel D. Spinks
Executive Director

Sec. 501.003. PRACTICE OF PSYCHOLOGY.

(a) In this section, "psychological services" means acts or behaviors that are included within the purview of the practice of psychology.

(b) A person is engaged in the practice of psychology within the meaning of this chapter if the person:

(1) represents himself or herself to the public by a title or description of services that includes the word "psychological," "psychologist," or "psychology" when providing or offering to provide psychological services to another in a professional relationship;

(2) provides or offers to provide psychological services to individuals, groups, organizations, or the public in a professional relationship;

(3) is a psychologist or psychological associate employed as described by Section 501.004(a)(1) who offers or provides psychological services, other than lecture services, to the public for consideration separate from the salary that person receives for performing the person's regular duties; or

(4) is employed as a psychologist or psychological associate by an organization that sells psychological services, other than lecture services, to the public for consideration.

(c) The practice of psychology:

(1) consists of the observation, description, diagnosis, evaluation, assessment, interpretation, or intervention in and treatment of human behavior by applying education, training, methods, and procedures for the purposes of

(A) predicting, treating, remediating or eliminating:

i. symptomatic, maladaptive, or undesired behavior;

ii. emotional, interpersonal, learning, neuropsychological, cognitive, or behavioral disorders, including those that accompany medical problems; or

iii. mental illness.

(B) facilitating the enhancement of individual, group, or organizational effectiveness – including personal effectiveness, adaptive behavior, interpersonal relationships, academic, vocational, and life adjustment, health, and individual, group, or organizational performance;

(C) assisting in legal decision-making; or

(D) consulting with others, such as other mental health professionals, physicians, school personnel, or organizations within the scope of the provider's competency and training with respect to services provided for a specific individual.

(2) includes the supervision of any of the activities or services listed under paragraph (1) above.

(3) does not include:

(A) the offering of advice, counsel, or guidance addressing or affecting the mental, emotional, or behavioral health of another individual, whether solicited or unsolicited, when:

(i) there is no request for or expectation of compensation from the recipient in connection with the advice, counsel, or guidance;

(ii) the primary focus of the provider's occupation is other than the delivery of mental, emotional, or behavioral health care services and the person is offering the advice, counsel, or guidance ancillary to the person's occupation; or

(iii) the advice, counsel, or guidance is offered within the context of an organized or structured program or peer support service that is designed to support or assist individuals with a self-identified goal of changing or improving certain aspects of their mental, emotional, or behavioral health; and

(B) the individual offering the advice, counsel, or guidance does not represent:

- (i) himself or herself to be a licensee of the Board, or that he or she is otherwise engaged in the delivery of psychological services; and
- (ii) the advice, counsel, or guidance as being psychological in nature.