

Vol 14 No. 1

Summer 2001

LSSPs Adhere to State and Federal Education Laws

Licensed specialists in school psychology (LSSPs) provide psychological services in an environment that, in many ways, is quite different from that of those who practice psychology outside of the public school setting. For this reason, it is not surprising that LSSPs are often confronted with state and federal education laws that are unique to their particular type of practice. This makes an LSSP's duty to understand and follow the laws relating to school psychology an especially challenging task.

Board rule 461.14 states that, in the event of a conflict among state or federal statutes and Board rules, the state or federal statutes will control. Therefore, unless there is separate state or federal law that dictates otherwise, the Psychologists' Licensing Act and Board rules are to be followed by an LSSP.

What are some of the laws relating to the practice of school psychology that may override Board rules and the Act? There are many. Some of these rules include

1. The Family Educational Rights and Privacy Act (FERPA)
2. Individuals With Disabilities

Education Act (IDEA)

3. The Texas Education Code
4. The Texas Public Information Act (sometimes called the "Open

Records Act")

5. Section 504, Rehabilitation Act of 1973.

Where can an LSSP obtain information related to these rules and regulations? The following websites contain information relating to the practice of school psychology and can also direct LSSPs to other informative website links:

1. The U.S. Department of Education- www.ed.gov
2. The Texas Education Agency (TEA)-: www.tea.state.tx.us.
3. The National Association of School Psychologists-(NASP) -www.naspweb.org.
4. The Texas Association of School Psychologists (TASP)-
www.txasp.org

To make matters more complex, in addition to state and federal laws, there may be policies that are specific to a particular school district to which an LSSP must also adhere. Consequently, LSSPs must look to their school district attorneys to obtain information relating to these policies.

Because TSBEP is not the agency responsible for promulgating and enacting many of the school laws and rules that LSSPs must follow, the Board is often not the best source of information for questions regarding those regulations. The Board typically can only provide general information about these regulations. Therefore, in addition to any new rule that might be contained in their TSBEP rulebooks, LSSPs have the cumbersome task of keeping abreast of the other state and federal laws specifically relating to the provision of psychological services within the public school setting. These state and federal laws provide the guidelines for LSSPs in areas such as informed consent, record keeping, parental access to psychological records, confidentiality, and the required credentials for providing certain types of services in the school setting.

The following is a sampling of the types of questions that the Board receives about psychological services in the public schools. Some of these questions can be answered without referring and deferring to other state and federal laws. The others, however, require the inquirer to seek other information sources as previously indicated.

Q1: Who can determine special education eligibility for an emotionally disturbed student?

A: A multidisciplinary team determines special education eligibility during an Admission, Review, or Dismissal meeting. The LSSP usually conducts an ED assessment for this purpose or, if an outside assessment has been submitted, the LSSP generally determines if the psychological report meets all the criteria to address such eligibility from the psychological perspective. The LSSP may accept a psychological assessment done by anyone authorized by the TSBEP Act and Rules to conduct a psychological assessment. If the LSSP determines that not all eligibility factors have been addressed, the LSSP may conduct additional assessment.

Q2: Does a licensed psychologist who is also an LSSP need supervision for one year after LSSP licensure?

A.: No. Board rule 465.38(4)(A) states that direct, systematic face-to-face supervision must be provided to licensed specialists in school psychology for a period of one academic year following licensure unless the individual also holds licensure as a psychologist in this state.

Q3. Who is authorized to supervise and evaluate an LSSP?

A: Board rule 465.38 requires that supervision of an LSSP must be provided by an LSSP with a minimum of three years of experience in providing psychological services in the public schools. Board rule 465.2 states that supervisors should have competency to perform any service provided under their supervision. The Act and Board rules establish the minimum criteria for the practice of school psychology in the public schools. Nothing in the Act or Board rules prevents a school district from establishing criteria above and beyond that minimum, including requiring additional supervision.

Q4: Is it a violation for an LSSP who is also an LPA, PLP or LP, to provide psychological services in private practice as well as in the schools?

A: It is not a violation of the Act or Board rules for such a dually licensed person to provide psychological services in private practice as well as in the schools.

However, Board rule 453.13 states: "If potential for impairment or harm exists, the licensee shall not provide services regardless of the wishes of the other party." Therefore, such a dual relationship is potentially problematic. Suppose, for instance, that the child could obtain similar services for free in the schools. Or, what if the licensee obtains information in the course of his/her private work with the child which is needed by the school district (such as test results) and the parents refuse to sign the consent to release this confidential information? Or, suppose that the IEP recommends in-school counseling for the child without the parent indicating that the licensee has an out-of-school professional relationship with the child already. These are only a few examples to suggest how such a dual relationship might place the licensee in an awkward situation between the obligation to the school employer and the obligation to the client, thereby affecting the licensee's objectivity and possibly harming the client.

Q5: Under what conditions can an LSSP intern in Texas be hired to work in a public school?

There are two types of LSSP internships which would allow the LSSP intern to be hired to work in a public school. In both instances, Board rules require that the person be referred to as an "LSSP intern."

A. LSSP Internship for the purposes of LSSP licensure.

To obtain licensure as an LSSP, Board rule 463.9(c) requires that internships must consist of a minimum of 1200 hours, of which 600 must be in a public school. This LSSP internship or other site-based training must be provided through a formal course of supervised study from a regionally accredited institution of higher education in which the applicant is enrolled. For persons whose internships begin before July 1, 2001, either a formal internship or experience may be obtained to comply with this internship rule. Therefore, on or after July 1, 2001 all internships must be formal.

Internships may not involve more than two sites (a school district is considered one site) and may be obtained in not less than one or more than two academic years. Direct systematic supervision must involve a minimum of one face-to-face contact hour per week or two consecutive face-to-face contact hours once every two weeks with the intern. The internship must include direct intern application of assessment, intervention, behavior management, and consultation, for children representing a range of ages, populations and needs. Additionally, internship in the public school for the purposes of LSSP licensure must be supervised by a qualified individual per Board rule 465.38 relating to Psychological Services in the Schools.

B. LSSP Internship for the purposes of licensure as a psychologist.

Licensure as a psychologist requires the completion of two years of supervised experience. Interns who choose to complete this requirement in the public schools must conduct their internships in accordance with Board rule 463.11(c)(1) and 463.11(c)(2)(C).

Typically, a person who completes the requirements for licensed psychologist in the public schools will have met the internship requirement for the LSSP. However the reverse is not usually so.

In accordance with the exemption in the Act, section 501.004(a)(2), a student who is enrolled in coursework or practica for a university program may provide psychological services in the public schools provided that the coursework or practica require such services to be provided, even though this coursework or practica are not required for licensure with the Board.

Q6: Is a licensed professional counselor (LPC) who is permitted to provide counseling services in the school qualified to provide personality assessment and/or emotional assessments in public schools?

A: In general, questions relating to the types of services that an LPC may provide should be answered by the Texas State Board of Examiners of Professional Counselors. However, any “school psychological service” that is provided in a public school setting must be provided by an LSSP, an LSSP intern, or LSSP trainee. The assessment of emotional or behavioral disturbance, for educational purposes, using psychological techniques and procedures is considered the practice of psychology.

Q7: Is an individual with a master’s level LSSP allowed to use projective tests for assessing emotional or behavioral disturbance? Is an individual with a master’s level LSSP who is trained in the use of and interpretation of neuropsychological instruments qualified to administer these assessments?

A. Board rules do not stipulate the specific instruments LSSPs may or may not use in their professional work in Texas public schools. However, Board rule 465.9 indicates that licensees provide only services which they have the education, skills, and training to perform competently. This would apply to such psychological services as projective and neuropsychological testing.

Q8: Can a licensed psychologist who is not an LSSP provide contract services to a school district?

A: Nothing in Board rule 465.38 prohibits public schools from contracting with licensed psychologists who are not LSSPs to provide psychological services in their specific areas of competency. Such contracting is generally for services that are not within the competency of or are not readily available from the LSSP employed by the district. Such contracting must be on a short term or part time basis and cannot cover the broad range of school psychological services.

Q9: Are test protocols part of a child's educational record? Do parents have access to them and can they be subpoenaed? What should be contained in the records of a special education child receiving counseling? Who owns the records? And how long should records be kept?

A: Both state and federal laws govern mental health and educational records in the school setting. Board rule 465.22(a)(6) states that "licensees working in public school settings shall comply with all federal and state legislation and regulations relative to the content, maintenance, control, access, retention and destruction of psychological and educational records, test data and test protocols." Thus, the licensee is advised to contact the attorney for his or her school district to determine if there are educational regulations superseding Board rules.

Q10: The Board's requirements for obtaining "informed consent" are much tougher than IDEA or 504. Whose requirements do LSSPs follow? And will an LSSP get in trouble with the Board for following the education laws instead of Board rules?

A: Board rules 461.14 and 465.38 state that federal or state statutes supersede Board rules in the event of a conflict. This means that an LSSP may follow the appropriate education laws even if they are less stringent than Board rules. Should a complaint be filed with the Board for failure to follow Board rules, the LSSP would be expected to be able to refer to the specific state or federal education law that was being followed.

Q11: Does a parent signature on an IEP constitute an adequate "informed consent" for services according to Board rules? Is a licensee of the Board required to obtain consent from the parent of a minor before providing psychological services to that student?

A: Informed consent issues are controlled by federal (IDEA) and state laws. In general, a licensee of the Board is required to obtain consent from the parent of a minor before providing psychological services to that student. However, the Texas Family Code does list some limited circumstances that would permit a psychologist to provide counseling services without parental consent. These instances are limited to counseling for suicide prevention; chemical addiction or dependency; or sexual, physical, or emotional abuse. Otherwise, parental consent must be obtained by LSSPs in accordance with the applicable state and federal laws before evaluating a student.

Q12: What if the parent refuses to give consent for the LSSP to do an assessment of the student?

In most instances, section 151.003(1)(6) of the Texas Family Code would be the controlling statute in this situation in that it gives the parent the right to consent to the child's psychological treatment and care. However, in a situation where the school recommends a comprehensive Individual Assessment of the child and the parent refuses to provide consent for the LSSP to complete the assessment, a hearing needs to be requested.

If the Special Education Hearing officer overrides the parent's refusal to provide consent, assuming the hearing officer has been given the authority, Board rule 461.15 provides, "in the event of conflict among state or federal statutes and Board rules, state or federal statute(s) control." This means that the LSSP would conduct the assessment in adherence to the state or federal statute authorizing the hearing officer to order the assessment, rather than to the Board rules and the Family Code.

Q13: If the public school district specifically determines that informed parental consent is not legally required, and a complaint is later filed against the LSSP who performs the assessment of the student, what action would the Board take?

A. Should a complaint be filed with the Board for failure to follow Board rules, the LSSP would be expected to be able to refer to the specific state or federal education law that was being followed.

Licenses in Exempt Facilities

Attorney General Opinion

JC-321 Clarifies Board

Jurisdiction over Licensees

Working in Exempt Facilities

An opinion rendered by the attorney general (John Cornyn #321) has sought to clarify when the Board has the statutory authority to investigate licensees whose activities are "within the confines" of an exempt facility as defined in the Act, Section 501.003. The opinion defines "within the confines" to mean activities performed in the scope of employment with the exempt facility. This is a well-grounded tenet of common law; for instance, in tort law, employers are liable for the torts of employees that occur within the scope of employment, whether or not it is actually on the premises of the worksite.

The basic conclusion of the opinion is that "a licensee's activity or service, performed at an exempt facility but beyond the scope of the licensee's employment with the exempt facility, is subject to the Act and may be investigated by the Board. The previous attorney general opinion (JM-1247) covering this subject decided that any activity is subject to investigation once the licensee consents to licensure; and therefore that opinion has been overruled."

The opinion tries to establish a coherent definition of "within the confines of," whether this means a geographic boundary or a boundary pertaining to the duties of the licensee. The "scope of employment test" best

serves to clarify this term in the Act. Therefore, if an exempt facility refers a licensee for investigation, it is safe to assume that the activity complained of was beyond the scope of employment and may be investigated. Conversely, if the exempt facility refuses to participate or cooperate in the investigation of a licensee, the Board may assume that the activity was within the scope of employment and therefore immune from investigation.

When a complaint on a licensee working in an exempt facility is filed, the Board will work, subject to confidentiality provisions, with the administration of the exempt facility to determine whether the activity falls within the scope of employment.

There are certain rules that apply to all licensees, such as those concerning continuing education.

Where the rule is geared toward issues in the patient-licensee relationship, the facility immunity will probably apply. Where the rule deals with conduct regardless of employment, the investigation will be sanctioned under the new opinion. In any event, each complaint will be looked at individually to make a “scope of employment” assessment.

Questions have also arisen as to whether the opinion applies to contractors of exempt agencies, or just government employees. What matters in the context of exempt agencies are the services being performed, not whether it is done by an employee or contractor. Put another way, the word “employee” or “employment” is not defined in the Act, but “psychological services” are.

Therefore, the only question the Board would ask in an exempt facility situation is: Are psychological services being performed by a licensee to a patient in an exempt facility? If the exempt facility has the patient and is maintaining the records, whether the licensee is an employee or contractor will not matter.

Attorney General Opinion JC-321 can be found online at:
<http://www.oag.state.tx.us/opinopen/opinions/op49cornyn/jc-0321.htm>.

by Brett Norbraten

General Counsel

TEXAS SUPREME COURT RULES ON PARENTAL ACCESS TO MENTAL HEALTH RECORDS

On July 6, 2000 the Supreme Court of Texas reversed the judgment of the lower court by holding that a parent’s right to access of their child’s mental health records is not absolute. In *Abrams v. Jones*, the Court

examined the issue of whether or not a parent has at all times the right to have access to their child's mental health records.

In the suit, Dr. Laurence Abrams, Ph.D., denied Jones' access to his eleven year-old daughter's mental health records based on Abrams' professional opinion that release of the records would be harmful to the girl. Section 611.0045(b) of the Health and Safety Code allows mental health professionals to deny a patient, or the parent of a minor patient, access to "any portion of a record if a professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health." However, psychologists must be ready to give sound justification for denying access.

Under Section 611.005, in a suit brought to compel release of the records, "the burden of proving that the denial was proper is on the professional who denied the access."

Further, under Section 611.0045(c), a psychologist who denies a patient access to a portion of his confidential record must also give the patient a detailed written statement that specifies the part of the record that is being withheld, the reason for the denial, and the duration of the denial.

Board rules and state laws relating to the maintenance and release of psychological records are listed in the TSBEP June 1, 2001 *Rules and Regulations*.

Know your Board Rules:

What is "resigned in lieu of adjudication"?

Resigned in Lieu of Adjudication:

Board rule 461.7(f)(1) indicates that Resigned in Lieu of Adjudication is the license status when a licensee is permitted to resign their license while a complaint is pending against them. Resigned in Lieu of Adjudication is in the form of an Agreed Order between the licensee and the Board. Should the licensee ever wish to become licensed again in this state, he or she would have to first resolve the pending complaint.

How long can a licensee remain on "inactive status"?

Inactive Status:

Board rule 461.7 states that inactive status lasts for two years, unless other conditions are met. If these conditions are met, the licensee can continue the inactive status in two-year increments indefinitely. The conditions are that prior to the end of each two-year inactive status period the licensee must notify the Board in writing that an extension is requested and submit proof to the Board of continuous licensure by a psychology licensing board in this or another jurisdiction for the past two-year period and payment of all required fees.

If a licensee wants to stop practicing and never practice again, how can the licensee “retire” the license?

Retirement Status:

Board rule 461.7 states that retiring a license is approved by the Board only when a person holds an active or inactive license; is in compliance with all Board rules including continuing education; and has no pending complaint or restricted license. Additionally, the person must notify the Board in writing before the renewal date of their desire to retire the license. The Board does not reinstate a license once it has been retired. A retired license is required to be returned to the Board office.

Big Changes in the Board’s

Administration of the EPPP and Jurisprudence Examinations

-

After many years of abiding by the limitations of only two national exam dates per year, the administration of both the Examination for Professional Practice in Psychology (EPPP) and the Jurisprudence Exam has been transformed.

Beginning on September 1, 2001, the EPPP will be offered as a computerized exam in the state of Texas. The exam will be offered through the approximately 25 Prometric Testing Centers across the state. However, Texas approved applicants may take the EPPP in any of the many Prometric Testing Centers located in all other states which have adopted the computerized EPPP.

The procedure is that the Board will provide an EPPP packet to an approved applicant. The packet contains information instructing the applicant how the computerized exam will be administered. The first step is for the applicant to complete the scantron and submit it and the required exam fee to the Board. After review, these are then forwarded by the Board to the Professional Examination Service (PES). PES will then provide the applicant with an approval to test letter allowing them to schedule a testing time with PES. Testing times may be set from 9-5, six days per week.

The computerized EPPP will allow the applicant to take this exam in a more timely and convenient manner. While there is an added cost of \$65 for this computerized version, which will be paid by the applicant to PES, most applicants will realize a savings in travel costs.

Beginning July 2001, the Jurisprudence Exam will be an open-book, mail-out exam. After the applicant has been approved by the Board and has submitted the \$200 fee, the Board will provide the applicant with the Jurisprudence Exam packet which includes a scantron/answer sheet. The applicant has two weeks to complete the exam and return it to the Board office. The passing rate for the Jurisprudence open-book, mail-out exam has been raised from 70% to 90%.

Computerizing the Jurisprudence Exam has become a cost prohibitive option both for the Board and the applicants. Therefore, the Board believes that to coincide with the enhanced timeliness and flexibility of the EPPP administration, it must adopt the open-book, mail-out form of administration for the Jurisprudence Exam. Such open-book jurisprudence exams are not without precedent in other licensed professions in Texas.

Exam fees both for the EPPP and the Jurisprudence Exam cannot be accepted before July 1, 2001. Any questions regarding these exam administration changes should be directed to the licensing staff that are available for calls on Tuesdays and Thursdays.