

# TSBEP Newsletter

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Texas State Board of Examiners of Psychologists

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## Attorney General Opinion Results in New Board Rules Prohibiting Extenders

by Barbara M. Holthaus, General Counsel

An opinion rendered by the Office of the Attorney General, Letter Opinion No. 96-147, has resulted in the adoption of Board rules that clarify that only individuals who are either licensed by the Board or who are specifically exempted by the Psychologists' Licensing Act (the Act) may be employed by a psychologist and/or engage in the delivery of psychological services. Unlicensed, non-exempt "extenders" may not be employed to provide any type of psychological services under the supervision of a licensed psychologist.

The Board has also adopted rules that: (1) provide guidelines as to the type of activities that fall outside the scope of psychological services that may therefore be performed by unlicensed, non-exempt individuals employed by a psychologist; and (2) guidelines for the delivery of services by individuals licensed by another board who are employed by a licensed psychologist.

## Licensure Requirements & Exemptions Established by Statute

The Act, at section 20, prohibits a person from engaging in the practice of psychology or representing him or herself as a psychologist or psychological associate unless the person is licensed under the Act or exempt from the Act. There is no statutory authority that permits an

unlicensed individual who is not exempted from the license requirement of the Act to engage in the practice of psychology even though they are practicing under the supervision of a licensed psychologist, nor is there any language in the statute that permits a licensed psychologist to delegate or appoint another unlicensed individual to provide services under the license of the psychologist.

The Act does provide specific exceptions to the mandate of §20. Section 22(a) of the Act exempts governmental agencies and regionally accredited institutions of higher education from the Act. Section 22(c) specifically exempts certain individuals from the licensing requirements of the Act, including individuals practicing under the authority of another licensing agency, if the licensee is practicing within the scope of that license and does not represent him or herself as a psychologist or describe the services he or she is providing as "psychological."

Examples of individuals exempt under §22(c) would include psychiatrists, licensed professional counselors, and licensed social workers. Finally, members of the clergy acting within the scope of their ministerial duties and volunteers providing services for non-profit agencies are exempt under sections (d) and (e) of §22, respectively, provided that the individual does not call him or herself a "psychologist" and the services are not labeled as "psychological."

Individuals exempt pursuant to subsections (a), (c), (d), and (e) of § 22 need not be subject to clinical supervision by a psychologist. On the other hand, "unlicensed interns, students and

residents pursuing a course of study in preparation for the professional psychology under qualified supervision in recognized training institutions or facilities, if these activities and services constitute a part of his (or her) supervised course of study" are required by the specific terms under § 22(b) to be supervised.

Section 21(B) appears to permit post doctoral level individuals to practice under supervision for purposes of obtaining the required year of post doctoral experience required for licensure as a psychologist.

Finally, section 26, the Licensed Specialist in School Psychology, requires a candidate for that license to obtain a minimum of 1200 hours of supervised experience of which 600 must be obtained by practicing in a public school district under supervision.

Board Rule 465.18

Notwithstanding this statutory scheme, former Board rule 465.18, as amended in 1993, appeared to give psychologists the authority to allow unlicensed and non-exempt individuals to practice psychology under the supervision of the psychologist by allowing a licensed psychologist to be responsible for the professional supervision of Certified Psychologists, Psychological Associates and *other psychological extenders*.

This was interpreted by many individuals to grant psychologists the ability to allow these unlicensed practitioners to practice under the license of the psychologist. In other situations, it appears to have been utilized to transform a person licensed in another profession into a

"psychologist" for purposes of performing certain functions, such as projective testing, that the individual's own license did not permit.

### The Historical Background

In 1993, the Board's Act was amended by the Texas Legislature to define the practice of psychology very broadly apparently to ensure that unlicensed individuals could not legally engage in activities performed by licensed psychologists.

During that same time, a provision was added to the Licensed Professional Counselor Act, Art. 4512g V.T.C.S., that prohibits a Licensed Professional Counselor (LPC) from performing "standardized projective testing," thereby further tightening the definition of psychology to effectively encompass the process of "standardized projective testing."

These changes, while protecting the practice of psychology and the use of the term psychologist and limiting the ability of other individuals to provide the same services as licensed psychologists, created a discrepancy between the law and the practice of some psychologists at the time who employed individuals to perform functions of their practice which had become statutorily defined as the practice of psychology.

The change in the law required any individual offering these functions to either have a license from the Board or to fit under the statutory exemptions to the licensure requirement. Board rule 465.18 was amended, apparently to permit licensed psychologists to resolve this variance. It is possible that the extender practice was modeled after the practice of medical doctors who may delegate unlicensed individuals to carry out standing order in certain cases. Psychologists were also accustomed to supervising interns and students. Unfortunately, both of these practices are authorized by law--in the medical doctors' case by a specific section of the Medical Practice Act and in the case of students and interns case by Section 22(b) of the this Act. However, nothing in the Act or any other law authorized the Board to implement a rule whereby a licensed psychologist could allow an unlicensed individual to utilize a psychologist's license as an unlicensed, non-exempt extender.

Many of the psychologists employing "extenders" under rule 465.18 endeavored to employ only trained and experienced individuals, to limit the types of activities employed by these "extenders," and to closely supervise these individuals. Unfortunately, some licensees stretched the rule to the point that the Board was unable to ignore the disparity between the law and the rule. For example, individuals who had completed a doctoral or masters degrees in psychology, but who had not obtained licensure, were working at separate sites, sometimes hundred of miles away, from the psychologist under whose license they were supposedly practicing.

Other psychologists were utilizing these unlicensed individuals to perform psychological assessments and to write psychological reports for the signature of the psychologist. Some were using unlicensed individuals to provide therapy to clients with whom the psychologist had never even been in the same room. When a consumer filed a complaint against the psychologist and the extender because of actions of the extender, the licensed psychologist would disavow responsibility for the extender's action by arguing that they were unaware of the extender's

activity. The extenders were not accountable to the Board since they were not licensees of the Board and therefore could not be prosecuted for the unauthorized practice of psychology because of the extender policy. As more and more of these examples came to the attention of the Board, the incongruity of the Act and the Board's rule came under close scrutiny.

In addition, questions to the Board from both its licensees who were employing unlicensed extenders as well as directly from these extenders themselves made the Board increasingly aware that there were other problems with the "extender" rule. For example, callers were inquiring as to the Board's position on allowing extenders to have their own business cards, how a psychologist and extender should arrange insurance liability, and even questions concerning business arrangements whereby the extender would pay the psychologist for supervision and, in effect, set up his or her own "private practice." In short, Board rule 465.18 and the "extender" concept appeared to hinder the Board's efforts to protect the consumers of psychological services from the unlicensed and unauthorized practice of psychology and to enforce its Act by enjoining psychologists from aiding and abetting the unauthorized practice of psychology.

To resolve these concerns, in July of 1996 the Board requested an opinion from the Office of the Attorney General. Letter Opinion No. 96-147 was subsequently issued by the Attorney General in December 1996.

#### Current Board Requirements

The current guidelines for the use of unlicensed, non-exempt individuals by psychologists are spelled out in Board rule 465.4, effective September 1997, "Employment of Individuals Not Licensed by the Board." A psychologist may employ or utilize individuals who are licensed members of another profession to provide only activities or services permitted by the applicable license or licenses held by that individual. These services and activities may not be described or represented to the patient or client as psychological services, and the individual must be clearly identified to the patient or client as a licensee of the applicable profession who is providing services pursuant to that individual's own license. Psychologists may employ unlicensed, non-exempt individuals only to perform services which do not constitute the practice of psychology or the activities and services of another licensed profession.

Permissible duties include secretarial and clerical duties. This includes such activities as scheduling appointments or processing insurance forms. It could also include data gathering from check lists, administering, proctoring, or scoring non-projective tests and obtaining documentation for record keeping purposes, provided that these activities do not require psychological education or involve the provision of psychological services, and technical, educational, or other duties that are adjunctive to and incorporated into the provision of psychological services. It could also include providing educational information or assisting a client's work with a computer, special equipment or special materials, provided that the duties do not require psychological education or involve the provision of psychological services or the services or activities of another licensed profession. See Board Rule 465.4

The only unlicensed individuals who may provide psychological services are: (1) individuals practicing in a setting exempt by Section 22(a) of the Act; (2) individuals specifically exempted

from licensure requirements by Section 22(b) of the Act, relating to provision of services as part of a supervised course of study by students, residents or interns pursuing a course of study in a recognized training institution or facility; (3) individuals engaged in post-doctoral supervision for purposes of satisfying Section 21(a)(2) of the Act, and; (4) individuals completing supervised experience for purposes of satisfying Section 26(b)(3) of the Act, relating to Licensed Specialist in School Psychology. See Board rule 465.3(a). These individuals (other than those practicing in a setting exempt by section 22(A)) must be under the direct supervision of a licensed psychologist at all times. All patients or clients who receive psychological services from these individuals must be clearly informed of the supervisory status of the individual and how the patient or client may contact the supervising licensed psychologist directly. See Board rule 465.3(b).

In addition, an individual may not provide psychological services under a license from this Board and services or activities under another professional license simultaneously. Patients and clients who receive services and activities provided by an individual who holds more than one professional license must be informed of the license under which the services and activities are being provided. See Board rule 465.3(c).

The Board also clarified its current supervision rule, which was amended and renumbered as Board rule 465.2, to state that for purposes of this rule, the term "supervision" applies only to clinical supervision; it does not apply to supervision of purely administrative or employment matters.

A by-product of the abolition of the unlicensed extender rule is that it brings the Board supervision rules into line with the requirements of the Texas insurance Code and Board rule 465.36(c)(1)(Z) concerning third party payors. The Texas Insurance Code requires that only individuals specifically designated in the Code may be reimbursed for services. Unlicensed extenders are not recognized as providers of psychological services who may be reimbursed. Therefore, a psychologist utilizing an unlicensed extender would not be able to obtain third party reimbursement for services rendered by an unlicensed extender. The rule and the Code also specify that the identity of the actual provider of the psychological services must be reported to third party payors.

Licenses should note that the Board has no interest in bringing disciplinary actions against licensees who employed extenders at the time when the Board's position on this matter was not clear provided that the licensee was acting in good faith. However, current compliance is mandatory. Failure to comply may result in disciplinary actions being taken against the license.



## **Attorney General Upholds Test Data Rule**

In a recent opinion, Attorney General Letter Opinion 97-073, the Office of the Attorney General upheld Board rule 465.22(d)(5), which maintains that test data is not a part of a patient's psychological records. Therefore, test data are not subject to subpoenas issued pursuant to Texas Health & Safety Code, Chapter 611.006, and do not need to be released upon a patient's request for patient records pursuant to Texas Health & Safety Code, 611.0045.

Psychologists should continue to release test data to other qualified mental health providers upon presentation of a valid release signed by the patient or pursuant to a court order as stated in the rule.

Psychologists who receive a subpoena for patient records which specifically requests test data should notify the requestor that test data are not subject to subpoena; refer the requestor to the Board rule; and, inform the requestor that, upon receipt of a valid court order, the psychologist will produce copies of the test data.

If summoned to court to respond to a request for test data, the psychologist should: (1) explain to the judge the basis for the rule (protect the public consumers of psychological services by protecting the validity of test protocols); and (2) request that if an order is entered to produce the test data that the court include in its order that parties who receive the test data make every effort to maintain the confidentiality of the test data.

## **New Law Creates Provisionally Licensed Psychologists**

As a result of the passage of House Bill 1719 by the 75th Texas Legislature, effective September 1, 1997, TSBEP will no longer offer the credential of certified psychologist. Instead, an applicant must become a provisionally licensed psychologist (PLP) before becoming a licensed psychologist (LP). This type of "licensure" is the same status as what was previously referred to as "certified."

After September 1, 1997, all renewal permits for "certified psychologists" will state that the individual is a "provisionally licensed psychologist." Also, on the Agency's computer data base,

certified psychologists will be listed as provisionally licensed psychologists and will be referred to as such for verification of licensure.

These psychologists may refer to themselves as provisionally licensed psychologists. However, certified psychologists may, if they wish, legally continue to refer to themselves as certified psychologists as long as they are provisionally licensed with this Board and/or until they become licensed as psychologists.

A certified psychologist who wishes to obtain an original license stating that s/he is provisionally licensed must request this in writing and pay the duplicate license fee of \$25. This license will identify the individual as a provisionally licensed psychologist and will bear the original date of certification and the date that the provisional license is issued.

After September 1, 1997, individuals licensed as provisionally licensed psychologists--in other words those who have never been certified psychologists--must refer to themselves as provisionally licensed psychologists, unless and until they are credentialed as licensed psychologists. They may not refer to themselves as certified psychologists.

Another important change effected by House Bill 1719 is that the name of the Act was legally changed to the Psychologists Licensing Act.

#### Guidelines Concerning LSSP Contractual Arrangements for School Psychological Services

There are issues concerning the independent contracting of Licensed Specialists in School Psychology (LSSPs) with public school districts to provide psychological services to students which need to be clarified. The LSSP is a license issued by the Board that is required to provide school psychological services to children who are recipients of the services by virtue of their status as students in a Texas public school district. These services include, but are not limited to, counseling, assessments, writing reports, and recommending school-related placement or treatment. The LSSP does not permit an individual to provide any type of psychological services in the private sector.

#### Contracting Permitted by Board Rules:

Any qualified doctoral or masters level LSSP who meets the Board's criteria to provide services without supervision (see Board rule 465.38(3)) may contract independently with a public school district or a cooperative of public school districts to provide school psychological services on behalf of the district or cooperative. The contract must ensure that the LSSP will provide all services in compliance with the Psychologists' Licensing Act, the rules and regulations of the Board, and all applicable state and federal law.

#### Contracting Not Permitted:

An LSSP may not contract with a private entity or person to provide services of any kind under his/her LSSP license. Trainees, interns, and LSSPs required to practice under supervision, as defined by Board rules, may not enter into an independent contract to provide school

psychological services in a public school district. An LSSP who contracts with a school district may not permit an individual who does not hold a valid LSSP to perform any of the contracted services.

#### Dual Licensure:

Any LSSP who provides psychological services outside of his or her contractual relationship with the public school district must have a separate license to provide services in the private sector. A licensee who holds both an LSSP and a private sector license who offers services to a Texas public school student must notify the student, the student's parent or guardian, and any affected third party as to the license under which s/he is providing the specific psychological services. An LSSP who provides services to a public school student may not provide psychological services under another license to the student as a private patient unless the s/he can demonstrate that it creates no potential for a harmful dual relationship. An LSSP whose private sector license is a Licensed Psychological Associate must provide all private sector services under the supervision of a Licensed Psychologist pursuant to Board rule 465.2, regardless of the fact that the individual is eligible to provide services to public school students as an LSSP without supervision.

#### Records:

All records generated by an LSSP contracting to provide services must comply with all applicable rules concerning public school records. Records of services provided in a private practice setting by an individual who is licensed as both an LSSP and a private sector provider must be kept separate and apart from the records s/he generates in his/her capacity as an LSSP. The licensee's access to any student's public school records, in his/her capacity as a private sector licensee, is governed by the same guidelines and standards that would be used by a non-LSSP licensee to access the child's records.

### **TSBEP Funding and Expenditures**



Contrary to the perceptions of many licensees and applicants, the Texas State Board of Examiners of Psychologists does not have the authority to expend the thousands of dollars in fees that it collects annually. Instead, all fees collected by this agency are deposited directly to General Revenue.

This agency's operating budget is appropriated every two years by the Texas Legislature. The Legislature also places a cap on the number of full-time employees that the agency may hire.

The agency is funded biennially at a rate far below the anticipated collection of fees. In fact, the surplus of fees collected over expenditures by the agency is approximately \$900,000 per year.

During each biennial legislative session, the agency, like all other state agencies, must submit a projected budget for the next biennium. The Texas Legislature typically funds an agency at a level lower than the agency requests.

In the last session, this agency requested \$160,000 for the next biennium above its previous biennium's appropriations and one additional full-time employee. The agency received only \$48,000 of that request and no new employees.

It is often difficult for TSBEP to explain to licensees and applicants why licensing processes cannot be performed in a more timely and flexible manner. The most obvious answer is that this staff is asked to do more and more each year without an increase in staff. Typically, this results in the processing time increasing despite the fact of continual time-saving innovations implemented by the agency. Also, this is the primary reason why the staff cannot be more accommodating to individual licensee requests.

It is also important to note that before this agency can receive any increase in funding from the Legislature, it must demonstrate how the amount of fees collected will increase by that same amount and even more. This usually means the implementation of a new type of fee or raising current fees.

Statistics for fiscal year 1997 for the primary licensing and enforcement responsibilities performed by this agency include, but are not limited to: Renewals, New Licenses Issued, Individuals Examined; Complaints Resolved.

This agency consists of 14 full-time employees: 2 investigators, 1 secretary, 1 attorney, 1 legal secretary, 1 accountant, 1 receptionist, 1 clerk, 4 licensing personnel, 1 executive assistant, 1 director.

### **Information to Be Considered at Board Meetings**

Letters or information that an individual or an organization wishes for the Board to consider at one of its scheduled meetings should be received at the Board office by the deadline for completed files to be presented to the Board. Usually this deadline is approximately three weeks before the date of the Board meeting. Persons may consult the Schedule of Important Dates or contact the Board office concerning a particular deadline

Information received after this date will be held until the following Board meeting.



1997 Roster

The 1997 Roster has been printed and will be distributed in September 1997. LSSPs are not included in this roster because a complete listing was not available by the printing deadline. Therefore, it was determined that these licensees would be included in the 1998 Roster.

As a reminder, if a license was delinquent at the time that the list was formulated from the database for the roster, the licensee's name will not be included in the roster.

#### New Rule Books

The next issue of the updated rulebook is currently being printed and will be distributed in November 1997.

#### New Policy on Communication Regarding Licensure

A new policy passed by the Board states: Staff members may not comment or respond to questions concerning pending applications orally or in writing unless the request for information comes directly from the applicant. Staff will respond to inquiries from family members, spouses, or friends of an applicant or other individuals concerning an application only in situations where the applicant is incapable of personally making inquiries and has delegated in writing that the individual is acting as his/her agent and only during the applicant's incapacitation.

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