

Texas State Board of Examiners of Psychologists

May 11, 2017 Newsletter

TSBEP Votes in Support of the Texas Behavioral Health Executive Council

At the February 16, 2017 meeting of the Texas State Board of Examiners of Psychologists (TSBEP), the board voted unanimously in support of the Texas Sunset Advisory Commission's recommendation to create a new oversight board, the Texas Behavioral Health Executive Council (TBHEC). The Sunset Commission recommended the creation of this Executive Council to merge and have oversight of the agencies and programs regulating psychologists, marriage and family therapists, professional counselors, social workers, sex offender treatment providers, and chemical dependency counselors under a single, umbrella licensing agency.

The key points leading to this decision by TSBEP are as follows:

- The only process for continuing the Texas State Board of Examiners of Psychologists (TSBEP) as an independent board, based on the recommendations and wording of the Texas Sunset Advisory Commission, was through the creation of the TBHEC and TSBEP's inclusion in this new Council.
- The U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015) requiring states to provide active state supervision of regulatory agencies, when the governing body of those agencies is made up of a controlling number of active market participants, before the state can claim state action immunity in response to any anti-trust claims brought under the Sherman and Clayton Acts. The court made very clear that the active state supervision referenced must include a substantive review of agency rules and decisions by a supervisor, not merely the procedures used by the agency; the ability of a supervisor to veto or modify a particular agency rule or decision; and that the supervisor may not itself be an active market participant. TSBEP, like many other licensing boards in the nation, is at legal risk and cannot claim state action immunity without the new Executive Council, which has been designed to rectify the lack of oversight.

Additionally, it is important to note that according to the bills introduced, the Executive Council will consist of a majority of public members, not professional members as has been suggested by some in the profession. This is an important distinction because on its face, a majority of public members meets the requirement for oversight from someone other than active market participants. Moreover, the Executive Council would also be subject to the existing requirement that legal counsel certify each proposed rule as being within the agency's authority to adopt. This too is important because with the authority to hire and fire agency staff residing exclusively with the Executive Council, agency counsel can operate free of any concern about

losing his or her job if he or she refuses to certify a rule proposed by one of the member boards. The independence of legal counsel's decision on whether to certify a rule in this context can only serve to strengthen any claim of state action immunity asserted by a member of the Executive Council.

- The structure for the new Council will not change the role or mission of TSBEP, keeping in place the current Board's responsibility for implementing the Psychologists' Licensing Act through the development of rules for the practice of psychology in Texas. For example, according to the bills introduced in the House and Senate, the Board will retain the exclusive authority to develop rules for proposal regarding qualifications for licensure, the scope of practice, standards of care and ethical practice, continuing education requirements, and a schedule of sanctions for violations of the laws governing psychology. And while the Executive Council may adopt or reject a rule proposed by this board, it is expressly prohibited from making any changes to the rule. Additionally, the Executive Council will be required to solicit input and assistance from this board when addressing a complaint involving a standard of care or ethical practice issue. To summarize, the biggest change expected is that when TSBEP votes to make a change to its rules, those changes will have to be reviewed by the Executive Council to determine if any antitrust laws are implicated before the changes can be adopted.
- The new Executive Council's staff is expected to be many of the same agency employees who have provided services to licensees over the years. However, because staff will be serving more than just this agency, some additional staff will be needed.

To give the reader a better idea of the structure of TBHEC and where TSBEP fits into the framework, an organizational chart has been included for your convenience.

Lastly, while the members of this board certainly understand the hesitancy of some stakeholders to support the creation of the Executive Council, the Board genuinely believes that its licensees will not see any significant changes in the processes currently in place for licensure, renewals, or discipline as a result of the creation of TBHEC. The Board would however, receive the oversight required by the North Carolina Dental Board case and its board members would not be subject to individual liability for any anti-competitive rules or actions undertaken by the Executive Council or a member board.

Texas Behavioral Health Executive Council Structure



**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE
MAY 11, 2017 BOARD MEETING**

NAME	CITY	NATURE/INFRACTION	DISCIPLINARY ACTION
Darrah, Kathleen M., M.Ed.	Houston	Continued providing services when she knew or should have known she was not competent due to a physical or mental impairment or personal issue; failed to comply with a Board directive; and failed to cooperate with a Board investigation.	Revoked.
Love, Christopher L., M.S.	Ferris	Failed to obtain the minimum required professional development hours for renewal.	Administrative penalty.