

Texas State Board of Examiners of Psychologists

May 2018 Newsletter

The LPA and Independent Practice

By: Darrel D. Spinks, Executive Director, Texas State Board of Examiners of Psychologists

The duties and decisions imposed upon state agencies are inescapable, and seldom easy. Theodore Roosevelt is often credited with saying, “In any moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing.” This statement is one that accurately reflects the difficult choice faced by the Texas State Board of Examiners of Psychologists when it recently decided to create a pathway to independent practice for licensed psychological associates (LPA). It is my hope that this article will provide the reader with greater insight into some of the factors that played into the Board’s decision to allow qualified LPAs to practice independently.

While the prevailing view of the regulatory landscape in this state has remained virtually unchanged for forty-plus years, a recent shift in political and legal thinking, as well as a public need, has emerged that directly impacts the status quo. Leaders at both the state and federal level have been forced to shift their search for solutions to shortages of providers in regulated fields such as mental health care, in response to a growing number of challenges to state regulatory authority and the recent U.S. Supreme Court decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission*.

While not an exhaustive list, some examples of this shift in thinking include:

- The Whitehouse Report on Occupational Licensing
- The Texas Supreme Court decision in *Patel v. Texas Department of Licensing and Regulation*
- The Federal Trade Commission Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants
- The State Center’s Primer for State Regulatory Board Supervisors and Counsel

Since the Board’s inception, the independent practice of psychology in Texas has, for the most part, been the exclusive realm of doctoral level providers. Masters level providers, i.e. LPAs, were permitted to practice, but could only do so under the supervision of a licensed psychologist. However, due in part to the shift in political and legal thinking referenced above, this traditional demarcation has been called into question, namely during the Board’s December 2016 Sunset hearing. It was during that hearing that the Sunset Advisory Commission learned there was no express statutory basis for the Board’s lifetime supervision requirement for LPAs – the concern about express statutory authority arising directly out of the North Carolina Dental Board case. Moreover, some members of the Commission expressed interest in ensuring the Board was not creating unnecessary barriers within the profession and thereby limiting the number

of qualified providers available to practice independently.

You can view this hearing by [clicking here](#). The portion of the hearing relevant to TSBEP starts at 2:28:00, with the Sunset staff testimony, and the TSBEP testimony runs from 2:38:50 through 3:18:00. The public testimony begins at 3:18:00, and the reader is encouraged to watch the testimony beginning at 4:03:00 and running through 4:30:00 regarding LPA practice restrictions, as well as the questions posed to me regarding same by Senator Van Taylor.

Following that hearing, the Board was directed to conduct an evaluation of its rules and repeal any rule that it deemed susceptible to legal challenge based on the North Carolina Dental Board case. Upon conclusion of its review, the Board had some concerns that its lifetime supervision requirement for LPAs could be susceptible to legal challenge under federal law. Thereafter, and following consideration of several other factors relevant to the issue of independent practice by LPAs, the Board voted to repeal the lifetime supervision requirement and create a pathway to independent practice in its place.

While there were many individuals and associations who actively opposed this rule change, none offered any empirical support for their claims. In fact, some merely alleged that the Board acted out of cowardice or an irrational fear of litigation¹ when making its decision. Although the purpose of this article is not to restate the

¹ For those who believe the Board's concerns about the impact of the North Carolina Dental Board case are exaggerated or ill-founded, you are encouraged to watch the Texas Department of Motor Vehicles' public hearing before the Sunset Advisory Commission on May 23, 2018. During that hearing,

arguments for and against the rule change, it is important for the reader to know that the Board took those actions it believed were appropriate based upon the competent evidence and arguments presented. Given the mere anecdotal observations and conclusory statements offered by those in opposition to the rule change, to do nothing – or to maintain the status quo – was simply not an option. Furthermore, while the questions surrounding the legality of the lifetime supervision requirement certainly played a role in the Board's decision to eliminate the restriction, one cannot in good faith deny the effect that the lifetime supervision requirement had on the public's accessibility to qualified LPAs. Nor can one deny in good faith how the repeal of this restriction could help attract or retain more mental health care providers in Texas.

Additionally, while there has been a great deal of confusion and misinformation spread about the purpose and effect of this rule change, the changes adopted in Board rule 463.8 do not expand the scope of practice for LPAs, or diminish or abolish the distinctions in training or education between a doctoral and sub-doctoral level provider. The changes to 463.8 simply allow an LPA to practice independently, i.e. without supervision, if the LPA meets certain requirements. A brief overview of those requirements can be found on the Board's website by [clicking here](#). Furthermore, the Board's competency rule continues to apply to LPAs, regardless of whether they are practicing independently or under supervision. This means that LPAs may only provide those services for which they

Senator Watson provides a clear and succinct description of the issue and why it must be addressed. The hearing may be viewed by [clicking here](#). The relevant portion of the hearing begins at 1:05:30 and runs through 1:35:45.

have the necessary education, skills, and training.

In closing, it goes without saying that the decision to create a pathway to independent practice for LPAs was controversial. However, given the significant need for mental health care providers in this state, the absence of any data supporting the need for a lifetime supervision requirement, the directive from the Sunset Advisory Commission, as well as the political and legal forces in play, it was and continues to be my belief that the Board made the right decision.

Office of the Attorney General Opinion No. KP- 0198 – Billing of Third- party Payers

Following its November 9, 2017 meeting, the Texas State Board of Examiners of Psychologists submitted a request for an opinion to the Attorney General regarding the following question.

Whether a licensed psychologist may submit a bill to a third-party payer under the licensed psychologist's name without indicating that the psychological services rendered were provided by a supervisee.

In particular, the Board was concerned about the interplay between Section [501.351\(b\)](#) of the Psychologists' Licensing Act, Board rule [465.15\(a\)\(4\)](#), Section [35.02](#) of the Penal Code, and Section [105.002](#) of the Occupations Code.

A copy of the Board's request can be viewed by [clicking here](#).

On May 14, 2018, the Office of the Attorney General issued its opinion whereby it opined that a court would likely construe Section 501.351(b) to permit a psychologist to submit a bill to a third-party payer under the psychologist's name without indicating that the psychological services rendered were provided by a supervisee.

A copy of the Attorney General's opinion can be viewed by [clicking here](#).

The Board would like to take this opportunity to emphasize that despite the Attorney General opinion on this matter, licensees must continue to identify any services delegated to or rendered by a supervisee when billing under Medicaid rules².

² See Texas Medicaid Provider Procedures Manual, May 2018, Volume 2, Behavioral Health and Case

Management Services Handbook, Subsection 4.2.3 regarding *Delegated Services*.

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE
FEBRUARY 15, 2018 BOARD MEETING**

NAME	CITY	NATURE/INFRACTION	DISCIPLINARY ACTION	DATE
Shaw, James A., Psy.D.	Austin	Failed to provide accurate and correct information in license renewal application	Reprimand, administrative penalty, and professional development	02/15/18
Wills, Curtis E., Ed.D.	Houston	Continued providing services when he knew or should have known he was not competent due to a physical or mental impairment or personal issue; failed to comply with a Board directive; failed to cooperate with a Board investigation; and failed to report an arrest	Revocation	02/15/18
Ferrell, Jack G., Jr., Ph.D.	San Antonio	Failed to comply with a Board order; failed to obtain informed consent prior to initiating services; failed to respond to requests for records; and failed to cooperate with a Board investigation	Revocation	02/15/18

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE
MAY 24, 2018 BOARD MEETING**

NAME	CITY	NATURE/INFRACTION	DISCIPLINARY ACTION	DATE
McElveen, Brandon Thomas, M.S.	Houston	The licensee was arrested and charged with criminal acts of indecency with children.	Resigned in lieu of adjudication.	05/24/18
Renfroe, Thomas Wilson, Jr., Psy.D.	Tyler	The licensee made a comment to and physical contact with a patient that the patient found unwelcomed, inappropriate, and offensive.	Administrative penalty.	05/24/18