

Texas State Board of Examiners of Psychologists

Newsletter Vol. 27, No. 2

Online Training for HIPAA Now Available:

The U.S. Department of Health & Human Services, Office for Civil Rights has developed a set of computer-based training modules for covered entities and business associates to help them comply with the privacy, security and breach notification rules. These training modules cover various aspects of the HIPAA Privacy and Security Rules, and may be found at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/training/index.html>.

Security Risk Assessment Software Now Available for Download:

The Health Insurance Portability and Accountability Act (HIPAA) Security Rule requires that covered entities conduct a risk assessment of their healthcare organization. A risk assessment helps your organization ensure it is compliant with HIPAA's administrative, physical, and technical safeguards. A risk assessment also helps reveal areas where your organization's protected health information (PHI) could be at risk.

The U.S. Department of Health & Human Services has developed free software available for download to help providers conduct the required risk assessment. This software may be found at <http://www.healthit.gov/providers-professionals/security-risk-assessment>.

Declaration for Mental Health Treatment

The mental health arena has a legal instrument similar to the directive to physician and DNR typically found in estate planning documents. It allows individuals to dictate their wishes for mental health care in case that individual becomes unable to authorize their own mental

health care. The wishes may include what treatments may or may not be performed.

Properly called a *Declaration for Mental Health Treatment*, it is authorized by Texas Civil Practice and Remedies Code (CPRC) Chapter 137.

- A. **What the declaration encompasses.**
A declaration for mental health treatment can dictate the types of medications that can be given, consent (or lack thereof) to convulsive treatment, and the use of restraint, seclusion, and medication and the order of preference for each. CPRC §137.011.
- B. **Who may execute and period of validity.**
Any adult (18 and above) who has not been deemed incapacitated by court order may execute a declaration for mental health treatment. The declaration expires on the third anniversary of its execution or when it is revoked by the person who made the declaration. Of note, if the declarant becomes incapacitated while the declaration is still active, it remains in effect until the declarant is no longer incapacitated. CPRC §137.002.
- C. **Impact of a declaration for mental health treatment.**
Once an individual makes a declaration for mental health treatment, that document becomes part of that individual's medical record. CPRC §137.007. If an individual is determined by a court to be incapacitated, their mental health decisions are dictated by the declaration for mental health

treatment, and mental health care providers must act within the confines of the declaration. CPRC §137.004. If a physician or mental health provider is unwilling to comply with a declaration for mental health treatment, they may withdraw from providing treatment and must: (1)make a reasonable effort to transfer the case to a provider who is willing to comply with the declaration; (2)notify the declarant or their guardian, if appropriate, of the decision to withdraw; and (3)record in the declarant's medical record the notification and the name of the provider to whom the declarant is transferred. CPRC §137.007.

D. Conflicting or contrary provisions.
The declaration for mental health treatment supersedes any contrary or conflicting instructions given by a durable power of attorney or a guardian appointed after the declaration was made. CPRC §137.009.

E. Liability.
An attending physician, health or residential care provider, or someone acting under their direction, is not criminally, civilly, or professionally liable for an act or omission if that act or omission was done in good faith under the terms of the declaration for mental health treatment. Additionally, they are not liable for failure to act in accordance with the declaration if they were not (1)provided with a copy of the declaration, and (2)had no knowledge of the declaration after making a good-faith effort to learn of the existence of a declaration. CPRC §137.005.

F. Discrimination relating to the execution of declaration for mental health treatment.

A health or residential care provider may not charge a different rate solely because a person has executed a declaration for mental health treatment. They also may not require a person to execute a declaration for mental health treatment, refuse care solely because the person has executed a declaration, or discharge a person because they have or have not executed a declaration for mental health treatment. CPRC §137.006.

G. Disregard of declaration for mental health treatment.

A health care provider may provide treatment contrary to a declaration only if the declarant is under a court order under Health & Safety Ch. 574, or in case of an emergency when the declaration's instructions have not been effective in reducing the severity of the behavior that caused the emergency. A declaration for mental health treatment does not alter the ability for emergency detention under Health & Safety Code Ch. 573 or court-ordered mental health services under Health & Safety Ch. 574. CPRC §137.008.

H. Revocation.

A declarant who is not incapacitated may revoke the declaration by (1)notifying a licensed or certified health or residential care provider of the revocation, (2)acting in a manner that demonstrates a specific intent to revoke the declaration, or (3)executing a subsequent declaration for mental health treatment. Upon receiving notice of revocation, a health or residential care provider shall immediately record the

revocation in the patient's medical record and give notice of the revocation to any other health or residential care

providers known to be responsible for the patient's care. CPRC §137.010.

Informed Consent in Public Schools

The Texas State Board of Examiners of Psychologists (TSBEP) receives many requests for clarification of Board rules as they relate to informed consent in public schools. The TSBEP recognizes the unique difference in the delivery of school psychological services from that of the private sector and would like to offer clarification for LSSPs regarding the issue of informed parental consent. Before this issue is addressed, it is important to note that the TSBEP has no regulatory authority over public schools in Texas. However, since the TSBEP issues the required license for providing school psychological services in public schools (i.e., the LSSP), the TSBEP is required to regulate the "activities" of those individuals practicing with this license. In an attempt to address the regulatory requirements for LSSPs, particularly the requirements for informed parental consent in public schools, the Board offers the following clarifications:

LSSPs assigned to federal support programs (e.g., special education):

- When LSSPs are assigned by a public school to provide psychological services to eligible students in federal programs (such as special education) the federal requirements for these programs, including the requirements for informed parental consent, super cede Board rules.

LSSPs assigned to general education programs:

- When LSSPs are assigned by a public school to work with other populations of students (i.e., general education), the "activities" may or may not be considered "psychological services". Many of these activities are focused on prevention and support services and may not rise to the level of "psychological services", but may be considered "educational services". An example of an educational service might be *consultation*. However, since consultation might also be considered a psychological service, some differentiation is necessary.

Consultation as an *educational service*:

When consultation provided by an LSSP focuses on school-wide or classroom interventions aimed at all students or targeted groups of

students as part of a Response to Intervention (RtI) process, this activity might be considered an “educational service”.

Consultation as a *psychological service*:

When consultation provided by an LSSP focuses on targeted interventions for a specific student, this activity rises to a level of a direct service that might be considered a “psychological service”. Thus, LSSPs must determine if the activity they are performing rises to the level of “psychological services”, which would require informed parental consent.

When determining if an activity rises to the level of a “psychological service”, LSSPs should consider the questions provided in Figure 1 below:

Figure 1:

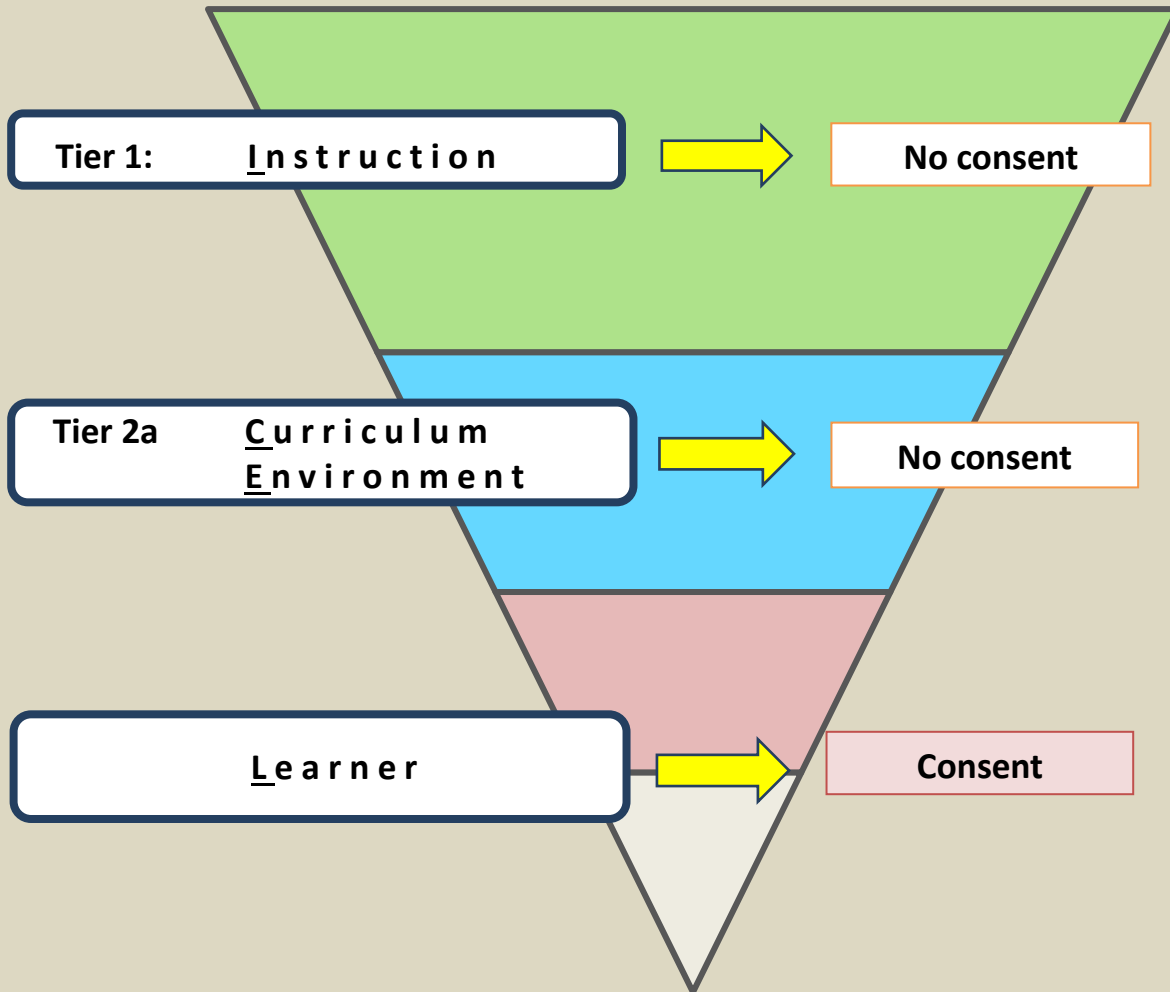
1. Does the activity require the individual to hold a specific license or credential in order to provide that activity in the public school (e.g., counseling, assessment, etc.)?
- 2. Is the activity solely reliant upon specialized education and training in psychology and psychological principles (such as that held by an LSSP)?**
- 3. Would the activity constitute the practice of psychology as defined by TSBEP and the Psychologists’ Licensing Act?**
4. Does the activity include direct student services (i.e., services that are not under the authority of the teacher or other staff member)?

If the answer to any of the above questions is “yes”, then the service should be considered a “psychological service”, which would require informed parental consent.

It should be noted, however, that questions #2 and #3 may be more challenging to answer when performing activities in a prevention-focused model, such as RtI. As a guide, the LSSP might consider other *domains* that could be impacting a student’s performance before providing student-focused consultation. These other *domains* are represented by the ICEL acronym – *Instruction, Curriculum, Environment, Learner*. It is possible that

these *domains* can be altered before the LSSP provides consultation focused on the individual student (which would require informed parental consent). Below is an illustrated example (Figure 2) of how the ICEL *domains* might be considered within the context of the RtI process and when consent would be necessary. For example, if the LSSP were consulting at Tier 1, the LSSP might consider instructional issues that could be impacting student performance before the LSSP focused on a concern for a particular student. Thus, no consent would be necessary since the focus is on instructional strategies and not on an individual student. Likewise, at Tier 2a, the LSSP might consider curriculum and environmental issues that could be impacting student performance before the LSSP focused on a concern for a particular student. Again, no consent would be necessary since the focus would be on the curriculum and environmental issues (e.g., classroom routines and structure) and not on an individual student. However, when an LSSP provides consultation at Tier 2b and Tier 3, issues become focused on the learner, or individual student. Thus, informed parental consent would be necessary.

Figure 2: Informed Consent Conceptual Framework within an RtI Model -Addressing ICEL Domains



Summary:

- TSBEP does not have the authority to regulate school districts, it only has the authority to regulate the “activities” of the individuals licensed by the Board (which includes LSSPs).
- The activities of LSSPs assigned to work with eligible students in federally-funded programs, such as special education, *may* be regulated by federal requirements that super cede TSBEP regulations, including requirements for informed parental consent.
- The activities of LSSPs assigned to work with students in general education settings may or may not rise to the level of “psychological

services", but some activities performed by LSSPs may be considered "educational services" and not subject to Board regulation.

- LSSPs should consider the four questions identified in Figure 1 to help differentiate "psychological services" from "educational services"
- When providing consultation within a school's RtI process, the consultation may not require informed parental consent if it is focused on other *domains* and not on the individual learner/student.

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE
MAY 8, 2014 BOARD MEETING**

NAME	CITY	NATURE/INFRACTION	DISCIPLINARY ACTION	DATE
Anderson, Emily Fraley	Austin	Failed to report legal actions taken against licensee	Administrative penalty and additional professional development	05/08/14
Butler, Lillian Carol	Austin	Failed to provide records as required by law	Administrative penalty and additional professional development	05/08/14
Dye, Lara	Austin	Failed to report legal actions taken against licensee	Administrative penalty and additional professional development	05/08/14
Hagey, Steven L	Austin	Failed to provide records as required by law	Reprimand, administrative penalty and additional professional development	05/08/14
Ratliff, Nancy Deel	San Antonio	Failed to provide records as required by law	Administrative penalty and additional professional development	05/08/14