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November 30, 2016

The Honorable Larry Gonzales, Chair
Sunset Advisory Commission
Robert E. Johnson Bldg., 6th Fl.
1501 N. Congress Ave.
Austin, Texas 78701

Re: Agency Response to Health Licensing Consolidation Project Report

Dear Chairman Gonzales:

The Texas State Board of Examiners of Psychologists (Board) reviewed and considered the Sunset Advisory Commission Staff Report (staff report) issued on November 2, 2016 at its regularly scheduled meeting on November 10, 2016. Following a thorough discussion of the report and the possible issue of consolidation, and after taking into consideration input received from agency staff, licensees, stakeholder associations, and members of the public throughout the review cycle, the Board presents the following responses to the Health Licensing Consolidation Project report (consolidation report) and the related findings in the staff report.

Issue: Consolidation of the Texas State Board of Examiners of Psychologists with the Health Professions division at TDLR.

Consolidation Report Recommendation: Transfer 10 health licensing programs, including TSBEP, to the Health Professions division at TDLR and reconstitute the associated regulatory boards as advisory boards.

Summary of Agency Response: The Board disagrees with this recommendation.

Discussion: The Texas State Board of Examiners of Psychologists was created by the 61st Legislature in 1969 to protect the public by ensuring that psychological services are provided to the citizenry by qualified and competent practitioners who adhere to established professional standards. This overarching goal is derived from the Psychologists' Licensing Act (Act) and supersedes the interest of any individual or special interest group. The Board, while effectively carrying out this mission as an independent agency for 47 years, is now faced with the prospect of having its functions transferred to a sister agency whose stated mission, while laudable, is seemingly more narrow in scope and focused more on internal

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regulatory efficiencies rather than public protection¹. The Board believes the current consolidation recommendation to be a significant misstep, and urges the Commission to keep in mind the prior determinations by the Legislature which continued the Board as an independent agency with a focus on public protection. In order to assist the Commission with its decision making, the Board will attempt to identify and discuss below each of the reasons given for consolidation set forth in the staff and consolidation reports.

Reasons Reported for Consolidation

According to the findings set out in the staff report, the Board is considered a candidate for consolidation because of:

- Staff turnover, or the potential thereof
- Customer service
- Limited information technology resources
- Costs of litigation

The consolidation report discusses the following reasons for consolidation:

- Duplication of administrative structures
- Slow complaint resolution
- Limited or no fingerprint background checks
- Unnecessary burdens to licensure
- Ineffective complaint prioritization
- Lacking consistency in penalties
- Cost due to lack of economies of scale
- Staff turnover posing a high risk to agency functions
- Size and resources limit effectiveness and customer service
- Agency practices that risk exposing confidential health information or discouraging patients from filing complaints on licensees

The Board will address each of the foregoing grounds for consolidation below, but not necessarily in the order they appear above. The Board will also address several additional arguments it identified in the reports that were not tied directly to any of the foregoing items.

First, with regard to staff turnover serving as a basis for consolidation, the Board contends that this is not an issue unique to smaller independent agencies, but rather a concern shared equally by all state agencies. No further proof is needed than to look at the multitude of LAR requests submitted over the years, including those of TDLR for the 2016-17 biennium, listing employee turnover as a justification for special exception items. With that being said, the Board does not believe the true concern behind this factor to be staff turnover, but rather how small independent agencies address or compensate for that turnover. In this regard, the Board believes its track record on performance measures demonstrates that it has the appropriate measures in place to weather periods of high turnover without negatively impacting its regulatory functions.

¹ TDLR's mission statement reads "To be the leader in public service by creating innovative, low-cost licensing and regulatory "next" practices, and cultivating highly-engaged employees who provide exceptional customer service." See <https://www.tdlr.texas.gov/compact.htm>.

According to the most recent statewide turnover report², the statewide turnover rate, excluding interagency transfers, was 18% and the statewide turnover rate excluding involuntary separations and retirements was 10.5%. This latter rate is often considered more of a true turnover rate because it reflects preventable turnover. Thus, while the state as a whole experienced turnover at the rate of 18% in fiscal year 2015, the Board fared much better with a rate of only 7.8%. However, the Board readily acknowledges having experienced some years with higher than normal turnover rates³. During those years though, the Board was still able to meet or exceed most, if not all of its performance measures, despite the myriad risks associated with significant staff turnover identified in the reports. The Board believes this is the result of its extensive cross-training required between positions; its use of statewide systems for payroll, accounting, and property management; and a work environment that fosters dedicated and engaged staff⁴ who take pride in performing their jobs well and assisting their colleagues when needed. The Board respectfully requests that the Commission take note of its performance history in this regard, as this is something both reports fail to acknowledge.

Second, the Board does not believe costs of actual or hypothetical litigation should serve as a basis for consolidation. The reported rationale for this factor fails to acknowledge the practical reality that the Attorney General and Solicitor General, with limited exception, represent state agencies both offensively and defensively at no cost to the agency. Thus, the Board does not see any greater efficiencies or cost savings associated with consolidation in this regard. Furthermore, while the consolidation report makes a brief reference to the Board being required to pay a judgment out of its fiscal year 2017 budget, the report fails to mention that the Board was able to plan for this event, and anticipates being able to satisfy that judgment once it becomes final without any negative fiscal impact on its operations and without receiving either emergency or supplemental appropriations. Thus, the Board fails to see what problem has gone unresolved in this regard justifying consolidation. The Board would also like to take this opportunity to point out that no state agency is appropriated funds for the purpose of paying prospective or hypothetical judgments entered against it at some undetermined point in the future. However, if the Commission is genuinely concerned about litigation costs, the Board believes the most reasonable and cost effective approach to addressing that concern would be to grant each agency a rider similar to the one found in TDLR's bill pattern regarding judgments and settlements. According to that rider, any judgment entered against TDLR arising out of a federal civil rights case⁵ must be paid by the Comptroller, and not from agency funds. The Board believes this approach would be much more cost effective, and represents a much cleaner and simpler solution over consolidation.

Third, the Board disagrees that it has put any unnecessary barriers to licensure in place. The only arguable barriers to licensure identified in this review appear in the staff report; the consolidation report fails to identify any barriers to licensure attributable to this agency. The purported barriers identified in the staff report were the oral exam, the post-doctoral year of supervised experience, and the reference letter requirement. The Board has previously agreed with the recommendation to eliminate the reference letter requirement, but both the oral exam and post-doctoral year appear in statute and are beyond the Board's control. Thus, the Board believes it unfair to imply it has unduly burdened applicants by relying upon statutory criteria. The Board respectfully requests that the Commission take this into consideration,

² SAO Annual Report on Classified Employee Turnover for Fiscal Year 2015, December 2015, Report No. 16-702

³ The agency's turnover rate for fiscal year 2014 was 37%. However, when you exclude involuntary separations and retirements, the Board's voluntary turnover rate for that same year drops to 14.8%, a figure below the statewide rate of 17.5%.

⁴ See the 2016 Survey of Employee Engagement beginning on pg. 48 of the Board's [strategic plan](#).

⁵ TDLR has requested in its current LAR that the language of the rider be expanded to include all litigation involving the validity or constitutionality of a state law, rather than be limited to only federal civil rights actions.

along with the agency’s prior responses concerning the oral exam and post-doctoral year when deciding the consolidation issue.

Fourth, the Board is concerned the cost savings projections set out in the report are too speculative to be relied upon given the significant differences between regulating a profession like psychology and occupations and small industry like those currently under regulation at TDLR. The Board would pause to say that it sincerely hopes the reader understands this response is not intended to “cast stones” or imply any type of misrepresentation on the part of its staff or that of TDLR; rather, the Board is concerned that the consolidation of professions like psychology, counseling, optometry, podiatry, etc. with TDLR represents a fundamental mismatch between the agency expertise and the regulated field, and will be more problematic for TDLR than any prior consolidation it has experienced. This belief is based in part upon what is known about regulating health care providers such as psychologists under a consolidated regulatory scheme. By way of example, the Health Professions Council’s (HPC) annual reports⁶ regularly reflect that this agency provides lower costs per licensee than either of its counterparts in California or Florida, both of which employ a consolidated regulatory scheme similar to the one being proposed in the consolidation report. As a result, the Board believes additional funding will eventually be necessary if consolidation under TDLR is approved, thereby reducing any cost savings to a nominal amount, or eliminating those savings altogether. The consolidation report also hints at this possibility when it states “...TDLR has the expertise to reassess after consolidating these programs and determine the appropriate number of FTEs and funding necessary to retain effective and efficient regulation of these professions.” Given the relatively small amount of projected cost savings, likelihood for additional funding needed, and disconnect between TDLR and the regulated professions in question, the Board does not believe the proposed consolidation represents the best course of action for Texans.

Fifth, while the Board certainly understands the desire to maximize regulatory efficiency, the Board believes both the staff and consolidation reports fail to acknowledge the many accomplishments and positive aspects of this agency’s operations. To begin with, this agency has consistently performed well in the area of customer service. By way of example, according to the Board’s most recent *Report on Customer Service*⁷, the agency’s overall satisfaction rating was 88%, with its lowest satisfaction rating of 69% coming from complainants in the disciplinary process. For the reader’s convenience, the agency has included the chart to the right detailing its most recent customer service numbers. The Board has also gone further than many large agencies like TDLR by making upper management and agency counsel available to licensees and the public alike to address complaints about staff and answer questions about state law and board rules. And while the Board is constantly looking for ways to improve upon its customer service and readily admits that it has not achieved 100% customer service satisfaction across the board, the Board believes it unfair to characterize its customer service as deficient to the degree that consolidation is the answer.

FY2016 Customer Service Satisfaction Ratings	
Oral Examinee Satisfaction Rating	94.86%
Oral Examiner Satisfaction Rating	99.64%
Written Examinee Satisfaction Rating	94.80%
Open Records Satisfaction Rating	97%
Applicant Satisfaction Rating	83.41%
Licensee Satisfaction Rating	89.58%
Complainant Satisfaction Rating	69.58%
Respondent Satisfaction Rating	77.36%

Furthermore, the Board disagrees that its IT resources and electronic footprint somehow lag substantially behind that of larger agencies such as TDLR. Currently, the Board, along with four other members of the

⁶ See <http://www.hpc.texas.gov/annual-reports/>

⁷ The Board’s customer service reports may be found at www.tsbep.texas.gov/additional-information.

Health Professions Council and the Boards of Plumbing Examiners and Professional Land Surveying, utilize the most advanced version of the Versa Regulation database available. This database not only provides expanded functionality to the Board, but it also provides the public with real-time access to licensee information through a public search function; allows licensees to renew their licenses online; and provides access to an online public profile for each licensed psychologist. The Board also anticipates that beginning in 2017, all of its disciplinary orders will be made publicly available through the public search function as well. It is also the Board's understanding that TDLR is either currently using an older version of Versa or only recently upgraded to the newest version, and continues to use several other older database systems in connection with some of its programs. Thus, with regard to database systems, the Board believes, thanks in large part to its participation in the Health Professions Council, it is in fact ahead of, or at least on par with TDLR. The agency is certainly not below TDLR's "existing level of software sophistication" as asserted in the consolidation report. Moreover, as noted in the Board's strategic plan, LAR, and website, the agency currently accepts applications through the PLUS System, a secure online application system designed with mobility between licensing jurisdictions in mind. The Board is also exploring the online application function built into its database system. Both of the online application systems identified would represent a no-cost option to the state, but the Board believes it prudent to wait until the conclusion of its Sunset review and the upcoming legislative session before making a decision about which system would benefit the agency and public more. Legislative changes stemming from this review or the upcoming session may impact the agency's decision making process.

Sixth, the Board disagrees with the assertion that duplication of administrative structures and costs due to a lack of economies of scale necessitate consolidation in this particular case, or that it dedicates a larger portion of its resources to administrative functions. The Board would again highlight to the Commission that the *projected* costs savings following consolidation of all nine agencies identified in the consolidation report is only \$281,047, a relatively small amount given the number of agencies being considered for consolidation. Furthermore, the consolidation report has left the door open for additional funding because of the likelihood that it will be needed once all of these agency functions have been consolidated at TDLR. It should be noted that neither the staff report nor the consolidation report break down the projected cost savings for each individual agency, thus the agencies are unable to provide the Commission with a more detailed response in this regard. And finally, contrary to the assertion that "[s]mall, stand-alone health licensing agencies dedicate a larger portion of resources to administrative functions," the Board would point out that 70% of its staff are directly involved in licensing or enforcement.

The Board would also take this opportunity to mention a few facts not referenced in the staff or consolidation reports that weigh against consolidation, namely the roles that the Health Professions Council and inter-agency memorandums of understanding (MOUs) play in achieving cost savings through economies of scale. The Health Professions Council was established in 1993, and consists of fifteen member agencies tasked with regulating 45 different programs, as well as a representative from the Office of the Attorney General and the Governor's Office. The Council was created to achieve the benefits of consolidation without sacrificing the quality, independence, accessibility, and accountability of independent health licensing and regulatory agencies. The Board firmly believes that the Council continues to serve its foundational purpose, with the prime example being the advanced database system shared by many of its members, and some non-member agencies as well. In addition to operating the shared database and providing IT support services, the Council has realized economies of scale in the areas of human resources, staff and board member training, policy and procedures development, minimum data set, legislative bill tracking, courier services, and assisting member agencies with providing interpretation services. Additionally, the collaborative effort and spirit that has naturally

evolved between the member agencies has allowed those agencies to rely upon one another in difficult times. By way of example, the Board's CFO has assisted both the Dental Board and Board of Plumbing Examiners when they were without a CFO, and many of the agencies share equipment and resources that would otherwise be unavailable to the borrowing agency due to limited budgets. Moreover, many of the member agencies have MOUs with one another to keep costs down. Again, by way of example, the Board's CFO provides accounting services to the Funeral Service Commission under an MOU, and many of the member agencies have MOUs with the Council for IT support. While none of these cost saving efforts were mentioned in the staff or consolidation reports, they have proven to be both effective and popular, so much so that non-member agencies, i.e. the Office of Public Insurance Council and the Texas Board of Professional Geoscientists, have entered into MOUs with the Council for shared IT support services. While the Board certainly understands the concerns set forth in the staff and consolidation reports regarding duplication of administrative functions and cost savings resulting from economies of scale, the Board believes the Commission should take into consideration the considerable pro-active measures taken by this agency, together with the other members of the Health Professions Council when deciding the consolidation question.

Seventh, the Board does not believe the functional divisions at TDLR are any different than the Board's current structure, or that consolidation with TDLR will provide any greater protection against anti-trust liability than what virtually all occupational licensing agencies face now with their current structures. The consolidation report places great emphasis on the functional divisions at TDLR, such as customer service, licensing, enforcement, and administrative services. The report also goes on to say that by utilizing such divisions, its staff are able to specialize in a particular task. The Board has been utilizing an almost identical functional division since its inception long before TDLR was created. Furthermore, because the public commission component of TDLR does not possess the power to modify any proposed rules that come before it, the Board does not believe TDLR's structure comports with the active supervision requirement set out in N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, (U.S. 2015) necessary to invoke state-action immunity. The Board respectfully requests that the Commission take these key factors into consideration when rendering its decision.

Eighth, the Board would point out that, much like the reference to TDLR's record for reducing fees on pg. 10 of the consolidation report, it too could reduce regulatory fees if the agreed upon recommendation 3.1 from the staff report were implemented. The Board would also note that not requiring agencies to raise fees to cover requested budget items when excess revenue is available would assist agencies with keeping regulatory fees low as well.

Lastly, many of the factors listed in the consolidation report as reasons for consolidation simply do not apply to the Board. For example, factors such as slow complaint resolution, insufficient fingerprint background checks, ineffective complaint prioritization, lack of consistency in penalties, and undesirable agency practices (e.g., public enforcement committee meetings) were not identified as being problem areas for this agency. Thus, the Board respectfully requests that the Commission take this into consideration when deciding whether to recommend the Board be consolidated with TDLR.

Conclusion

While this response is not intended to sound terse or disrespectful, it is important that the Commission understand the serious consequences that may result from this recommendation. The Board firmly believes that consolidation as recommended is both unwise and unwarranted, and cannot help but look

back at its previous review cycles where it faced similar recommendations and ask if we have forgotten the collective wisdom that prevailed during those times. To view the issue of consolidation of a health regulatory agency through the lens of a business model may well prove to be a disastrous decision given the recent track record of big business in this country. Furthermore, given the dearth of mental health providers in this state, not to mention the nation as a whole, the Board believes this is not the time to gamble by transferring the regulation of psychology to an agency whose focus is occupations and small industry, some of which are only tangentially related to the field of health care.

For 47 years, the citizens of Texas have trusted this Board to ensure they are serviced by qualified and competent providers, and to discipline those providers who do not comport with the law or minimum standards of care. Not only have members of the profession and public alike carried out that trust by serving as members of the board, but they have done so while sacrificing their own time and money. If we were to look at business models for how state agencies should run, we would have to look at the officer and director level of corporations to match the contemplative decision making power found in our independent regulatory boards. But again, it is important to recognize that executing the laws of this state is a fundamentally different task than anything carried out by private industry. More importantly, it is a function carried out by an almost entirely volunteer army of individuals motivated not by money or personal gain, but rather a sense of duty to serve the citizens of this state. Removing the regulation of this profession from these individuals will only serve to dampen the volunteer spirit and create a gap in knowledge between the regulators and the regulated when it comes to licensing and enforcement. The Board implores the Commission not to take this route out of a zeal for speculative gains in efficiency, and respectfully requests that the Commission keep the important distinction between government and business in mind when it renders its decision on the consolidation issue.

In the meantime, should you have any questions or concerns regarding this response, or need additional information or clarification prior to the December 8th and 9th hearings, please do not hesitate to call or write.

Sincerely,



Darrel D. Spinks
Executive Director