



Texas Society for Clinical Social Work



May 15, 2020

**Coalition Comments on Texas Behavioral Health Executive Council
DRAFT RULES**

The mental health professional associations listed above represent Licensed Marriage and Family Therapists, Licensed Professional Counselors, Psychologists and Social Workers. The comments herein reflect our collective efforts to ensure the successful launch and functioning of the newly created Texas Behavioral Health Executive Council (BHEC).

We appreciate the legislative leadership and thoughtful emphasis on strengthening the mental health infrastructure in Texas and applaud the many hours of implementation work in connection with establishing a well-functioning and responsive BHEC. BHEC is an innovative strategy to create operational efficiencies while maintaining the integrity of the respective member boards' appropriate regulatory authority over what makes each mental health professional licenses unique. The regulatory authority delegated to BHEC is explicitly limited to establishing operational efficiencies and ensuring that any rule promulgated by a member board does not violate federal antitrust laws by limiting competition or impacting prices charged by persons engaged in a profession or business the executive council regulates. This ensures active state supervision while protecting the state's sovereign immunity.

Our associations appreciate the opportunity to participate both informally and formally in the process to adopt the rules that will govern BHEC's operating procedures and relationship with our respective licensing boards. Many of the proposed rules reflect the comments and recommendations delivered by us at your last meeting, but there are additional rules we would respectfully submit for your consideration, such as those allowing for emergency licenses, that reflect the current health crisis and should provide for a much swifter state response in the future.

We welcome your favorable consideration and encourage the agency to adopt the language recommendations listed below to ensure the rules as finally adopted are consistent with Chapter 507 of the Texas Occupations Code, as well as current and best practices.

Applications and Licensure

SUBCHAPTER A – LICENSE APPLICATIONS

§882.9. Established Application Processing Time

- (a) The Council shall publish the minimum, maximum and median times for processing applications by each license type during the preceding 12-month period on its website, together with a justification for each of these periods. These figures will be updated on an annual basis.

Rationale: One of the key features contemplated by the Legislature in creating BHEC is to improve efficiency and to expedite license processing. Collecting data by each license type will help evaluate the achievement of that goal and promote the appropriate allocation of BHEC resources. A composite report

will not provide adequate and appropriate transparency given the historical delays in the processing of each license type for each mental health professional category.

SUBCHAPTER G – EMERGENCY TEMPORARY LICENSE

§882.70. Emergency Temporary License.

- (a) For purposes of this section, the term "good standing" means there is not current disciplinary action on the out-of-state license, certification, or registration.
- (a)(b) A person may practice marriage and family therapy, professional counseling, psychology, or social work in this state to render aid in an emergency or disaster if:

 - (1) the Governor declares a disaster under Government Code §418.014; and
 - (2) the person has a license, certificate, or registration that is in good standing issued by any state or political subdivision of any state.
- (c) The Council ~~shall~~ may issue an emergency temporary license to practice marriage and family therapy, professional counseling, psychology, or social work if:

 - (1) the Governor declares a disaster under Government Code §418.014;
 - (2) the person has a license, certificate, or registration that is not in good standing issued by any state or political subdivision of any state; the Governor declares a disaster under §418.014 and issues a proclamation in accordance with of the Government Code §418.016 suspending regulatory statutes and rules which would prevent, hinder, or delay necessary action in coping with the declared disaster;
 - (2) the Executive Director determines that enacting these emergency licensing provisions are necessary in that disaster area; and
 - (3) the applicant meets the requirements set forth herein below.
- (b)(d) An emergency temporary license issued pursuant to this rule will expire thirty (30) days after issuance or upon termination of the state of disaster, whichever occurs first.
- (e) An emergency temporary license issued pursuant to this rule is valid only for the practice of marriage and family therapy, professional counseling, psychology, or social work within the disaster area designated by the governor.
- (d)(f) To be eligible for an emergency temporary license, an applicant must:

 - (1) submit an application in the form prescribed by the Council; and

- (2) submit written verification that the applicant is actively licensed, certified, or registered to practice psychology, marriage and family therapy, professional counseling, or social work in another jurisdiction ~~and that the licensure, certification, or registration is in good standing.~~
- (e) ~~For purposes of subsection (d) of this section, the term “good standing” means there is not current disciplinary action on that out of state license, certification, or registration.~~
- (g) An emergency temporary license may be renewed in thirty (30) day increments if the disaster declaration has not expired or been terminated. To renew a license, an individual must submit a renewal application on a board-approved form on or before the license expiration date.
- (h) An individual practicing under an emergency temporary license must:
 - (1) display a copy of the emergency temporary license in a conspicuous location when delivering services, or provide written notification of the license number and instructions on how to verify the status of a license when initiating services with a patient or client;
 - (2) provide notification to the public and the patient or client regarding how a complaint may be filed with the Council; and
 - (3) comply with all other applicable Council rules.
- (i) There is no fee associated with the application, issuance, or renewal of an emergency temporary license.

Rationale: The unprecedented severity and magnitude of the current outbreak has shed some light onto appropriate disaster response provisions for health care providers. The published language removes practical agency discretion, is far more restrictive than current practice, and arguably conflicts with Government Code §418.117. The suggested new language addresses these concerns by codifying current practice, which is to allow out-of-state licensees in good standing to practice without an emergency license. The recommended changes would require a licensee who is not in good standing to seek approval from the BHEC for an emergency, temporary license. This is a practice adopted by the Board of Nursing, and it provides some discretionary flexibility to the agency to allow providers who are not in good standing to practice in Texas. For example, if a provider has a preexisting relationship with a patient who has returned to Texas during a disaster, and the provider is not in good standing because of some minor administrative violation, BHEC would have the ability to provide the person with an emergency license during a declared disaster.

Complaints and Enforcement

SUBCHAPTER B – INVESTIGATION AND DISPOSITION OF COMPLAINTS

§884.12

Complaint Disposition.

(c) The Council ~~shall~~ ~~may~~ solicit input from and request the assistance of a member board when considering a contested enforcement matter if there are concerns about the standard of care or ethical practice shown by a licensee. The Council ~~shall~~ ~~may~~ specify the format of the input and assistance requested to satisfy the requirements of this rule.

Rationale: One of the over-arching intents of the Legislature was to maintain the integrity and independence of each licensing board in establishing standards of care and ethical practices as set forth in §507.306 of the Texas Occupations Code. Each licensing board retains the authority to establish the standard of care and ethical practice required for their respective professions. BHEC does not have any authority related to standard of care or ethical standards and therefore must be required to consult with the member boards when these issues arise in contested enforcement matters. The benefits of engaging each board outweighs any potential processing delays.

General Provisions

SUBCHAPTER A – GENERAL PROVISIONS: Add a new §881.14 as follows:

§881.14 Impartiality and Non-discrimination

- (a) The BHEC board members will make decisions in the discharge of its statutory authority without regard to a person's age, race, religion, ethnicity, sex, gender, affectional orientation, disability, national origin, or genetic information.
- (b) Any BHEC board member who is unable to be impartial in the determination of disciplinary action against a licensee or who is determined to have a conflict of interest as set forth in §881.5 will declare this to the board and will not participate in any board proceedings involving that licensee.
- (c) A person needing accommodations under the Americans with Disabilities Act (42 U.S.C. §12101 et seq.) in order to access BHEC board services must request reasonable accommodations in writing and may be required to provide verification of the person's disability and recommendations for appropriate accommodations from a medical, mental health, rehabilitation, or educational professional or specialist qualified to make such recommendations.

Rationale: Each of the member boards housed at BHEC have similar language currently in their rules. It appears that due to the role BHEC has in issuing licenses and administering the complaint process, those specific rules are being removed as the individual member boards propose rules changes to align with HB 1501 and the creation of BHEC. These protections, however, should be maintained by BHEC. We anticipate that the omission of this important language is an oversight since these rules were developed prior to the rule reviews undertaken by the individual member boards.

SUBCHAPTER B – RULEMAKING

§881.20 Rulemaking by Executive Council

- (b) The Council shall have exclusive rulemaking authority for the agency, including rules governing general agency operations, administration of licensure, investigation of complaints, and sanction procedures. In connection with this rulemaking authority, the

Council ~~must~~ may only also review draft rules proposed by each member board for anti-competitive impacts, administrative consistency, and good governance concerns.

(d) Member boards must submit a new draft rule or rule change to the Council for consideration by submitting a draft of the rule with any deletions crossed through and additions underlined. The draft must also contain each of the notice components required in a preamble (e.g. §2001.024 of the Government Code) when proposing a new rule or rule change to the Council, member boards must also submit any information or comments received from the public in connection with the proposed rule. The Council shall limit its review of proposed rules to questions regarding anticompetitive impacts, administrative consistency, and good governance concerns.

Rationale: §507.153 of the Texas Occupations Code, enacted by the 86th Legislature, specifically limits review of member board rules by BHEC only for anti-competitive impacts, administrative consistency and good governance. As proposed, §881.20 (b) appears to be inconsistent with this statutory requirement. The words “must also” implies that the authority of BHEC to review member board rules is broader than statutorily allowed. Replacing “must also” with “may only” reinforces and better aligns with the statute as well as legislative intent.

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