



GOVERNOR GREG ABBOTT

To: Gloria Canseco, Chair
Darrel Spinks, Executive Director
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Texas Behavioral Health Executive Council

From: Erin Bennett, Director
Regulatory Compliance Division, Office of the Governor

Date: August 13, 2020

Subject: Proposed Title 22 Texas Administrative Code Section 801.58 (RCD Rule Review #2020-016)

I. Preface

The Texas Behavioral Health Executive Council (“council”) proposed new 22 TAC §801.58, which governs the provision of technology-assisted services by marriage and family therapists and marriage and family therapist associates.¹ The council submitted the proposed rule to the Regulatory Compliance Division (“division”) for review on July 14, 2020. The division invited public comments on the proposed rule for a 26-day period ending August 10, 2020, but received no comments.

II. Analysis

The council proposed new §801.58 in response to House Bill 1501, 86th Legislature, Regular Session (2019), which created the council and transferred the licensing and regulatory functions of the Texas State Board of Examiners of Marriage and Family Therapists (“board”) to the new council. Sections 507.151 and 507.152, Texas Occupations Code, now direct the council to adopt rules to administer and enforce the board’s governing statute. As part of the transfer of rulemaking authority from the board to the council, the council proposed new §801.58 to replace current §801.58. Both proposed and current §801.58 contain requirements for licensed marriage and family therapists and marriage and family therapist associates who provide treatment, consultation, or supervision through technology-assisted services. The council submitted proposed §801.58 to the division because the education requirements in Subsection (d) create a barrier to the provision of technology-assisted services and may reduce competition for those

¹ Rule Submission Memorandum from the Texas Behavioral Health Executive Council (July 14, 2020), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor); 45 Tex. Reg. 4668 (2020) (to be codified at 22 TAC §801.58) (proposed July 10, 2020) (Tex. Behavioral Health Exec. Council).

services.² Therefore, proposed §801.58 affects market competition pursuant to Sections 57.105(d)(1) and (2), Texas Occupations Code.

Proposed §801.58(d) requires marriage and family therapists and marriage and family therapist associates to obtain education, training, or supervised experience in the use of relevant technology as part of their academic program, or the substantial equivalent provided through eight hours of continuing education, prior to providing technology-assisted services. While the council has a statutory duty to determine the qualifications for licensure as a therapist or associate and to adopt rules detailing those qualifications pursuant to Sections 502.151(1), 502.1515(1)(A), and 507.153(a)(1)(A), neither Chapter 502 nor Chapter 507 authorize the council to require a therapist or associate to complete additional education, training, or supervised experience after licensure in order to practice marriage and family therapy, including through a particular delivery method. Moreover, the council has not proposed additional prerequisites for any of its other licensees seeking to provide technology-assisted services. Instead, the council, as well as other health regulatory boards, allow licensees to provide technology-assisted mental health services so long as they abide by the standards of care for those services.³ This aligns with Section 113.002, Texas Occupations Code, which allows licensed health professionals to provide mental health services within their scope of practice using telecommunications or information technology to clients in other states without mention of any additional education or training requirements. Ultimately, because the council has no express statutory authority to condition the practice of marriage and family therapy by licensees on the completion of additional prerequisites, the portion of proposed §801.58(d) requiring licensees to obtain education, training, or supervised experience in the use of relevant technology prior to providing technology-assisted services is inconsistent with state policy.

The other portion of proposed §801.58(d) requires marriage and family therapists and marriage and family therapist associates who provide technology-assisted services to complete two hours of continuing education relating to those services every licensure renewal period. In contrast to the prerequisites discussed above, continuing education does not prevent licensees from practicing within the scope of their license, but supports the ongoing competency of licensees. And, the council has clear statutory authority to adopt rules requiring continuing education in Sections 502.1515(1)(C) and 507.157. Similarly, the remaining provisions in proposed §801.58 are also consistent with state statute. Proposed §801.58(a) requires therapists and associates providing technology-assisted services to clients and supervisees in other states to comply with the laws of Texas and the out-of-state jurisdiction, which aligns with Sections 113.002 and 502.351(9). Proposed §801.58(c) requires individuals to be licensed to practice marriage and family therapy and explicitly identifies the source of this limitation as Section 502.251. Other provisions in proposed §801.58 establish standards of care for the provision of technology-

² Rule Submission Memorandum from the Texas Behavioral Health Executive Council (July 14, 2020), at 4-5.

³ See 22 TAC §781.223 (2018) (Tex. State Bd. of Social Worker Exam'rs); 45 Tex. Reg. 4921 (2020) (to be codified at 22 TAC §781.323) (proposed July 17, 2020) (Tex. Behavioral Health Exec. Council); 22 TAC §174.9 (2017) (Tex. Medical Bd.); Texas Board of Nursing, *Frequently Asked Questions - Nursing Practice*, "Telehealth" (last updated 2019) https://www.bon.texas.gov/faq_nursing_practice.asp#t43.

assisted services, including the requirements that therapists and associates meet the same standards for traditional practice settings in Subsection (b), verify the identity of the client and provider in Subsection (e), obtain informed consent in Subsections (f) and (h), assess the appropriateness of technology-assisted service delivery in Subsection (g), and protect client privacy in Subsection (i). The establishment of these requirements furthers the directives in Sections 502.151(2), 502.1515(1)(B), and 507.153(a)(1)(B) that the council adopt standards of care and ethical practice for the practice of marriage and family therapy. Thus, while these provisions of proposed §801.58 may affect market competition, they are consistent with state policy as established in state statute.

III. Determination

The division commends the board for its diligent research in developing proposed §801.58, as well as its willingness to address stakeholders' concerns by reducing from 15 to eight the number of hours of education, training, or supervised experience required to provide technology-assisted marriage and family therapy services.⁴ However, as explained above, the requirement in proposed §801.58(d) for a licensee to complete additional prerequisites prior to providing technology-assisted services is not consistent with state policy. Consequently, the proposed rule is disapproved by the division as written.

The division offers the following precise instructions for revision:

Remove the requirement from proposed §801.58(d) for licensees to obtain and maintain documentation of education, training, or supervised experience in the use of technology-assisted services as part of their academic program, or the substantial equivalent provided through at least eight hours of continuing education, prior to providing technology-assisted services.

The council may adopt the proposed rule without resubmission to the division if it adheres to the precise instructions for revision and makes no additional substantive changes to the proposed rule. Alternatively, the council may propose different language to address the inconsistency identified by the division, but must resubmit the rule for approval by the division prior to adoption.

⁴ Rule Submission Memorandum from the Texas Behavioral Health Executive Council (July 14, 2020), at 2-3.