

February 13, 2020

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VIA EMAIL & US MAIL

N.C. Rules Review Commission
Attn: Amber May, J.D., Commission Counsel
1711 New Hope Church Road
Raleigh, NC 27609

RE: Supervision of Licensed Psychological Associates;
Proposed Rules 21 NCAC 54.2006(a)-(d) & 54.2008(h)(3);
Position of the N.C. Psychological Association;
Request to Speak

Dear Ms. May:

I represent the North Carolina Psychological Association (“NCPA”) regarding a proposed change to the North Carolina Psychology Board (the “Board”) regulations governing supervision of licensed psychological associates (“LPAs”). NCPA has expressed its objections to the proposed rules in comments to the Board, and it appreciates the chance now to refine its objections and present them through you to the Rules Review Commission (“RRC”).

Introduction.

At present, LPAs are, with rare exceptions, master’s level clinicians who must be supervised throughout their careers in the more sophisticated aspects of their practice. The supervision is usually provided by doctoral level licensed psychologists (“LPs”). This has been true for LPAs or their predecessors since the 1960’s.

Now, the Board proposes to eliminate all required supervision for LPAs after they have been supervised by an LP or other qualified professional for a specified period of time (usually three years) and some other conditions have been met. *See*, 21 N.C. Admin. Code 54.2006(a)-(d) & .2008(h)(3); *N.C. Register*, vol. 34, no. 5, pp. 397, *et seq.*, at pp. 411-413. However, the North Carolina Psychology Practice Act, N.C. Gen. Stat. § 90-270.1, *et seq.*, (the “Act”) does not allow the Board to eliminate supervision for LPAs altogether. NCPA believes, and this memo will show, that the Act explicitly requires career-long supervision for all LPAs, and NCPA notes that

the RRC staff has reached the same conclusion.¹ But even if there were some ambiguity in the Act about the requirement to supervise LPAs, the legal rules of statutory construction show that the Board has misconstrued the Act and proposed a change that it has no authority to make.

Summary of the Act.

The Psychology Practice Act gives the N.C. Psychology Board specific authority to write rules governing the supervision of licensees. It says that all applicants to practice as LPs and LPAs, and all persons practicing as LPs and LPAs, “shall at all times comply with supervision requirements established by the Board.” N.C. Gen. Stat. § 90-270.5(c). However, the Board, like any licensing board or other agency, can only exercise the powers given to it in its authorizing statute, and here the Act goes on to describe the supervision requirements for both LPs and LPAs that the Board must accept and follow. As to LPs, they must be supervised while they are provisionally licensed, N.C. Gen. Stat. 90-270.5(c)(1) & (d), but once they are permanently licensed, they do not need to be supervised at all. *Id.* Things are different, however, for LPAs. When it comes to their supervision, the Act says two things. First, according to N.C. Gen. Stat., § 90-270.5(c), an applicant for permanent licensure as an LPA, just like an applicant for permanent licensure as an LP, “. . . *shall be supervised for all activities comprising the practice of psychology.*” *Id.* (emphasis added). The supervision is mandatory; it “shall” take place. Second, this subsection (c) goes on to say that after an LPA is permanently licensed, further supervision is still “*required [but] only for those activities specified in subsection (e) of this section*” 90-270.5. N.C. Gen. Stat., § 90-270.5(c)(2) (emphasis added).

Turning to N.C. Gen. Stat., § 90-270.5(e), as the Act tells us to, that subsection repeats the mandatory requirement that a permanently licensed LPA “*shall be supervised*” (emphasis added), and it adds that the supervision shall be by a “qualified licensed psychologist,” according to “Board rules specifying the format, setting, content, time frame, amounts of supervision, qualifications of supervisors, disclosure of supervisory relationships, the organization of the supervised experience, and the nature of the responsibility assumed by the supervisor.” *Id.*

Subsection 90-270.5(e) goes on to specifically list the “only” (i.e., the key) activities in psychology that require ongoing supervision for even a permanently licensed LPA. It says supervision

is required only when a licensed psychological associate engages in: assessment of personality functioning; neuropsychological evaluation; psychotherapy, counseling, and other interventions with clinical populations for the purpose of

¹ N.C. Gen. Stat. 90-270.5(e) “requires that when a psychological associate is engaging in certain health services he or she must be supervised . . .” RRC Staff Opinion (Jan. 7, 2020), p. 1.

preventing or eliminating symptomatic, maladaptive, or undesired behavior; and, the use of intrusive, punitive, or experimental procedures, techniques, or measures. The Board shall adopt rules implementing and defining this provision, and as the practice of psychology evolves, *may identify additional activities² requiring supervision in order to maintain acceptable standards of practice.*

N.C. Gen. Stat., § 90-270.5(e) (emphasis added).

Summary of the Proposed Rule Changes.

Current Rules. Consistent with the Act, the existing version of 21 NCAC 54.2006(a)-(d) says each of the following four aspects of clinical practice “requires supervision” if it is done by an LPA:

1. assessment of overall personality functioning,
2. psychological evaluations,
3. psychotherapy, counseling, and other interventions, and
4. intrusive, punitive, or experimental procedures.

These are, of course, the four aspects of clinical practice that the Act says shall be supervised.

However, even though the existing rules require supervision for all LPAs for certain activities, they do not require the same amounts of supervision. Under the present rules the most experienced LPAs (i.e., Level 3) require less supervision than their Level 1 and Level 2 colleagues, to wit:

Level 3. After a minimum of 5 calendar years consisting of at least 7500 hours of post-licensure supervised practice, a minimum of 1 hour per month individual supervision may be provided to a Psychological Associate who engages in *activities requiring supervision*. . . .

21 N.C. Admin. Code 54.2008(h)(3) (emphasis added). The italicized words refer to the activities listed in N.C. Gen. Stat. § 90-270.5(c)(2) & (e) that have to be supervised even after an LPA is fully licensed. *See, also*, page 2, *supra*.

Proposed Rules. The proposed rules would change all this. Proposed 21 NCAC 54.2006(a)-(d) says that the four key aspects of clinical practice specified in the Act will only require

² There is no section in the Act that gives the Board the authority to delete any activities from that list or to eliminate supervision of LPAs for these complex matters.

supervision if the LPA is “practicing under Level 1 or Level 2 supervision.” *N.C. Register*, vol. 34, no. 5, pp. 411 & 412. As to Level 3 LPAs, the proposed rules say:

Level 3. After a minimum of 3 calendar years consisting of at least 4500 hours of post-licensure supervised practice . . . , or 5 calendar years of post-licensure supervised experience . . . if a psychological associate does not meet the scale score of 500, *no further supervision shall be required*

21 N.C. Admin. Code 54.2008(h)(3). *N.C. Register*, vol. 34, no. 5, pp. 397, *et seq.*, 413 (emphasis added). Therefore, provided the LPA has enough supervised practice, and has a good recommendation from the current supervisor,³ the proposed rules eliminate supervision for all the LPA’s clinical activities.

Issue.

The issue before the Rules Review Commission is whether the Act gives the Board the authority to eliminate supervision altogether for Level 3 LPAs. The Board apparently⁴ claims to have this authority under two provisions of the Act: its authority to specify in its rules the “time frame [and] amounts of supervision,” N.C. Gen. Stat., § 90-270.5(e), and its authority to adopt rules “implementing and defining” the part of subsection 90-270.5(e) that lists the activities for which an LPA must be supervised. *Id.* Neither claim is correct.

Discussion.

The Source of Board Authority. The Board, like all other agencies, only has the authority the General Assembly intended to give it. Deciding what authority the General Assembly intended to give the Board is a question of law for the RRC to decide and ultimately would be a question of law for the courts. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam’rs*, 371 N.C. 697, 700, 821 S.E.2d 376, 379 (2018). To make this decision, the RRC must “apply the enabling legislation practically so that the agency’s power includes all those powers the General Assembly intended the agency to exercise.” *Id.*, quoting *High Rock Lake Partners v. N.C. Dep’t of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012).

³ The LPA’s current supervisor must have supervised the LPA for at least one year.

⁴ As this is being written, the Board has not filed a comment with the RRC to explain its legal argument, and only one lawyer who is a member of the public has offered a legal defense of the proposed rules. His view is that the Board’s own authority to supervise the profession is sufficient supervision, but that is contrary to the text, purpose, and spirit of the statute, which requires individual supervision by a qualified person. See Letter of John Baley.

The Plain Language of the Act. The courts say the “best indicia of . . . legislative purpose [are] the language of the statute, the spirit of the act, and what the act seeks to accomplish.” *N.C. Acupuncture, supra*, at 701, 821 S.E.2d at 380, quoting *Watkins v. N.C. State Bd. of Dental Exam’rs*, 358 N.C. 190, 207, 593 S.E.2d 764, 774. One might call these text, spirit, and purpose. If the text of a law is plain, then there is nothing to do but enforce it according to its “plain meaning.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 2005, 209, 388 S.E.2d 134, 137 (1990). Here, the Act is explicit when it says “shall be” supervision and supervision is “required,” even for fully licensed LPAs, whenever they engage in assessment, neuropsychological evaluation, psychotherapy, counseling, and certain specific techniques and interventions. N.C. Gen. Stat. § 90-270.5(c)(2) & (e). These are the “only” activities that the Act says require supervision for fully licensed LPAs, but as to them supervision is explicitly mandatory.

Of course, the Act also says the Board is to adopt (i) rules setting the “time frame” and “amounts of” supervision, N.C. Gen. Stat. § 90-270.5(e), and (ii) rules implementing and defining the supervision of assessment, neuropsychological evaluation, and the other listed services. *Id.* But this right to implement and manage supervision is not a license to abolish supervision. The statute has a two-tier structure. At its base, the Act says LPs or other qualified persons have to supervise fully licensed LPAs with respect to specific activities. On top of that, it says the Board will implement and define the supervision of these services. But the second tier presumes the first tier exists; the duty to set the standards for supervision presupposes that there will be supervision. The legislature never said anywhere in the Act that the Board may, at some point, dispense altogether with supervision for LPAs.

Purpose and its Spirit of the Practice Act. As mentioned above, the other two broad indicia of the meaning of a law are its purpose and spirit. The Act dates from 1967, but it was substantially rewritten in 1993. The Act as rewritten says the legislature’s purpose was to “protect the public from the practice of psychology by unqualified persons.” N.C. Gen. Stat. § 90-270.1(b); 1993 Session Laws, c. 375, s. 1. There is nothing in either the purpose or the spirit of the 1993 version of the Act about making LPA services more widely available or giving LPAs better access to payor panels. (These are good things that NCPA wants for LPAs and the public, but they are not part of the Act.) But the entire 1993 version of the Act does show the General Assembly decided once again (as it had decided in 1967) that there should be two categories of licensees in psychology, and that the more extensively trained licensees need to supervise the other in some areas of practice. In other words, because the Act is intended to protect the public, and because the Act divides practitioners into two groups, one of which can practice without supervision when fully licensed, and one which requires some supervision even after being fully licensed, it is clear that, in the words of *Watkins*, as quoted in *N.C. Acupuncture*, the Act “seeks to

accomplish” safety through supervision. *Watkins*, *supra*, at 207, 593 S.E.2d at 774. That is its purpose and its spirit.

Possible Ambiguity in the Language of the Act. NCPA sees no ambiguity in the Act, and it is pleased that the RRC staff agrees. However, the present Psychology Board apparently believes it has the unambiguous authority to write new rules dispensing with supervision of LPAs. What, then, should the RRC make of this disagreement? Is the present Board’s view entitled to any special weight?

Sometimes North Carolina courts say they will give “great weight” to an agency’s interpretation of the statute it administers, *High Rock Lake Partners*, *supra* at 319, 735 S.E.2d at 303, and sometimes courts say they will give the agency interpretation “some deference,” *Martin v. N.C. Dep’t of Health & Human Services*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009), quoting *Total Renal Care v. N.C. Dep’t of Health & Hum. Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005), but courts always say that the agency’s interpretation is “not binding” on them. *N.C. Acupuncture*, *supra*, *Martin*, *supra*. Moreover, “[t]he weight of [a board’s interpretation] will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control.” *N.C. Acupuncture*, *supra*; quoting *N.C. Sav. & Loan League, v. N.C. Credit Union Comm’n*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (emphasis added). So, despite being confident that the Act unambiguously requires supervision, NCPA will analyze the Act as if it were not completely clear.

One of the *N.C. Acupuncture* tests is easy to apply. The proposed rules are novel. No Board has ever taken the present Board’s position; no Board has tried to abolish supervision. What this Board is doing is inconsistent with all prior history. Therefore, it is not entitled to deference.

Nor are the new rules well-reasoned. First of all, the Board cannot give itself the authority to eliminate the supervision requirement by saying that eliminating supervision is somehow “implementing” it. See N.C. Gen. Stat. § 90-270.5(e). To “implement” means to “carry out; accomplish,” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/implement> (2019), “to give practical effect to and ensure of actual fulfillment by concrete measures,” *Webster’s Ninth New Collegiate Dictionary* (1983), and to “provide a definite plan or procedure to ensure the fulfillment of a purpose.” *American Heritage Dictionary* (1973). No one can implement, carry out, accomplish, give effect to, or ensure the fulfillment of plans to build a bridge, run for office, or attend college by not building, not running, and not attending. Nor can the Board implement, carry out, or accomplish supervision by not supervising. In the same way, the complete absence of supervision is not an “amount” of supervision, or a way to “define”

supervision.⁵ It is only the abandonment of supervision. Secondly, the main theme running through all the comments submitted by the proponents of the new rule say it is good for LPAs and patients alike. But that is not a well-reasoned argument. It does not say anything about the Board's authority to do away with supervision. Finally, if the reasoning is shaky, it follows that the rule must not have been thoroughly considered.

The Context for the Board's Authority to Set Time Frames and Amounts. A statute is not ambiguous simply because someone can conjure an alternative reading, and the Act is not ambiguous just because the Board may say that zero supervision is an amount of supervision. But assuming, once again, that there might be some ambiguity in the Act, and that the Board's authority to set the "time frame" for, and the "amount of," supervision might be construed to give it the authority to abolish supervision, there are several other rules of statutory construction that rebut this. We will deal with the first one here, and others in turn.

As we have seen, N.C. Gen. Stat., § 90-270.5(e) tells us that LPAs shall be supervised by a "qualified licensed psychologist" according to Board rules specifying the "format, setting, content, time frame, amounts of supervision, qualifications of supervisors, disclosure of supervisory relationships, the organization of the supervised experience, and the nature of the responsibility assumed by the supervisor." *Id.* When a statute lists a number of things, the things listed are to be understood in conjunction with the other words. *U.S. ex rel Wilson v. Graham County*, 528 F.3d 292, 302 (4th Cir. 2008) (a word is known by the company it keeps; *noscitur a sociis*). Now, NCPA has already shown that having a time frame for supervision and an amount of supervision presupposes that there is supervision, but for the moment, we will put that point aside, and emphasize this. All the other words listed in the statute presume the act of actual supervision: there cannot be a format, setting, or content for supervision without supervision; there cannot be a supervisor, a supervisory relationship, a supervised experience, or supervisory responsibilities if there is no supervision. Read as two more items in this list of other words and terms, the "time frame" for and the "amounts" of supervision can only refer to the active and ongoing supervision of LPAs by individual supervisors.

The Supervision of LPs vis a vis LPAs. When the legislature makes a distinction, this indicates that the legislature intended this distinction to exist. The Act says that both LPs and LPAs must be supervised while they are provisionally licensed. But then the Act distinguishes the way LPs and LPAs are treated after they are permanently licensed. Permanently licensed LPs stop being supervised, but permanently licensed LPAs continue to be supervised in each of four specific

⁵ By comparison, the Board could, within reason, define what is and is not an "intrusive" procedure or technique that must be supervised under subsection 90-270.5(e).

areas. If the General Assembly had wanted to end supervision for LPAs at some point, it could have done so, just as it did for LPs, but it did not do that.⁶

History of the Act. Previous versions of the Practice Act are consistent with NCPA’s position.⁷ When the Act was written in 1967, it did not speak of LPAs, but it did describe and regulate their predecessors, which were known then as “Psychological Examiners.” Once fully licensed, these Psychological Examiners could do things such as interviews and testing without supervision, but they could only do the more sophisticated things such as appraisals and counseling “under qualified supervision” by licensed practicing psychologists. 1967 Session Laws, c. 910, s. 2(d) (codified as N.C. Gen. Stat. § 90-270.2(f)).

In 1979, the Act was amended to remove all references to Psychological Examiners and replace them with the term “Psychological Associate.” 1979 Session Laws, c. 670, s. 1. The Act also carried forward the requirement of “qualified supervision” and said this:

The psychological associate does not engage in overall personality appraisal or classification, personality counseling, or personality readjustment techniques except under qualified supervision in accordance with the duly adopted rules and regulations of the Board.

1979 Session Laws, c. 670, s. 1.

Then in 1993, the Act was rewritten and recodified. 1993 Session Laws, c. 375. The Act said explicitly that it was intended to protect the public. N.C. Gen. Stat. § 90-270(1)(b). The profession of psychological associate was re-named as “licensed psychological associate,” and it was redefined and re-codified in N.C. Gen. Stat. § 90-270.2(7). Also, the supervision requirement that had been in § 90-270.2(f) was moved to N.C. Gen. Stat. § 90-270.5(e), where it remains, and says that LPAs “shall be supervised by a qualified licensed psychologist in accordance with Board rules”⁸ Note that need for a “qualified” supervisor was brought

⁶ Elliot Silverstein, Ph.D., J.D., President of NCPA, addresses this point in his comments to the Board which were filed with the RRC prior to the January, 2020, meeting.

⁷ For more on the history of the Act, see the letters of William Burlingame, Ph.D., and Richard Rumer, Ph.D., which were submitted to the Board and filed with the RRC prior to the January, 2020, meeting.

⁸ The Practice Act was also amended in 1977, 1985, and 2012. The amendments then did not affect supervision of LPAs or their predecessors, but that in itself further indicates that ongoing supervision was an accepted part of the Act.

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forward once again. But despite all the work that was done in 1993, the original supervision requirement from 1967 was carried forward and renewed.

The Board's Longstanding Position. Turning to the Board's prior position about supervising master's level clinicians, it has always required some significant level of supervision – first for psychological examiners, then for psychological associates, and now for licensed psychological associates.⁹ The Board's proposed rule is a complete change of course. When courts look at a Board's understanding of its enabling statute as a guide to the meaning of that statute, they will give the greatest weight to the Board's original understanding, especially if that is also a long-standing understanding. *Dept. of Water & Power, v. Energy Resources Cons. & Dev. Comm.* 2 Cal. App. 4th 210, 220 (1991) (“The Energy Commission’s administrative decision, which came 16 years after the [State Energy Resources Conservation and Development] Act’s passage, is not entitled to great weight.”) Therefore, no one – not the Rules Review Commission, and not the courts – should defer to the present Board’s new view of its authority under the Practice Act, which deviates not only from the understanding of the 1993 Board, but also from the understanding of every Board but this one. The present Board’s view has to be rejected because there have not been any changes in the Act that justify it.

Conclusion.

NCPA knows that the Board is acting in good faith when it seeks to end supervision for LPAs who have a specified number of years and hours of successful supervised practice. The LPAs who support this change also do this in good faith. But that does not mean the Board may substitute its novel view in place of the views that have held for over half a century, views that are imbedded in all the versions of the Practice Act from 1967 until now. It means these issues need to go back to the General Assembly, which is the only body in North Carolina that may address them.

Request to Speak

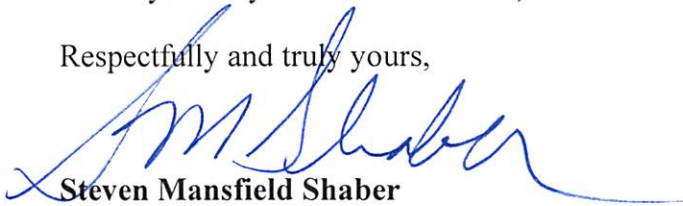
Please renew my previous request to be allowed to speak on behalf of NCPA at the upcoming RRC meeting.

⁹ If the Board had come forward with a new rule in the mid-1990's and said that the 1993 rewrite gave it the authority to dispense with supervision for LPAs, that would at least have been a timely argument, though not a persuasive one. But it is now more than sixteen years since the Act changed.

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Thank you for your attention to this, and on behalf of NCPA, I am

Respectfully and truly yours,

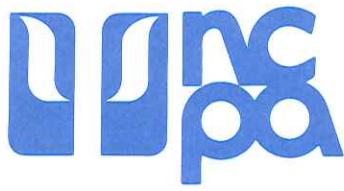


Steven Mansfield Shaber
Partner

SMS/dt

cc: Martha Turner-Quest -- Via Email
Executive Director
N.C. Psychological Association

Elliot Silverstein, Ph.D., J.D. – Via Email
President
N.C. Psychological Association



Letters in Opposition

North Carolina Psychological Association

Thursday, January 9, 2020

Via Email and Courier

rrc.comments@oah.nc.gov

N.C. Rules Review Commission

Attn: Amber May, J.D.

1711 New Hope Church Road

Raleigh, NC 27609

Re: Proposed Changes to N.C. Psychology Board Rules

Dear Ms. May,

The North Carolina Psychological Association ("NCPA") concludes the proposed rule that would eliminate supervision of licensed psychological associates ("LPAs") by licensed psychologists is beyond the N.C. Psychology Board's ("Board") statutory authority and therefore within the scope of the Commission's review. N.C.G.S. 50-21-9. NCPA submitted the enclosed letters to the Board in response to the proposed rule change regarding supervision of LPAs within the State of North Carolina. The enclosed letters are from NCPA members, Drs. William Burlingame, Richard Rumer and Elliot Silverstein, and American Psychological Association, Chief of Professional Practice, Dr. Jared Skillings.

I am submitting sixteen (16) sets of this letter with enclosures (via courier). I am sending this letter with enclosures to the Board's rule coordinator.

Thank you for your consideration and attention to this matter.

Sincerely,

Martha Turner-Quest

Executive Director

Enclosures (4)

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Letters in Opposition

cc: Daniel Collins, J.D.
Rulemaking Coordinator
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895 State Farm Road, Ste. 101
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Letters in Opposition

W. V. BURLINGAME, Ph.D.

Licensed Psychologist

January 8, 2020

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Daniel P. Collins, J. D.
Executive Director
North Carolina Psychology Board
895 State Board Road, Suite 101
Boone, NC 28607

Re: proposed supervision rules

Dear Dan,

I am writing to you as a friend of the North Carolina Psychology Board and as a defender of the North Carolina Psychology Practice Act. My friendship with the Board dates back over 35 years, and my activities to defend the integrity of Act date from the two years that I spent as chair of a Task Force which rewrote the Act which now governs the practice of psychology in North Carolina. With the bill in draft form, I spent many months educating the psychology community and then the committees of the legislature prior to its being enacted into law. NCPA's newsletters document all of these activities over the course of some dozen publications. Following its adoption, I wrote draft rules for the Board for two years which would serve to implement the many provisions of the new Act.

Let me be self-indulgent for another paragraph or two. In order to assure my credibility, I first want to mention many of the roles I have played. I served two three-year terms on the Board, which included four years as Chair and one as Vice Chair. During this period I successfully shepherded two amendments to the Act through the General Assembly, which is no mean feat with any legislature. As chair, I successfully abolished the highly time-consuming oral examination (administered to all who psychologists who entered NC from another state or province) and substituted the written state examination. I personally drafted all 50 items of the state exam, plus a few spares. I facilitated the Board's adoption of a statistically defensible method of establishing pass points for the national written exam (the Angoff Procedure). I created the newsletter for the Psychology Board, personally writing the first three newsletters. Aside from the above, after serving on the Board, I served as an investigator for the Board, crafting the summaries after investigating complaints. At various points, I served as the Board's expert, providing testimony or behind-the-scenes consultation, and drafting statements of charges. In this and other roles I worked closely with at least three of the attorneys assigned to the Board since its inception. I personally drafted interpretations of the statute and rules which accompanied applications for licensure, and I collaborated in the design of all forms adopted by the Board. During all of these years, I acted as an informal liaison between the Board and NCPA and the psychological community. As you know, more recently I have served as a supervisor for the Board, and in the role of tutor in keeping with consent orders issued by the Board with about 20 to 30 North Carolina psychologists.

In my final months as Board Chair, I presided over a formal hearing in which one Dr. White was charged with multiple ethics violations. The Board revoked his license, and Dr. White appealed and

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appealed, and in a devastating decision the NC Court of Appeals found that APA's Ethics Code (incorporated by reference) was "unconstitutionally vague" for the purpose of disciplining psychologists. The NC Supreme Court declined to hear the case, and so the Board was left without a statutory basis for determining ethics violations. Meanwhile, NCPA was scarcely aware of the crisis. Given that I had already crafted statute (child abuse and neglect, rights of minor patients), and was the psychologist most familiar with the Act, I assumed leadership in addressing this grave hiatus in statutory authority.

I formed a task force and for two years I scoured the statutes of all North American jurisdictions in search of commendable features to be incorporated in a new statute for North Carolina. With no ethics code, we had to anticipate what APA might build into a revision of its ethics code while we created a separate North Carolina ethics code for psychology practitioners. Looking back we achieved remarkable congruence, and I broke new ground by incorporating a standard of care criterion for adjudicating ethics complaints relative to competence and the provision of patient/client diagnosis and treatment. I don't know whether this feature has since been adopted in other states, but it has played an important role in adjudicating complaints in North Carolina. Further, by creating Health Services Provider certification we plugged a major hole in North Carolina's generic licensure (if this is not clear to the reader, feel free to inquire). I also vastly expanded the numbers of options available to the Board in ordering remedies for ethics violations and substandard practice. I put in place statutory prescriptions for documentation, provided records retention mandates, required "summary content" documentation (my term) and asserted jurisdiction over "ancillary services" (also my term). Anticipating that the need for reciprocity among states would emerge with greater urgency, we attempted to provide statutory language which would be facilitative in the future. In my search, I found that one state authorized its board to charge a fee for processing ethics complaints. Knowing that the legislature zealously guards fees, I doubted that this provision would survive bill scrutiny. But, it did, and our bill was enacted in its totality and went into effect in 1994. I was pleased when the CEO of APA's Practice Directorate called the new North Carolina Psychology Practice Act "the most comprehensive in North America."

Hopefully, having provided a history lesson and established some credibility, I want to comment on the proposed rules regarding the supervision of LPAs. Speaking without a citation, my understanding is that administrative rules serve to **implement** statute. On countless occasions the verb **implement** has been uttered within my hearing. The Psychology Practice Act mandates supervision of LPAs. The proposed rules establish a mechanism for the termination of all supervision. Thus, they subvert the will of the legislature in my opinion by abolishing the very supervision that the statute mandates. Therefore, in defense of the integrity of the Psychology Practice Act, I oppose the adoption of the proposed rules.

Sincerely,

William V. Burlingame, Ph.D.,
Licensed Psychologist

Letters in Opposition

Richard R. Rumer, Ph.D.
Clinical & Forensic Psychology

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P.O. Box 61067
Durham, NC 27715-1067

24 September 2019

Mr. Daniel Collins
North Carolina Psychology Board
Submitted via email
to Comments2019@NCPsychologyBoard.Org

re: Proposed 21 NCAC 54.2008

Mr. Collins, and Ladies & Gentlemen of the Board:

I am writing to express deep concern over the Board's proposal to create the possibility of the independent practice of psychology by some Licensed Psychological Associates.

As you will recall, following the *White v. NC State Board of Examiners* decision, the psychologists and legislators of this state had to draft a new Psychology Practice Act. Dr. Burlingame asked me to work on the Ad Hoc Committee that prepared a draft law to submit to the General Assembly. I served as that group's secretary, drafting and re-drafting the multiple versions that we discussed in depth over the years.

As best as I can recall, the group never anticipated any fully independent practice of psychology by Licensed Psychological Associates, at least within the realm of what we usually call "clinical" psychology. We carefully wrote definitions regarding personality assessment, neuro-psychological testing, counseling, and other therapeutic measures to insure that the public was protected through appropriate supervision. We added language so that, if new psychological techniques outside of these definitions were developed, these would be supervised appropriately as well. At no point did we imagine that the scope of supervised practice would shrink or even vanish, as our vision was that, if anything, the knowledge base of psychology would expand and require more rather than less study and training for safe, appropriate services to the public.

The proposed regulations, in my view, far exceed the intent that was written into the Psychology Practice Act that you now administer. Put simply, I think the proposed regulations are inconsistent with the statute. I urge you to reconsider this proposal.

Respectfully,

Richard Rumer, Ph.D.

Richard Rumer, Ph.D.
Licensed Psychologist, HSP-P (NC #1072)
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Letters in Opposition

ELLIOT M. SILVERSTEIN, Ph.D., ABPP
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October 30, 2019

Daniel P. Collins, J.D.
Executive Director
North Carolina Psychology Board
895 State Board Road, Suite 101
Boone, NC 28607

Dear Mr. Collins:

While I am currently president of the North Carolina Psychological Association ("NCPA"), I am not writing in that capacity, but am speaking for myself about the proposed North Carolina Psychology Board ("Board") rule changes. NCPA's official response will be sent separately by Steve Shaber, J.D.

There are several changes that I support and believe are a good idea. First, the increase in hours required for continuing education seems warranted (21 NC 54.2104), and allowing for diagnoses under the International Classification of Diseases instead of just the Diagnostic and Statistical Manual of Mental Disorders is also welcome. I also find the idea of psychologists being required to complete a three hour training session and pass an examination in order to supervise an applicant, a licensed psychological associate, or a provisionally licensed psychologist in North Carolina to be a concept worth developing.

On the other hand, I feel a major proposed change to the rules exceeds the authority of the Board; namely, eliminating all supervision of some Licensed Psychological Associates. I believe that any fair reading of the entire statutory authority for the Psychology Practice Act, North Carolina General Statutes, Article 18A, Chapter 90-270.1 through Chapter 90-270.23 ("the Act"), would make it clear that supervision was always intended for Licensed Psychological Associates unless changed by the legislature. I base this conclusion on a number of factors. First, I spoke with Drs. Richard Rumer and William Burlingame who were both involved in the re-writing of the current version of the licensure law which was adopted in 1994. They both indicated to me that the Act was intended to provide for permanent supervision of Licensed Psychological Associates. Every other North Carolina Psychology Board has interpreted the Act similarly. It is only this Board's interpretation that it has the authority to make such changes. If this is the case, apparently the next Board could reinstate the

supervision requirements. I understand that both Dr. Rumer and Dr. Burlingame are writing separately to you about this matter.

Second, Chapter 90-270.5(e) clearly states that Licensed Psychological Associates **shall** (emphasis added) be supervised. The Board is apparently interpreting the language in this section that the Board will designate the time frame and amounts of supervision to allow the Board to say that at some point no supervision will be required. This does not seem consistent with the rest of the language in the Act. The Act specifically lays out areas that are required for supervision, and this section ends with the statement, "(t)he Board shall adopt rules implementing and defining this provision, and as the practice of psychology evolves, may identify additional activities requiring supervision in order to maintain acceptable standards of practice." This language strongly states that additional areas may require supervision, and the statute allows the Board to reserve the right to expand rather than subtract from the requirements.

Third, the Act specifically exempts those who are providing certain psychological services from this Act in Chapter 90-270.4, and clearly specifies the time frame for supervision of provisionally Licensed Psychologists after completing their training. Licensed Psychological Associates are neither exempted nor given a set time framework. The Act uses the same language of "time frame and amounts of supervision" for provisionally Licensed Psychologists as is used for Licensed Psychological Associates and then specifies two years to receive full licensure as a Licensed Psychologist. Since there is no similar specified time frame for Licensed Psychological Associates, the logical reading of "time frame and amounts of supervision" for them would indicate that the intention is for continuing supervision. Thus, I feel the Board's proposed rules are overreaching the clear intent of the underlying statutory authority.

In addition, I feel I should comment on providing a pathway for independent practice for those Licensed Psychological Associates who pass at the 440 level rather than the American Psychological Association and the previous North Carolina Psychology Board required minimum score of 500 for independent practice. The fact that the Board allows for a lower passing rate for Licensed Psychological Associates to practice would further indicate that supervision should be required and was intended to be required. I know of no other profession that allows practitioners to practice with a lower pass rate and then after a number of years allows them to practice independently despite not meeting the minimum passing level for independent practice. North Carolina would have the lowest standards for independent practice in the United States. This provision would allow master's level practitioners from unaccredited programs who could not practice independently anywhere else to move to North Carolina and obtain a pathway to independent practice. There seems little justification for such an outcome.

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Thank you for your consideration.

Sincerely,

Elliot M. Silverstein, J.D., Ph.D., ABPP

Letters in Opposition



AMERICAN
PSYCHOLOGICAL
ASSOCIATION

October 29, 2019

VIA ELECTRONIC MAIL

Daniel P. Collins, J.D., Executive Director
North Carolina Psychology Board
895 State Farm Road, Suite 101
Boone, NC 28607

Re: **Proposed Rule Adoptions for 21 NCAC 54.1602 through 21 NCAC 54.2706**

Dear Mr. Collins:

On behalf of the American Psychological Association (APA), I submit our comments on proposed changes to the state's psychology licensing rules. APA is the professional organization representing more than 118,000 members and associates engaged in the practice, research and teaching of psychology. APA works to advance psychology as a science and profession and as a means of promoting health, education and human welfare. We work closely with our state affiliate, the North Carolina Psychological Association, to further those goals in North Carolina.

APA opposes many of the proposed substantive rule changes and urges the Board to withdraw some of its proposed rules for the following reasons as discussed in further detail below:

- (1) The proposed rule changes affecting practice by licensed psychological associates exceed the scope of the statutory authority and therefore, this rulemaking is improper and should be withdrawn. [21 NCAC 54.2006, 21 NCAC 54.2008]
- (2) There is a lack of evidence demonstrating that master's trained licensed psychological associates are competent to practice independently under the same full scope of psychological practice as licensed doctoral-level psychologists. [21 NCAC 54.1802, 21 NCAC 54.1803, 21 NCAC 54.1901]
- (3) It is inappropriate to allow a master's level licensed psychological associate to supervise any non-resident doctoral-level psychologist engaged in temporary practice in North Carolina. [21 NCAC 54.1610, 21 NCAC 54.1703]

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1. **Some of the proposed rules are inconsistent with the relevant provisions of the North Carolina Psychology Practice Act and are therefore, invalid.**

Pursuant to the principles of administrative law, an agency like the North Carolina Psychology Board is allowed to promulgate rules on those issues where the statute confers authority to do so. If the rules exceed the scope of authority that the legislature has conferred by statute, then the rules are void or invalid. If the rule conflicts with existing law or the legislative intent underlying the law, then the agency has exceeded its authority in creating the administrative rule, and therefore the rule fails.

In this case, the provisions of proposed changes to 21 NCAC 54.2006 and 54.2008 are incompatible with the enabling statute - G.S. Section 90-270.5(e) relating to the practice of licensed psychological associates. These proposed rules seek to establish three tiers of practice for licensed psychological associates – Levels 1 and 2 requiring varying levels of supervision and Level 3 allowing for independent practice with the identical scope of practice as allowed for licensed doctoral-level psychologists. Both proposed rule changes cite G.S. Section 90-270.5(e) as statutory authority.

Specifically, 21 NCAC 54.2006 states that supervision is required for assessment of overall personality functioning; administration of neuropsychological evaluations; psychotherapy, counseling and other interventions with a clinical population¹ by psychological associates “if practicing under Level 1 or Level 2 supervision.” In addition, supervision is required for psychological assessment, psychoanalysis, behavior analysis, biofeedback, hypnosis and the design or clinical oversight of interventions with clinical populations. Implicit in this provision is the allowance that certain licensed psychological associates (Level 3) may engage in any of the above activities without any supervision.

However, G.S. Section 90-270.5(e) clearly states that a “licensed psychological associate shall be supervised by a qualified licensed psychologist.” The provision states that a “licensed psychological associate who provides health services shall be supervised for those activities requiring supervision by a qualified licensed psychologist.” Furthermore, it states that except as otherwise provided, “supervision, including the supervision of health services, is required only when a licensed psychological associate engages in: assessment of personality functioning; neuropsychological evaluation; psychotherapy, counseling, and other interventions with clinical populations.” The provision ends with the instruction that the board “shall adopt rules implementing and defining this provision and... may identify additional activities requiring supervision in order to maintain acceptable standards of practice.” The proposed rules are in direct conflict with G.S. Section 90-270.5(e).

The legislative intent underlying the Psychology Practice Act does not demonstrate any flexibility for the Board to create rules allowing licensed psychological associates to practice

¹ Defined in the same rule to include “persons with discernible mental, behavioral, emotional, psychological or psychiatric disorders as evidenced... by the current Diagnostic and Statistical Manual of Mental Disorders and all persons meeting the criteria for such diagnoses.” [proposed changes omitted]

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independently especially when providing health services including personality testing, neuropsychological activities, psychotherapy and other enumerated psychological services. But the proposed rules are incompatible with the specific language of G. S. Section 90-270.5(e) in seeking to remove the supervision requirement and allowing licensed psychological associates to engage independently in the very activities that the statute defines as requiring supervision.

Therefore, these proposed rule provisions exceed the scope of the Board's authority granted by the Psychology Practice Act and are therefore, invalid. We ask that these provisions be withdrawn.

2. **There is no evidence demonstrating that master's trained licensed psychological associates have the requisite education, training and competence to practice independently under the same full scope of psychological practice as licensed doctoral-level psychologists.**

It is important to note that these proposed changes allowing licensed psychological associates to practice independently do not include any proposed changes to education and training requirements for licensed psychological associates. As proposed, the rules deem licensed psychological associates as sufficiently competent based on their current education and training requirements to provide the full spectrum of psychological interventions independently just like doctorally-trained licensed psychologists.

In comparing 21 NCAC 54.1802 with 21 NCAC 54.1803, the education and training requirements for psychological associates in North Carolina to become licensed providers are far less than what is required for licensed doctoral-level psychologists. In North Carolina, to become licensed as a psychologist, the candidate must have completed a doctoral degree in psychology (4-6 years of graduate training) from a program accredited either by the American Psychological Association or the Canadian Psychological Association and 2 years of supervised clinical experience (minimum of 3000 hours and 1 year must be postdoctoral training) as well as pass the EPPP licensing exam (scaled score of 500) and the jurisprudence exam. In addition to the standard psychology coursework including scientific and professional ethics and standards, research design and methodology, statistics and psychometrics, and specialty electives, the doctoral psychology program must include courses in these specific content areas: biological bases of behavior (e.g., physiological psychology, neuropsychology, psychopharmacology); cognitive-affective bases of behavior; social bases of behavior; and individual differences. The candidate must also complete supervised clinical training that includes practicum, internship, field experiences or laboratory training as well as the thesis/dissertation.

However, a current candidate for licensure as a psychological associate must have completed a graduate degree primarily psychological in nature and 500 hours of supervised training under the supervision of a licensed psychologist as well as passing the EPPP and jurisprudence exam. The program shall include coursework in academic psychology; statistics and research design; scientific and professional ethics and standards; and electives in a psychology specialty area. There is no mention of coursework in biological, cognitive-affective or social bases in behavior. While master's-level psychology programs may cover core coursework for clinical psychology,

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the training cannot sufficiently provide the depth of training required for specialty areas of psychological practice.

The newly proposed rule changes (see 21 NCAC 54.1901) also would establish different passing scores for the EPPP for licensed psychological associates. If the candidate achieves a scaled score of 440, he/she would practice under supervision. If the candidate seeks independent practice as a licensed psychological associate, he/she must meet the scaled score of 500. The proposed rule changes offer yet another pathway to independent practice – if the candidate is unable to meet the scaled score of 500 but practices for at least 5 years under supervision, then he/she may practice without supervision.

There is no evidence offered validating that psychological associates have the appropriate education, training and skills to practice in any specialty areas within psychological practice, requiring specific expertise such as neuropsychology, geropsychology, rehabilitation psychology, child and adolescent psychology as compared to psychologists. Yet nothing in the proposed rules prevents a psychological associate from engaging in specialty practice so long as he/she has either achieved a scaled score of 500 on the EPPP or the lower score of 440 and completed 5 years of supervised practice. Yet, the Board proposes to allow licensed psychological associate to engage in the full range of professional psychological practice as permitted for doctoral level psychologists. The reality is that the EPPP is a knowledge-based test, not a test of clinical skills. As such, test scores cannot confirm that an individual is competent for independent practice. Rather, EPPP test scores must be considered within the context with higher levels of education and extensive supervised training in psychology as offered in doctoral psychology programs.

APA has affirmed that the doctorate is the minimum educational requirement for entry into professional practice as a psychologist, acknowledging that postdoctoral education and training is an important component of a psychologist's ongoing obligation to engage in continuing professional development throughout his or her professional career. Most US states only allow doctoral-trained individuals (who meet the specified licensing criteria defined by state law) to practice psychology. While a handful of states may allow master's level individuals to be licensed under the psychology licensing laws, most of those states stipulate a narrower scope of practice and/or mandate supervision for those who do not have a doctoral degree.

Nonetheless, in these proposed rule changes, North Carolina seeks to lower the requirements for the practice of psychology to a master's level discipline despite the fact that nearly all other US jurisdictions as well as the US federal system require the doctorate as the standard for the independent practice of psychology.

We strongly urge that all of the provisions related to granting independent practice for psychological associates be withdrawn.

- (3) It is inappropriate to allow a master's-level licensed psychological associate to supervise any non-resident doctoral-level psychologist engaged in temporary practice in North Carolina.**

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APA strenuously objects to the fact that a master's level psychological associate may be allowed to supervise an out-of-state doctoral-level psychologist who may be practicing temporarily within the state of North Carolina as spelled out in 21 NCAC 54.1610. While it may be appropriate to require that an out-of-state psychologist formally collaborate or consult with a North Carolina licensed psychologist, it is inappropriate to allow the out-of-state licensed psychologist to be under the oversight of a master's level provider. For the same reasons stated above, a psychological associate's education and training do not have the same depth of training as a psychologist. This is especially true of psychologists practicing in specialty areas such as neuropsychology, health psychology, or rehabilitation psychology, where the psychologist makes very sensitive and specialized decisions such as determining where in the brain a stroke occurred or whether a patient is suitable for an invasive medical procedure like heart transplantation.

It is also worth noting that 21 NCAC 54.1703(2) which outlines the requirements for an out-of-state licensed psychologist to obtain either a 5-day or 30-day temporary license, does not mandate supervision. Rather, it states that the applicant psychologist should include the "name of the North Carolina psychologist(s) with whom you will be associating, if applicable" and "whether required to be supervised for practice in the jurisdiction in which the applicant is licensed." There is no requirement that supervision is required and no mention of psychological associates.

Therefore, we ask that 21 NCAC 54.1610 be revised, removing the reference to psychological associates as eligible supervisors, to be consistent with 21 NCAC 54.1703.

Thank you for the opportunity to provide comments on these proposed rule changes. For the aforementioned reasons, the proposed rules exceed the statutory authority granted by the North Carolina legislature and therefore are void. The proposed rules would also put the public at increased risk of harm, and we ask that it be immediately withdrawn.

If you have any questions or need further information, please contact Deborah Baker, JD, Director of Legal & Regulatory Policy by telephone at (202) 336-5886 or by email at dbaker@apa.org.

Cordially,



Jared L. Skillings, PhD, ABPP
Chief of Professional Practice, American Psychological Association
Board-certified in Clinical Psychology, Clinical Health Psychology, and Behavioral & Cognitive Psychology

cc: North Carolina Psychological Association