

BACKGROUND PAPER FOR The Board of Behavioral Sciences

**Joint Sunset Review Oversight Hearing, November 18, 2020
Senate Committee on Business, Professions and Economic Development
and Assembly Committee on Business and Professions**

IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS REGARDING THE BOARD OF BEHAVIORAL SCIENCES

BRIEF OVERVIEW OF THE BOARD OF BEHAVIORAL SCIENCES

History and Function of the Board

The Board of Behavioral Sciences (Board or BBS) licenses and regulates Licensed Clinical Social Workers (LCSWs), Licensed Marriage and Family Therapists (LMFTs), Licensed Educational Psychologists (LEPs), and Licensed Professional Clinical Counselors (LPCCs). Additionally, the Board registers Associate Clinical Social Workers (ASWs), Associate Marriage and Family Therapists (AMFTs), and Associate Professional Clinical Counselors (APCCs).

The Board is responsible for the regulatory oversight of over 120,000 licensees and registrants. Each profession has its own scope of practice, entry-level requirements, and professional settings with some overlap in areas.

- LMFTs are employed in mental health agencies, counseling centers, and private practice. LMFT's utilize counseling or therapeutic techniques to assist individuals, couples, families, and groups with a focus on marriage, family, and relationship issues.
 - AMFTs have completed the required educational program and are in the process of obtaining the hours of supervisory experience required for licensure.
- LCSWs are employed in health facilities, private practice, and state and county mental health agencies. LCSWs utilize counseling and psychotherapeutic techniques to assist individuals, couples, families, and groups.
 - ASWs have completed the required educational program and are in the process of obtaining the hours of supervisory experience required for licensure.
- LEPs work in schools or in private practice and provide educational counseling services such as aptitude and achievement testing or psychological testing. LEPs may not provide psychological testing or counseling services that are unrelated to academic learning processes in the education

system.

- LPCCs apply counseling interventions and psychotherapeutic techniques to identify and remediate cognitive, mental, and emotional issues, including personal growth, adjustment to disability, crisis intervention, and psychosocial and environmental problems. LPCCs work in a variety of settings including hospitals, private practice, and community-based mental health organizations.
 - APCCs have completed the required educational program and are in the process of obtaining the hours of supervisory experience required for licensure.

Business and Professions Code (BPC) §4990.16 states that *protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions.*

As stated in its 2018-2021 Strategic Plan, the Board’s current mission statement is:

Protect and serve Californians by setting, communicating, and enforcing standards for safe and competent mental health practices.

The Board is comprised of 13 members, 6 professional and 7 public members. The professional members consist of two LCSWs; two LMFTs; one LEP; and, one LPCC and each professional member must have at least two years of experience in his or her profession. The Governor appoints the six professional members along with five public members. The Senate Committee on Rules and the Speaker of the Assembly appoints one public member each.

The Board is statutorily required to meet at least twice annually, once in northern California and once in Southern California (BPC § 101.7a). However, the Board typically meets at least four times per year. Board members receive a \$100-a-day per diem. Consistent with board meetings, committee meetings are subject to the Bagley-Keene Open Meetings Act.

Seven members constitute a quorum of the Board, which is required for the Board to act or make a decision on behalf of the Board. In late 2019, the Board experienced a significantly high vacancy rate (seven members), in which a lack of quorum resulted in the Board’s cancellation of a meeting in September of 2019. However, there are now 12 appointed board members with one public member vacancy and the Board has not had to cancel any additional meetings as a result of its past vacancy issues.

The following is a listing of the current Board members and their background:

Name and Short Bio	Appointment Date	Term Expiration	Appointing Authority
Massimiliano Disposti Chair, Public Member Mr. Disposti was appointed as public member for his role of advocacy against the mental health disparities in the LGBTQI community and the negative outcomes that years of discriminatory policies have caused to the same. Mr. Disposti has founded a free mental health behavioral experience within the LGBT Center where	06/01/19	06/01/23	Senate

<p>he operates and where hundreds of patients are served each year. Mr. Disposti is a seasoned non-profit executive in organizational oversight, marketing/communications, development/fundraising, event planning, outreach, membership building and campaigns.</p>			
<p>Jonathan Maddox, Professional Member Mr. Maddox has been a LMFT in private practice since 2004, and training and internship coordinator at San Francisco County Behavioral Health Services since 2014, where he has served in several positions since 2006, including program director and clinical supervisor. He was a mental health consultant for Contra Costa County Mental Health Services from 2005 to 2006, a therapist at the East Bay Agency for Children from 1998 to 2000 and a military police officer in the U.S. Army from 1989 to 1992. Mr. Maddox earned a Master of Arts degree in marriage and family therapy from Oral Roberts University.</p>	9/15/17	06/01/21	Governor
<p>Deborah Brown, Public Member Ms. Brown works as an Adjunct Faculty member and University Supervisor for the Department of Instruction and Curriculum at California State University, Fresno. Ms. Brown was a secondary school educator for the Yosemite Unified School District in psychology from 1994-2015 and served as Social Science Department Chair for 17 years. In addition, she served as the school's WASC chair for 14 years as well as serving as a chair for WASC Visitation Teams for California secondary schools. She holds both a California Clear and Professional Teaching and Administrative Credential. In addition, prior to entering the teaching profession, she served as Mayor Pro Tem and Councilmember for the City of Rancho Cucamonga from 1986-1991. She earned a Master of Public Administration degree from California State University, Northridge.</p>	08/23/12	06/01/21	Governor
<p>Christine Wong, Professional Member Ms. Wong has been employed by Glenn County Health Services since 2002, and currently serves as Health Services Program Coordinator. She was formerly the Senior Mental Health Counselor for the Children's System of Care Program. Ms. Wong is also a Mental Health Clinician for Butte County Probation Department's Minor Adjustment Program, providing family counseling to the incarcerated minors in juvenile hall and upon release in the community since 2008. Ms. Wong is the Field Instructor for California State University, Chico, School of Social Work and previously served as the Dean of Student Affairs for Hong Kong Shue Yan College from 1993-1997. Ms. Wong received her Master of Social Work degree from the University of Hull, United Kingdom.</p>	05/18/11	06/01/21	Governor
<p>John Sovec, Professional Member Mr. Sovec is a LMFT in private practice in Pasadena California who specializes in supporting the needs of the LGBTQ community. He is the clinical consultant for The Life Group LA, adjunct faculty at Phillips Graduate Institute, and guest lecturer at Alliant University and USC School of Social Work. Mr. Sovec is a nationally recognized expert on creating affirmative LGBTQ support, and is the author of multiple publications and speaks at conferences nationwide. He provides training for community agencies, schools, non-profits, and provides professional consultation on LGBTQ competencies.</p>	12/11/19	06/01/22	Governor

<p>Crystal Anthony, Professional Member Ms. Anthony is a therapist at the Program for Torture Victims and co-executive director for Underground GRIT. She was a clinical social worker for the Orange County Health Care Agency from 2014 to 2019 and a bilingual project LIFE program coordinator at North County Lifeline from 2012 to 2015, where she was also a community assessment team therapist in 2014. Ms. Anthony was an educationally-related mental health services behavioral health clinician in 2013.</p>	10/7/19	6/01/22	Governor
<p>Ross Erlich, Public Member Mr. Erlich practices criminal law with an emphasizes in complicated criminal matters including bail, probation violations and other complex white-collar matters. Mr. Erlich was born and raised in the San Fernando Valley and is a founding member of the Jobs Vision Success' Emerging Leaders Board (formerly known as Jewish Vocational Services) and serves on the Steering Committee for the Rautenberg's New Leaders Project through the Jewish Federation. Mr. Erlich was a former Executive Board member, and current member, of Bet Tzedek's New Leadership Council and a Co-Chair of Govern for California's San Fernando Valley Courage Committee.</p>	2/6/20	6/01/23	Assembly
<p>Susan Friedman, Public Member Ms. Friedman was an Emmy-award winning network news producer for NBC News from 1982 to 2008 and from 1968 to 1977. She was a reporter and producer for the local Public Broadcasting Service from 1977 to 1982. She is a founding member of the Alliance for Children's Rights Board of Directors and vice chair and commissioner of the Los Angeles County Mental Health Commission.</p>	3/5/20	6/01/22	Senate
<p>Christopher C. Jones, Professional Member Mr. Jones is the President and CEO of Dynamic Interventions, the first incorporation of Licensed Educational Psychologists in the history of California. He worked as a school psychologist in Massachusetts and California, then left public education to open Dynamic Interventions in 2006. He was awarded the Suzanne Fisher Leadership Award by the California Association of School Psychologists (CASP) in 2019. He was the recipient of the CASP Outstanding School Psychologist Award, and currently sits on the CASP Board of Directors as the LEP Committee Chair.</p>	6/29/20	6/01/24	Governor
<p>Kelly Ranasinghe, Public Member Mr. Ranasinghe is currently is a Deputy County Counsel in Imperial County, California practicing child welfare law in juvenile court. Previously, Mr. Ranasinghe was a partner at the law firm of Henderson and Ranasinghe LLP and a senior program attorney at National Council of Juvenile and Family Court Judges, where he focused on domestic violence and child sex trafficking. He is a member of the National Alliance of Mental Illness (NAMI) and a certified peer mental health facilitator through the NAMI Connections program. Mr. Ranasinghe is also a member of the National Association of Counsel for Children and a board certified child welfare law specialist.</p>	6/29/20	6/01/21	Governor
<p>Wendy Strack, Professional Member Ms. Stack is currently the CEO of Wendy J Strack Consulting LLC, with more than 20 years of experience in creating and delivering award winning advocacy, communications, and outreach programs</p>	01/29/20	06/01/22	Governor

in Southern California. Wendy is a member of California Women Lead, Women’s Transportation Seminar (WTS), and the California Association of Public Information Officials (CAPIO). She also holds certifications in Basic and Advanced Public Information Officer/Joint Information Center/Joint Information Systems from the California Office of Emergency Services and the Federal Emergency Management Agency. She has also served on the City of Riverside Human Resources Board since 2018.			
Diane Herweck, Professional Member Ms. Herweck has been the Core Faculty, Lead Faculty and Clinical Director at the University of Phoenix since 2001; Adjunct Faculty at Palo Alto University since 2018; Part-Time Faculty at Capella University since 2017; and Practicum and Internship Evaluator and Adjunct Faculty at Grand Canyon University since 2015. She was Adjunct Faculty and Core Faculty at Capella University from 2008 to 2013. Herweck is a Member of the American Counseling Association, Association for Counselor Education, Western Association for Counselor Education and Supervision, California Association for Licensed Professional Clinical Counselors and California Association of Marriage and Family Therapists. She earned a Doctor of Psychology degree in clinical psychology from the United States International University and a Master of Arts degree in clinical psychology from Pepperdine University.	10/27/20		Governor
Vacant, Public Member			Governor

The Board appoints the Executive Officer (EO). The current EO, Kim Madsen, was appointed in 2010, but will be departing the Board in December 2020. The Board recently established an executive officer search committee and has appointed an interim Executive Officer, Steve Sodergren.

In Fiscal Year (FY) 2019/20, the Board was authorized for approximately 62 staff positions. As of December 1, 2019, the Board reported eight vacancies, which were intentionally held open to achieve budget savings for budget year 2018/19. However, the Board notes in November 2020, that many of those vacancies are filled. Since the Board’s last sunset review in 2016, the Board has had an approximate 22 %, increase in authorized staff positions. The Board reports that since its last sunset review, it has experienced an average vacancy rate of around 7%.

The Board does not have any statutorily required committees; however, the Board utilizes ad-hoc committees on as-need basis. The Board Chair appoints the committee membership. The Board currently has three standing ad-hoc committees, a policy and advocacy committee, a telehealth committee and a licensing committee. The telehealth and licensing committees are new and the BBS anticipates the first telehealth committee meeting in January 2021, and the first licensing committee meeting in spring of 2021. Past committees include: 1) Continuing Education; 2) Out of State Education; 3) Examination Program Review and, 4) Supervision.

Fiscal, Fund and Fee Analysis

As a Special Fund agency, the Board does not receive General Fund (GF) support and instead relies solely on fees set by statute and collected from licensing, renewal fees and other administrative fees in order to fund operating costs. Currently, the Board’s fee schedule includes at least 47 separate fees applicable to its four distinct licensing classifications and three registration programs. Fees are

assessed for initial licensing, original application, examination and re-examination, associate registration, biennial license renewal, annual registration renewal, inactive license, retired license, delinquent license, along with various others. All Board fees are specified in statute and regulations.

All board licenses are renewed biennially and registrants are renewed annually. All other fees are for examinations and initial licensure and are processed and received on an on-going basis. There is no mandated reserve level for the Board; however, BPC § 128.5 prohibits the Board from maintaining a reserve balance that exceeds 24 months of the Board's operating budget.

The total revenues anticipated by the Board for FY 2020/21, is \$9.17 million and the total anticipated expenditures for FY 2020/21 is \$12.47 million, which equates to a negative operating budget. The Board notes in its 2019 Sunset Review Report that fees have remained stagnant for 20 years and effective July 1, 2019, the Board incurred an additional \$500,000 expense for Attorney General services associated with the recent rate increases. Because of an anticipated operating deficit in FY 2019/20, the Board sought a fee increase for licensing and renewal fees in 2020. AB 3330 (Calderon, Chapter 359, Statutes of 2020) provided increases for various fees for licensees under the Board's jurisdiction including fee increases for examinations, (both clinical and the law and ethics examination), initial license, renewal and application. While the board is currently operating with a negative budget, the fee increase, which takes effect on January 1, 2021, is anticipated to provide the Board with a positive operating budget. The Board projects the additional revenue will provide the Board with a 0.5-month reserve in FY 2021/22.

On average, the Board has spent approximately 42% on enforcement; 16% on examinations; 22% on licensing, and 20% on administrative expenses. For FY 2015/16 the Board spent 22% of its budget on pro rata costs; 19% in 2016/17; 22% in 2017/18; 21% in 2018/19; and in 2019/20, the Board spent approximately 22%.

In comparison, in 2016, during the Board's last sunset review, the Board reported the following percentage breakdown for expenditures: on average, the Board's enforcement program accounted for 43% of expenditures, the examination program accounted for 28%, and the licensing program accounted for 29%. The administrative program includes costs for the executive staff, the board, administrative support, and fiscal services. The percentage of expenditures spent on DCA pro rata was as follows: 17% for FY 2011/12; 20% for FY 2013/14; 20% for FY 2014/15; and, at the time, projected 19% for FY 2015/16. In the current report, the FY 2015/16 pro rate expenditure was \$2.277 million, which was actually 22%, slightly higher than estimated.

From FYs 2009-10 through 2016-17, the Board spent approximately \$3.248 million on BreEZe and anticipates spending \$2.441 million for FYs 2017-18 through 2019-20. The Board was part of the Release 1 phase for the system and has utilized BreEZe since October 8, 2013. The Board notes that it has added several features to its BreEZe system including access for licensure and registration renewals, payment acceptance for citations and fines, and submission for the California Law and Ethics Examination.

Current Expenditures by Program Component:								
Dollars in the Thousands	2015-16		2016-17		2017-18		2018-19	
	PS**	OE&E	PS**	OE&E	PS**	OE&E	PS**	OE&E
Enforcement	\$1,530	\$1,905	\$1,831	\$3,281	\$1,948	\$3,173	\$2,379	\$3,576
Examination	\$434	\$1,463	\$680	\$1,354	\$640	\$1,184	\$675	\$1,187
Licensing	\$1,036	\$1,463	\$1,240	\$1,354	\$1,447	\$1,184	\$1,357	\$1,187
Administration*	\$899	\$1,463	\$984	\$1,354	\$1,007	\$1,184	\$1,052	\$1,187
DCA Pro Rata	\$0	\$2,277	\$0	\$2,296	\$0	\$2,577	\$0	\$2,627
Diversion (if applicable)	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
TOTALS	\$3,900	\$8,573	\$4,735	\$9,635	\$5,043	\$9,302	\$5,462	\$9,762

Per BPC § 125.3, the Board is authorized to request licensees who are disciplined by the Board through the administrative process, to reimburse the Board for the enforcement-related costs. The Board also has authority to seek cost recovery as a term and condition of probation, which must completely be paid prior to the end of the licensee’s probation. In disciplinary cases where a licensee is ordered to surrender their license, cost recovery may be ordered. If an individual who surrenders a license seeks to reapply for licensure, they must pay the ordered cost recovery in full prior to issuance of a new license. In revocation cases, where cost recovery is ordered, but not collected the Board will transmit the case to the Franchise Tax Board (FTB) for collection. However, the Board notes that the majority of cost recovery ordered is for probationary cases.

Licensing

The Board’s total licensing and registrant population in December of 2019 was approximately 116,000. As of August 2020, that number is now just over 120, 000. Those figures include the following:

- 48,600 LMFTs;
- 31,000 LCSWs;
- 2,000 LEPs;
- 2,300 LPCCs;
- 15,600 AMFTs
- 16,800 ASWs
- 5,100 APCCs

The Board reports that its total licensee population has experienced an approximate 9% annual increase since its last sunset review.

The licensing program of the Board provides public protection by ensuring licenses or registrations are issued to applicants who meet the minimum requirements of current statutes and regulations, and who have not committed acts that would be grounds for denial. In order to accomplish this, the licensing unit must verify that each applicant meets the required education, experience, and examination requirements. The Board notes that staff vacancies in the *licensing evaluator staff* position can negatively affect licensing timeframes.

The Board's established application processing timeframes are as follows:

- 30 business days: APCC Registration
- 60 business days: LPCC Application for Licensure
- 30 business days: AMFT Registration
- 60 business days: MFT Application for Licensure
- 30 business days: ASW Registration
- 60 business days: LCSW Application for Licensure
- 60 business days: LEP Examination Eligibility Application
- 30 business days: Initial License Issuance
- 30 business days: All Renewals

As of December 2019, the Board noted that it was currently meeting its established timeframes. However, the processing time for LMFT and LCSW applications for licensure were reported to take 55 days and 51 days, respectively during FY 2018-2019. The Board notes that some processing times have increased during 2020, for both registration applications and licensure applications to which the Board attributes to a traditional increase of applicants during the time of year. Additionally, the Board experienced staff vacancies in these units, which subsequently have been filled.

The Board requires primary source documentation for any educational transcripts, experience records, license verification from other states, and professional certifications. As part of the licensing process, all applicants are required to submit fingerprint images in order to obtain criminal history background checks from the California Department of Justice and the Federal Bureau of Investigation. Although the Board reported in 2015, during its last sunset review, that all current licensees had met current fingerprint requirements, the Board discovered in 2018, that a number of licensees did not have a complete fingerprint record on file. The Board notes that it has been working to update those files accordingly. The Board notifies a licensee through the BreEZe system during the renewal process if the licensee is missing a fingerprint file. Unlike many other healing arts licensing bodies, the Board does not query the National Practitioner Databank. Instead, the Board verifies out-of-state applicants via other states' regulatory boards.

The Board does not approve schools. Instead, the Board assesses whether or not the coursework completed during the degree program contained the appropriate coursework to satisfy the licensure requirements. This curriculum review was previously conducted by an educational subject matter expert. In 2019, the Board and the Bureau for Private Postsecondary Education (BPPE) entered a Memorandum of Understanding to authorize BPPE to conduct the curriculum review.

Applicants for licensure as a "LMFT" must obtain a doctor's or master's degree from a school, college, or university approved by or accredited by the following entities:

- BPPE
- Commission on the Accreditation for Marriage and Family Therapy Education; or,
- A regional or national institutional accrediting agency recognized by the U.S. Department of Education.

Applicants for licensure as a “LCSW” must obtain a master’s degree from a school of social work, accredited by the Commission on Accreditation of the Council on Social Work Education.

Applicants for licensure as a “LEP” must obtain a master’s degree from a regionally accredited university. Regionally accredited schools include:

- Western Association of Schools and Colleges
- Northwest Association of Secondary and Higher Schools
- Middle States Association of Colleges and Secondary Schools
- New England Association of Colleges and Secondary Schools
- North Central Association of Colleges and Secondary Schools
- Southern Association of Colleges and Schools

Applicants for licensure as a “LPCC” must obtain a doctor’s or master’s degree from a school, college, or university approved by or accredited by the following entities:

- BPPE;
- A regional or national institutional accrediting agency recognized by the U.S. Department of Education.

LMFT, LPCC and LCSW candidates are required to take and pass two examinations in addition to meeting the degree requirements.

LMFT candidates are required to take and pass the California Law and Ethics Examination and a California-based clinical examination.

LCSW candidates are required to take and pass the California Law and Ethics Examination and the Association of Social Work Boards National Examination.

LPCC candidates are required to take and pass the California Law and Ethics Examination and the National Clinical Mental Health Counseling Examination.

LEP candidates are required to take only one examination, the LEP written examination. The LEP written examination is developed by the Board and the DCA’s Office of Professional Examinations Services and incorporates questions related to the California Law and Ethics Examination, which is taken separately by the other three licensing groups.

The Board, in consultation with the Office of Professional Examination Services at the DCA, develops the California Law and Ethics Examination, the LEP written examination, and the LMFT clinical examination.

All examinations are computer based. Upon complete application review, the Board provides the applicant's information to the testing vendor. Applicants must schedule their own examination at the testing center specified for each examination.

In total, the Board is responsible for the administration of five examinations: the LMFT Clinical, and Law and Ethics examinations; the LCSW and LPCC Law and Ethics examinations and the LEP licensing examination. While the majority of the examination passage rates are above 70%, the LEP licensing examination is consistently below 70%. In FY 2017-18, the average pass rate was 58%, in FY 2018/19 the pass rate climbed to only 68%.

In 2017, the Board established a License Portability Committee. The purpose of the committee was to review existing licensure requirements for California and other state agencies as they pertain to improving license portability across states. In 2019, the Board sponsored SB 679 (Bates, Chapter 380, Statutes of 2019). The bill aimed to address potential barriers for out-of-state licensed applicants and to provide a more efficient pathway to licensure. Until January 1, 2020, out-of-state applicants licensed in another state were required to meet current licensing requirements for in-state applicants, including education, supervision/experience and examinations. Individuals who were licensed in another state were not granted licensure in California solely because they held an out-of-state license. In 2019, the Governor signed SB 679, which sought to streamline the licensing process for out-of-state applicants holding an existing license in another state.

Prior to 2020, there were three pathways to obtain licensure as an LMFT, LCSW, or LPCC for out-of-state applicants:

1. Individuals who have held licenses from out-of-state for less than 4 years
2. Individuals who have held licenses from out-of-state for more than 4 years
3. Unlicensed individuals

SB 679 revised the three pathways above into the following two:

1. Individuals who have held licenses from out-of-state for more than 2 years;
2. Unlicensed or other individuals.

The bill reduced the length of the required course in California law and professional ethics from 18 to 12 hours, which reduced the number of days necessary to complete the course from three to two. The bill became effective on January 1, 2020. At this time, it is unclear what effect, if any, the change has had on out-of-state applicants, if there have been instances of consumer harm from revising licensure requirements for out-of-state licensees, or if the change has had any impact during the recent COVID-19 pandemic. The Board reports that there has been an approximately 22% increase for out-of-state applications between the calendar years of 2018 (292 applications) and 2019 (357 applications). The Board anticipates the volume of applications to increase for 2020.

Continuing Education

Current law requires all licensees of the Board, as a condition of biennial licensure renewal, to complete 36 hours of continuing education (CE) in specific areas relevant to the licensee's respective field of practice (BPC § 4980.54, 4989.34, 4996.22, and 4999.76). An individual must only complete 18 hours of CE within their initial license renewal period (16, CCR section 1887.2).

An exemption from the CE requirement exists if the licensee meets one of the following criteria:

- The license is inactive (BPC §§ 4984.8, 4989.44, 4997 or 4999.112).
- For at least one year during the licensee's previous license renewal period the licensee was absent from California due to military service.
- For at least one year during the licensee's previous license renewal period, the licensee resided in another country.
- For at least one year during the licensee's previous license renewal period, the licensee or an immediate family member, including a domestic partner, where the licensee is the primary caregiver for that family member, had a physical or mental disability or medical condition. The physical or mental disability or medical condition must be verified by a licensed physician or psychologist.

The Board has the authority to conduct audits to determine compliance with the CE requirements. Each month a random number of licensees are selected for an audit. The licensee is notified in writing, and provided a due date to submit copies of any CE certificates completed during the last renewal period. Upon receipt of the documentation, the certificates are analyzed to determine if the CE was obtained from an approved provider, and during the renewal period subject to the audit.

Licensees that comply with the CE requirements are notified in writing. Licensees that fail the audit are referred to the Board's Enforcement Unit for the issuance of a citation and fine. The fine amount is determined by the type (e.g., course required for each renewal cycle) and number of CE units that are missing. The fine may range from \$100 to \$1,200.

The average percentage of licensees who failed the Board's CE audit, during FYs 2015/16 through 2018/19 was 27%.

Beginning June 30, 2015, the Board stopped approving CE providers, and instead required licensees to obtain CE from providers approved by other national or statewide associations including any of the following:

1. An accredited or approved postsecondary institution that meets the requirements set forth in BPC §§ 4980.54(f) (1), 4989.34(b)(1), 4996.22(d)(1), or 4999.76(d).
2. A Board-recognized approval agency or a continuing education provider that has been approved or registered by a Board-recognized approval agency, including the following:
 - *National Association of Social Workers*
 - *Association of Social Work Boards*

- *National Board for Certified Counselors*
 - *National Association of School Psychologists*
 - *American Psychological Association*
 - *California Association of Marriage and Family Therapists*
 - *California Psychological Association*
3. An organization, institution, association or other entity that is recognized by the Board as a continuing education provider, including the following:
- *American Association for Marriage and Family Therapy*
 - *American Association for Marriage and Family Therapy-California Division*
 - *California Association for Licensed Professional Clinical Counselors*
 - *California Association of Marriage and Family Therapists*
 - *National Association of Social Workers-California Chapter*
 - *California Society for Clinical Social Work*
 - *California Association of School Psychologists*
 - *California Psychological Association*
 - *California Counseling Association*
 - *American Counseling Association*

Enforcement

The Board notes in its 2019 Sunset Review Report that it receives on average approximately 2,500 consumer complaints and criminal conviction notifications annually. The Board reports that this is a 25% increase from the Board's prior sunset review in 2016, when the Board reported that it received approximately 2,000 complaints annually.

The Board notes that this increase is in-line with the increase in the Board's overall licensing population. However, according to the Board the increase in complaint and subsequent arrest notifications has led to an increase in the enforcement workload for the Board's enforcement program. The Board notes that since the last sunset review, there has been a 23% increase in statement of issues and accusations filed.

In 2010, the DCA established standard performance measures for each board and bureau to assess the efficiency of enforcement programs. DCA set a goal to complete consumer complaints within 12 to 18 months and each entity was responsible for setting internal guidelines to meet the goal of closing a case resulting in discipline within the 12 to 18 month timeframe. The Board's 2019 Sunset Review Report states that for FY 2018-2019, the average timeframe for the Board to close cases resulting in formal discipline of a licensee was 514 days. As commonly shared with many other licensing boards and bureaus, cases that rise to the level of formal discipline may be impacted by entities outside of the Board's control including the Attorney General and the Office of Administrative Hearings. The required partnership between the three different administrative departments affects the timeframes for closing cases.

The Board reports for FY 2018-19, that it met the majority of its established performance metrics. The table below identifies the actual formal disciplinary actions taken by the Board in the past four years.

Disciplinary Outcomes	FY 2015-16	FY 2016-17	FY 2017-18	FY 2018-19
Revocation	27	21	39	50
Voluntary Surrender	17	50	42	54
Suspension	0	0	0	0
Probation with Suspension ¹	1	0	1	0
Probation ²	57	66	92	85
Probationary License Issued	N/A	N/A	N/A	N/A
Other	8	11	16	22

The Board established complaint prioritizations guidelines in 2009. The complaint prioritization guidelines allow the Board’s enforcement staff to review and address the most serious complaints more expeditiously than those complaints, which do not rise to the level of consumer harm.

Per the Board, complaints categorized as “urgent” demonstrate conduct or actions by the licensee or registrant that pose a serious risk to the public’s health, safety or welfare. Examples of these complaints include practicing while under the influence of drugs or alcohol, sexual misconduct with a patient, or acts of serious patient harm. These complaints receive immediate attention of the Enforcement Manager.

Complaints prioritized as “high” involve serious allegations of serious misconduct, but the actions do not pose an immediate risk to the public’s health, safety or welfare. Examples of these complaints include prescribing or dispensing without authority, aiding and abetting unlicensed activity, or compromising an examination.

Complaints prioritized as “routine” involve possible violations of the Board’s statutes and regulation, but do not pose a risk to the public’s health, safety or welfare including: recordkeeping violations, quality-of-service complaints, or complaints of offensive behavior or language.

The Board and its licensees are subject to certain mandatory reporting requirements for actions, which result in a settlement or arbitration award to an individual.

- BPC section 801(b) requires every insurer providing professional liability insurance to a Board licensee to report any settlement or arbitration award over \$10,000 of a claim or action for damages for death or personal injury caused by the licensee’s negligence, error or omission in practice, or by rendering of unauthorized professional services. This report must be sent to the Board within 30 days of the disposition of the civil case.
- BPC section 802(b) requires Board licensees and claimants (or, if represented by counsel) to report any settlement, judgment, or arbitration award over \$10,000 of a claim or action for

damages for death or personal injury caused by the licensee's negligence, error or omission in practice, or by rendering of unauthorized professional services. This report must be submitted to the Board within 30 days after the written settlement agreement.

- BPC section 803(a) requires the clerk of the court to report, within 10 days after judgment made by the court in California, any person who holds a license or certificate from the Board who has committed a crime or is liable for any death or personal injury resulting in a judgment for an amount in excess of \$30,000 caused by his or her negligence, error or omission in practice, or by rendering of unauthorized professional services.
- BPC section 803.5 requires a district attorney, city attorney, or other prosecuting agency to report any filing against a licensee of felony charges and the clerk of the court must report a conviction within 48 hours.
- BPC section 805(b) requires the chief of staff, chief executive officer, medical director, or administrator of any peer review body and the chief executive officer or administrator of any licensed health care facility or clinic to file an 805 report within 15 days after the effective date which any of the following occurs as a result of an action taken by the peer review body of a Licensed Marriage and Family Therapist, Licensed Clinical Social Worker, Licensed Educational Psychologist, or Licensed Professional Clinical Counselor: 1) The licentiate's application for staff privileges or membership is denied or rejected for a medical disciplinary cause or reason; 2) the licentiate's membership, staff privileges, or employment is terminated or revoked for medical disciplinary cause or reason; or, 3) Restrictions are imposed, or voluntarily accepted, on staff privileges, membership, or employment for a cumulative total of 30 days or more for any 12-month period, for a medical disciplinary cause or reason.
- Penal Code section 11105.2 establishes a protocol whereby the DOJ reports to the Board whenever Board applicants, registrants, or licensees are arrested or convicted of crimes. In such instances, the DOJ notifies the Board of the identity of the arrested or convicted applicant, registrant, or licensee in addition to specific information concerning the arrest or conviction.

Additionally, registrants and licensees are required to disclose at the time of renewal all convictions since their last renewal.

During the last four FYs, the Board received 12 reports for settlement or arbitration award. The average amount of the award paid on behalf of the licensee was \$57,000.00.

The Board notes that while the number of reports the Board received from the required entities is low, the Board is not currently experiencing any problems regarding the receipt of reports from entities required to report identified incidents to the Board.

The Board is subject to statute of limitations periods for filing cases as specified in BPC §§ 4990.32 and 4982.05. An accusation must be filed within three years from the date the Board discovers the alleged act or violation or within seven years from when the alleged incident occurred, whichever occurs first.

Accusations regarding alleged sexual misconduct must be filed within three years from the date the Board discovers the alleged act or omission or within ten years from when the alleged incident occurred whichever occurs first. Cases involving a minor patient are tolled until the minor child reaches 18.

Cases which involve the procurement of a license by fraud or misrepresentation are not subject to the statute of limitation timeframes.

The Board reports that it has implemented a monitoring program for case aging to ensure that cases are not lost based on the expiration of the statute of limitations. Further, the Board notes that in the last seven years, it has not lost a case to due to the statute of limitations expiring.

The Board utilizes cite and fine as an enforcement tool against a licensed or unlicensed individual who is found to be in violation of the Board's statutes or regulations. Cite and fine is used as a mechanism to address minor violations where formal probation, revocation, or suspension may not be warranted by the act that occurred. Examples of actions that result in a fine or citation include unlicensed practice, practicing with an expired license, record keeping violations, or failing to complete CE, among others.

The five most common violations for which a citation is issued are:

- Failure to complete required CE
- Failure to maintain patient confidentiality
- Providing services for which a license is required (unlicensed activity)
- Misrepresenting the license held
- Misrepresenting the CE completed

Licensees who fail to pay a fine are unable to renew their license until the fine is paid in full. Additionally, the Board utilizes the Franchise Tax Board Intercept Program, which allows tax returns to be intercepted as payment for outstanding fines. Utilization of the program requires specific consumer identifying information, which is not always available to the Board for those individuals who are fined for unlicensed practice.

The Board is authorized through BPC § 125.3 to request that licensees who are disciplined through the administrative process reimburse the Board for those administrative expenses. While the Board seeks cost recovery in every case, the Administrative Law Judge may reduce the amount proposed by the Board or decide not pursue cost recovery. The Board may establish a payment schedule for a licensee; however, full compliance is only required for an individual to reapply or satisfy conditions of probation.

For more detailed information regarding the responsibilities, operations, and functions of the Board or to review a copy of the Board's *2019 Sunset Review Report*, please refer to the Board's website at www.bbs.ca.gov.

PRIOR SUNSET REVIEWS: CHANGES AND IMPROVEMENTS

BBS was last reviewed by the Legislature through sunset review in 2016. During the previous sunset review, 12 issues were raised. In December 2019, BBS submitted its required sunset report to the Senate Committee on Business, Professions and Economic Development and Assembly Committee on Business and Professions (Committees). In this report, BBS described actions it has taken since its prior review to address the recommendations made. Issues which were not addressed and which may still be of concern to the Committees are more fully discussed under “Current Sunset Review Issues.”

- **General Fund loans were repaid to the Board.**
- **Examination restructure did not lead to licensing backlogs.** The Committees asked what impacts the Board anticipated because of the examination restructure and asked for a plan to address potential licensing timeframe gaps. The implementation of the examination restructure was relatively uneventful. Board staff actively monitored and identified candidates whose eligibility may not have successfully transferred. These issues were quickly resolved and candidates resumed their examination process. Currently, the examination restructure is functioning as expected.
- **Updated fingerprints are in place and CE audits are being conducted.** The Board now has a full-time staff person to conduct audits and completed its “retro-fingerprint project”. During this project, all licensees and registrants who had not previously submitted fingerprints to the Board were required to do so. A licensee or registrant who did not comply with the fingerprint requirement was issued a citation and fine.
- **CPEI performance measures are being achieved.** The Committees suggested whether an enforcement-related advisory committee could help identify those areas where BBS needed to improve its enforcement program to better serve licensees and consumers. The additional enforcement staff and reorganization of the Board’s Enforcement Unit enable the Board to achieve the CPEI Performance Measures.
- **Updated Strategic Plan is in place.** The Board adopted a new strategic plan to guide the Board through 2021.

CURRENT SUNSET REVIEW ISSUES IDENTIFIED FOR THE BOARD OF BEHAVIORAL SCIENCES

The following are unresolved issues pertaining to the BBS, or areas of concern that should be considered, along with background information for each issue. There are also Committee staff recommendations regarding particular issues or problem areas BBS needs to address. BBS and other interested parties have been provided with this Background Paper and BBS will respond to the issues and staff recommendations.

ADMINISTRATIVE ISSUES

ISSUE #1: (BOARD COMPOSITION.) Should professional representation be reduced or expanded?

Background: The Board's 13-person membership is comprised of seven public members and six professional members (licensees of the Board). As prescribed in BPC § 4990, the professional members include two LMFTs, two LCSWs and one LEP and LPCC member each.

When the LPCCs were added to the Board's jurisdiction in 2009 (SB 788, Wyland, Chapter 619, Statutes of 2009), the enabling statute authorized only one additional Board member to represent the LPCC profession. It is unclear why only one LPCC member was added as the LMFT and LCSW professions each held two positions on the Board. LPCCs, LEPs, LCSWs, and LMFTs all have different practice areas and mental health focus. Although the number of licensed LCSWs and LMFTs are significantly higher than the number of licensed LEPs and LPCCs in California, it does not appear that board member representation is based on the population of a profession.

Staff Recommendation: *The Board should advise the Committees on the current professional membership representation of the Board, and if there are any issues with the current membership configuration.*

ISSUE #2: (BOARD SURVEY NECESSITY.) Do Board surveys inform BBS' work and add value?

Background: The Board collects information from two different types of customer satisfaction surveys. The DCA issues a survey for consumer complaint satisfaction, and the Board issues a survey for consumer satisfaction with overall Board communications. Between FYs 2015-16 and 2018-19, the Board reported that it only received 21 responses to surveys. Given that in the last FY year alone, the Board received approximately 1,700 complaints, the number of surveys received relative the number of complaints received and processed by the Board is relatively small. This raises the question as to whether or not the complaint satisfaction survey issued by the DCA is very beneficial. It is unknown what the costs are associated with the DCA creating and administering this survey, as it is likely charged as a portion of DCA pro rata expenses. Given the Board's recent fiscal concerns, should complaint satisfaction surveys be continued?

With respect to the internal survey conducted by the Board, the Board reported between FYs 2016-17 and 2018-19, it received 1,130 survey responses. The Board's internal survey aims to capture responses related to how well the Board communicates with licensees, applicants, and consumers.

Staff Recommendation: *The Board should advise the Committees on the usefulness of current surveys, and if possible, provide information as to whether or not these surveys are beneficial to the Board's overall operations.*

LICENSING ISSUES

ISSUE #3: (TELEHEALTH.) Is the Board aware of any issues with the online practice of licensed therapists?

Background: The ability to access mental health professionals and their services through online services has changed the traditional view of mental health treatment. No longer does an individual need to be physically present in an office setting to obtain services from a licensed provider. Telehealth/online services are an important tool for expanding access to critical mental health services, especially for many patients in rural areas, and as a result of the recent COVID-19 pandemic. However, with that expansion comes the responsibility of the Board to ensure that only licensed professionals are providing those services to patients and that service providers are identifiable should enforcement be necessary.

BPC § 2290.5 defines “Telehealth” to mean “the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient’s health care. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.”

Further, BPC 2290.5 requires before the delivery of health care via telehealth, the health care provider initiating the use of telehealth to inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health. This consent needs to be documented.

At this time, the Board does not have reciprocity or practice agreements with other states. Further, the ability to track and monitor unlicensed practice can be challenging if the practice is occurring in another state. Advertisements of unlicensed practitioners that are internet based may not be easily removed from online search engines; thereby leaving consumers in need of mental health treatment in situations that may not benefit them. It is imperative that the Board find the appropriate means to inform consumers about safe telehealth practices. In addition, it is unclear from a quick search of online service providers where a consumer would be able to find information to report concerns about a practitioner.

CCR Title 16 § 1815.5 specifies the standards for practice for the Board’s licensees and registrants with respect to providing telehealth services. The regulations specifically state that all psychotherapy services offered via telehealth are subject to the Board’s statutes and regulations. The regulations specify that California-licensees may only practice via telehealth in another jurisdiction if they meet requirements to lawfully provide services in that jurisdiction, and the delivery of services via telehealth is allowed by that jurisdiction. Additionally, the regulations cover the requirements for California licensees to provide services via telehealth.

As noted by the Board in its 2019 Sunset Review Report, “Over the last few years the practice of online therapy has become increasingly prevalent. Californians are now able to access therapy services through the internet as well as through phone applications. Reflecting this trend, Board staff continues

to receive an increasing number of inquiries regarding the lawful practice of telehealth. At this time, the Board has not identified any major issues with unlicensed activity.”

Historically, there has been limited guidance on telehealth practice. The law requires a valid state license in marriage and family therapy, clinical social work, educational psychology, or clinical counseling, respectively, before a person can engage in the practice of any of these professions in this state. Also, a licensee or registrant in California may provide online therapy service to clients in another jurisdiction only if they meet the requirements to lawfully provide online services in that jurisdiction if the jurisdiction allows online services. The recent COVID-19 pandemic has likely increased the need for telehealth services.

In 2019, the Board reported that it was working to establish a telehealth committee to engage stakeholders in discussion to gain a better understating of the benefits and possible downfalls of telehealth. The goal of the committee will be to establish new regulations if necessary and to establish guidelines for the practice of telehealth for the Board’s licensees. The Board anticipates this committee to meet for the first time on January 22, 2021.

Given the important mission of expanding mental health treatment and access, telehealth or web-based services have the opportunity to play a vital role in access to treatment for many patients who may not be able to obtain services via the traditional model. However, it is imperative that the Board be proactive in ensuring that only licensed mental health professionals are treating individuals and that the services provided are consistent with current practice to ensure consumer protection.

Staff Recommendation: *The Board should advise the Committees on what steps, if any, it is taking to ensure the integrity of telehealth services provided to patients and consumers. Additionally, the Board should advise the Committees on how, what if any changes to the current telehealth laws may be necessary because of the COVID-19 pandemic and current state and local government requirements for businesses. Given the vulnerability of persons seeking mental health treatment, consumer safety is vital.*

ISSUE #4: (SUPERVISION.) How does the Board ensure that supervisors are not supervising more registrants or trainees than authorized and how does the Board ensure individuals are actually earning reported hours?

Background: Under current law, the pathway to licensure for LMFTs, LCSWs and LPCCs is complex and includes both a qualifying degree and accumulated hours of supervised work experience. Specifically, in order to qualify for licensure, applicants for those license types must obtain at a minimum, a master's degree, and two years of supervised work experience, which consists of at least 3,000 hours. Within the 3,000-hour requirement for supervised experience, there are limitations on the types of hours that can be counted towards the supervision requirement and specified requirements for licensees who act in a supervisor capacity. In addition, supervised work experience hours can only be acquired in certain practice settings.

For example, CCR 16 § 1833 specifies that supervised experience cannot be credited for more than 40 hours in a week for MFTs and no more than 500 hours of experience will be credited for providing group therapy or group counseling.

Further, CCR 16 § 1820 for PCCs, specify that during each week in which experience is claimed and for each work setting in which experience is gained, an applicant or associate shall have at least one hour of one-on-one, individual, face-to-face supervisor contact or two hours of face-to-face supervisor contact in a group of not more than eight persons receiving supervision. Further, no more than six hours of supervision, whether individual or group, is given credit during any single week.

During the BBS's last sunset review in 2016, the Committees questioned how the Board ensures the integrity of the supervised experience requirements and asked if any changes were necessary. Although at the time of the last sunset, there were no immediate recommended statutory changes, the Board has since sponsored legislation to address some of the complexities of the supervision program.

Some of the major legislative changes include authorizing the Board to audit supervisors to ensure they meet the qualifications to supervise and further require supervisors to maintain documentation to ensure they met the qualifications.

Additionally, changes were made to the supervised experience requirements for future licensees including, but not limited to: removing the limit of 15 supervisees in a corporation; supervisors at private practices or corporations can continue to supervise up to 3 supervisees each; allows the 52 weeks of required individual supervision to now be either individual, triadic, or a combination of both; clarifies that consultation or peer discussion does not qualify as supervised experience; and, for associates, ties additional supervision needed in a week to the amount of direct clinical counseling performed that week (previously, it was tied to the amount of client contact or face-to-face psychotherapy performed in a week).

Additional language was incorporated into the LPCC practice act, consistent with LMFT and LCSW practice acts, prohibiting PCC trainees, associates or applicants from leasing or renting space or paying for furnishings, equipment, supplies or other expenses that are the obligation of their employers among others.

Additionally, the recent COVID-19 pandemic has likely affected the ability for individuals to acquire supervised hours, especially in face-to-face settings.

While the Board has made a number of programmatic steps to help ensure the integrity of the supervision program and provide clarity for individuals who may supervise associates and in what setting, it would be helpful to know if the changes have provided beneficial to licensees who act as supervisors and to associates who are gaining hours of supervised experience.

Staff Recommendation: *The Board should advise the Committees on whether it believes there are any deficiencies with the current supervision program or any issues specifically related to the recent pandemic.*

ISSUE #5: (AB 2138.) What is the status of the Board’s implementation of Assembly Bill 2138 (Chiu/Low) and are any statutory changes needed to enable the Board to better carry out the intent of the Fair Chance Licensing Act?

Background: In 2018, Assembly Bill 2138 (Chiu/Low, Chapter 995, Statutes of 2018) was signed into law, making substantial reforms to the license application process for individuals with criminal records. Under AB 2138, an application may only be denied based on prior misconduct if the applicant was formally convicted of a substantially related crime or was subject to formal discipline by a licensing board. Further, prior conviction and discipline histories are ineligible for disqualification of applications after seven years, with the exception of serious and registerable felonies, as well as financial crimes for certain boards. Among other provisions, the bill additionally requires each board to report data on license denials, publish its criteria on determining if a prior offense is substantially related to licensure, and provide denied applicants with information about how to appeal the decision and how to request a copy of their conviction history. These provisions are scheduled to go into effect on July 1, 2020.

Because AB 2138 significantly modifies current practice for boards in their review of applications for licensure, it was presumed that its implementation would require changes to current regulations for every board impacted by the bill. Currently, the Board is in the process of finalizing its regulations to revise its denial criteria to incorporate the changes from the bill. It is also likely that the Board may identify potential changes to the law that it believes may be advisable to better enable it to protect consumers from license applicants who pose a substantial risk to the public. AB 2138 went into effect on July 1, 2020.

Staff Recommendation: *BBS should provide an update in regards to its implementation of AB 2138 provisions, as well as relay any recommendations it has for statutory changes.*

WORKFORCE ISSUES

ISSUE #6: (EXEMPT SETTINGS.) Is clarity needed for what places are considered *exempt settings*?

Background: Board licensees and registrants provide mental health services in a multitude of settings. The variety of locations where treatment may be provided include hospitals, community clinics, schools, non-profits, private companies, and government agencies, among others. Under current law, in order to provide services in certain settings a person must have a license or registration issued by the Board. However, the BPC provides specific exemptions to the licensure and registration requirements for those persons practicing in government entities, schools/colleges and universities, and non-profit and charitable institutions. If a service is being provided at any other location, then a license or registration is required to practice.

While it appears easy to digest where services may be provided without a license or registration, the law is less clear about the locations and places where licenses or registrations are required, and

specifically where registrants are permitted to obtain supervised experience hours that will count towards licensure.

Those exempt settings identified above have been excluded from the BBS practice acts since at least the mid-1980s. The BBS noted concerns about whether consumers were being harmed in these settings. As a result, the Board established an “exempt setting” committee, which met throughout 2017 and 2018 to examine issues related to exempt settings. The committee was established for two purposes: to examine mental health services provided in exempt settings to determine if consumers are receiving services consistent with the standard of care for the mental health professions; and to examine different types of practice settings that offer mental health services to determine if setting definitions need to be refined.

The Board reports that its committee has completed its first objective with the implementation of AB 630 (Arambula and Low, Chapter 229, Statutes of 2019) which required consumer notification for complaint procedures for exempt settings, and Board-contact information for non-exempt settings. The Board reports that it is now focused on clarifying the definitions of practice settings in order to more clearly identify what the various types of settings the licensees in supervisory roles and registrants may be practicing in, and the availability to gain experience hours necessary for licensure.

As noted by the Board’s Exempt Settings Committee meetings, there is not a precise definition of a private practice, and there are other settings with different business structures that are not clearly identifiable as exempt settings or private practice, or corporate owned; which makes it challenging to determine where its acceptable to gain hours or supervise for hours and under which employment structure. The Board notes that clarifying the statute and the definitions of these non-exempt settings may be beneficial in not only reducing confusion but also increasing access to supervisors and the places where future-licensees are able to obtain the relevant work experience.

In 2020, Assembly Member Arambula introduced AB 2363, which sought to clarify the definition of “non-exempt settings” raise the ceiling on the number of trainees a supervisor is allowed to supervise, and prohibit trainees from gaining supervised experience in specified employment settings. A policy committee did not hear this bill.

Staff Recommendation: *The Board should advise the Committees on its continued efforts to clarify the definition of non-exempt settings and any other issues related to trainee supervision.*

ISSUE #7: (INDEPENDENT CONTRACTORS). Does the new test for determining employment status, as prescribed in the court decision *Dynamex Operations West Inc. v. Superior Court*, have any unresolved implications for licensees working in the Board’s professions as independent contractors?

Background: In the spring of 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903) that significantly confounded prior assumptions about whether a worker is legally an employee or an independent contractor. In a case involving the classification of delivery drivers, the California Supreme Court adopted a new test for determining if a worker is an independent contractor, which is comprised of three necessary elements:

- A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- B. That the worker performs work that is outside the usual course of the hiring entity’s business; and
- C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Commonly referred to as the “ABC test,” the implications of the *Dynamex* decision are potentially wide reaching into numerous fields and industries utilizing workers previously believed to be independent contractors. Occupations regulated by entities under the Department of Consumer Affairs have been no exception to this unresolved question of which workers should now be afforded employee status under the law. In the wake of *Dynamex*, the new ABC test must be applied and interpreted for licensed professionals and those they work with to determine the rights and obligations of employees.

In 2019, the enactment of Assembly Bill 5 (Gonzalez, Chapter 296, Statutes of 2019) effectively codified the *Dynamex* decision’s ABC test while providing for clarifications and carve-outs for certain professions. Specifically, physicians and surgeons, dentists, podiatrists, psychologists, and veterinarians were among those professions that were allowed to continue operating under the previous framework for independent contractors.

Staff Recommendation: *The Board should inform the committees of any discussions it has had about the Dynamex decision and AB 5, and if it is aware of any potential to impact the current professions.*

ENFORCEMENT ISSUES

ISSUE #8: (COST RECOVERY.) How can the Board improve the collection of cost recovery?

Background: Cost recovery can be an effective tool to help a Board recoup a portion of costs associated with taking enforcement actions against a licensee. In the Board’s 2019 Sunset Review Report, it reported that it spent \$5,954,025 on enforcement, ordered \$732,158.88 in cost recovery, yet the Board only collected a fraction of that for a total of \$56,830.38. Given that the Board is facing deficits, recently raised fees, and notes higher costs associated with enforcement including an increase in enforcement related actions, the Board should be exploring ways to strengthen its collection of cost recovery in an effort to help offset the expense of enforcement. The chart below notes the Board’s expenditures for enforcement during the last four FYs along with the amount of cost recovery ordered and collected.

COST RECOVERY (LIST DOLLARS IN THOUSANDS)				
	FY 2015–16	FY 2016–17	FY 2017–18	FY 2018–19
Total Enforcement Expenditures	3,435,870	\$5,111,728	\$5,121,179	\$5,954,025**
Potential Cases for Recovery*	99	121	128	150
Cases Recovery Ordered	92	99	95	120
Amount of Cost Recovery Ordered	281,348.28	293,460.53	480,297.94	732,158.88
Amount Collected	54,806.61	55,160.61	37,316.37	56,830.38

Staff Recommendation: *The Board should advise the Committees on its efforts to obtain cost recovery as a way mitigate the expenses associated with taking enforcement actions.*

COVID-19 ISSUES & RESPONSE

ISSUE #9: (COVID-19). Since March of 2020, there have been a number of executive issued waivers, which affect licensees and future licensees alike. Do any of these waivers warrant an extension or statutory changes?

In response to the COVID-19 pandemic, the Governor instituted a number of actions and issued numerous executive orders in order to address the immediate crisis, including impacts on the state’s healthcare workforce stemming from the virus. On, March 4, 2020, the Governor issued a State of Emergency declaration, as defined in Government Code § 8558, which immediately authorized the Director of the Emergency Medical Services Authority (EMSA) to allow licensed healthcare professionals from outside of California to practice in California without a California license. Under BPC § 900, licensed professionals are authorized to practice in California during a state of emergency declaration as long as they are licensed and have been deployed by the Director of EMSA.

Following that executive order, on March 30, 2020, the Governor issued Executive Order N-39-20 authorizing the Director of DCA to waive any statutory or regulatory professional licensing relating to healing arts during the duration of the COVID-19 pandemic – including rules relating to examination, education, experience, and training. Many of the waivers, which affected the Board, also affected other healing arts licensees under the DCA. Some of those broad waivers include the following:

- DCA-20-69 allows registrants whose registrations expire between March 31, 2020 and December 31, 2020 to renew their registration without the California Law and Ethics Examination. (Must attempt at a later date.)

- DCA-20-69 allows Board licensees who are set to renew between March 31, 2020 and December 31, 2020 to not need to complete continuing education in order to renew their license. (Must complete at a later date.)
- DCA-20-57 allows an individual with a retired, inactive, or cancelled license who wishes to restore their license in order to help with the current State of Emergency to do so during this time without being subject to the normally required continuing education requirements and renewal and delinquency fees. This only applies to individuals whose license has been retired, inactive, or cancelled for no more than 5 years.

In addition to waivers related to healing arts boards generally, there were a number of waivers requested by the Board and issued by the director of the DCA to address issues specific to the Board and its licensees.

- DCA-20-71 waives the requirement that associate marriage and family therapists, associate clinical social workers, and associate professional clinical counselors must pass the California law and ethics examination before a subsequent registration number is issued. The waiver applies to all associates who are in their last year of renewal, if that renewal expires between March 31, 2020 and December 31, 2020. (The California law and ethics exam will still need to be passed by the next renewal date)
- DCA-20-73 waives the requirement, which only permits Associate Marriage and Family Therapists (AMFTs), Associate Clinical Social Workers (ASWs), and Associate Professional Clinical Counselors (APCCs) to obtain their required weekly direct supervisor contact via videoconferencing if they are working in an exempt setting. It also waives BPC §§ 4980.36(d)(1)(B)(ii) and (d)(1)(B)(vi)(II) for MFT trainees, and 4999.33(c)(3)(K) for PCC trainees, that specifically requires provision of “face-to-face” mental health services in order to complete required practicum hours.
- DCA-20-68 extends examination eligibility for LMFT; LEP, LCSW, and LPCC applicants that failed to take or retake a required examination, and whose one-year eligibility to take or re-take the examination expired between March 31, 2020 and November 30, 2020.
- DCA-20-52 waives BPC § 4980.42(c) for students last enrolled in a practicum course between March 31, 2020, and August 31, 2020, as specified.

Many of the above-mentioned waivers are extended, while some are set to expire in December 2020. The question remains as to whether or not any of these waivers are still relevant during the pandemic or necessary. Should any waivers be a permanent change?

Staff Recommendation: *The Board should advise the Committees on its COVID-19 waiver requests and whether or not any of the waivers be permanent or for a set time, or if any waivers are no longer necessary.*

OTHER ISSUES

ISSUE #10: (TECHNICAL CHANGES MAY IMPROVE EFFECTIVENESS OF THE LAW ADMINISTERED BY THE BOARD). There are amendments to the various practice acts that are technical in nature but may improve Board operations and the enforcement of those laws.

Background: There may be a number of non-substantive and technical changes to the four licensing entities regulated by the Board, which may improve operations. Since the Board’s last sunset review in 2016, the Board has sponsored or been impacted by 25 pieces of legislation which address all or parts of the Board’s duties, oversight authority, licensing requirements, examination standards, among others.

As a result, there may be a number of non-substantive and technical changes to the Board’s licensing laws, which should be made to correct deficiencies or other inconsistencies in the law. Because of numerous statutory changes and implementation delays, code sections can become confusing, contain provisions that are no longer applicable, make references to outdated report requirements, and cross-reference code sections that are no longer relevant.

For example, current BPC § 4999.46.1 and BPC § 4999.12 both define the term of “supervision” under the LPCC practice act. However, BPC § 4999.12 additionally defines other terms commonly referenced throughout the LPCC practice act. Because BPC § 4999.12 defines multiple terms, the more appropriate place for a definition of “supervision” is under that section. As such, it would be best to repeal BPC § 4999.46.1 for consistency and clarification purposes. Additionally, as a result of SB 679 (Chapter 380, Statutes of 2019) BPC § 4996.17.2 contains an incorrect cross reference related to the educational requirements for out-of-state applicants who do not qualify for the new streamlined pathway to licensure. Currently, BPC § 4996.17.2 specifies that applicants must have a master’s degree or meet the requirements of BPC § 4996.18(g). However, that code section applies to a requirement to inform patients about applicant/registration status while gaining experience hours as opposed to BPC § 4996.18(e) which specifies the educational requirements that must be achieved in order to obtain licensure/registration in California if other specified education is not met. BPC § 4996.17.2 should be amended to correctly cross-reference BPC § 4996.18(e) instead of BPC § 4996.18(g).

The Board’s sunset review is an appropriate time to review, recommend, and make necessary statutory changes.

Staff Recommendation: *The Board should recommend cleanup amendments to the Committees.*

CONTINUED REGULATION OF THE PROFESSION BY THE CURRENT PROFESSION BY THE BOARD OF BEHAVIORAL SCIENCES

ISSUE #11: (CONTINUED REGULATION BY THE BOARD.) Should the licensing and regulation of the BBS be continued and be regulated by its current membership?

Background: The Board is charged with protecting the consumer from unprofessional and unsafe mental health practices. It appears as if the Board has been an effective, and for the most part efficient, regulatory body for the professions that fall under its purview. However, the Board needs to continue to improve its enforcement outcomes, manage a more effective CE program, maintain high standards for the professions by ensuring active supervisors are not misrepresenting supervised employees, maintain an operational board, and focus on ensuring safe access to vital telehealth services. Given that the Board has been working to ensure its fiscal health, streamline licensing requirements and enhance license portability, the Board should be able to continue to fulfill its mandate, meet performance targets, and continue to protect consumers.

The Board should be continued so that the Legislature may once again review whether the issues and recommendations in this Background Paper have been addressed.

Staff Recommendation: *The Committees recommend that the LCSW, LMFT, LEP and LPCC professions, and registration of ASW Associates, MFT Associates and PCC Associates continue to be regulated by the Board in order to protect the interests of consumers and be reviewed once again.*