



Board of Behavioral Sciences

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BOARD MEETING NOTICE

March 24, 2011

The Board of Behavioral Sciences will meet via teleconference beginning at 8:30 am at the following locations:

Department of Consumer Affairs
El Dorado Room
1625 North Market Blvd., #220
Sacramento, CA 95834

415 Karla Court
Novato, CA 94949

Pioneer High School
10800 E Benavon St
Whittier, CA 90606

8:30 am

FULL BOARD OPEN SESSION

- I. Call to Order & Establishment of a Quorum

FULL BOARD CLOSED SESSION

- II. Pursuant to Government Code Section 11126(e)(1) the Board Will Confer With Legal Counsel to Discuss Writ of Mandate:

California Association of Marriage and Family Therapists, a California Non-Profit Mutual Benefit Corporation vs. Board of Behavioral Sciences, Case Number 34-2010-80000689, Sacramento Superior Court

FULL BOARD OPEN SESSION

- III. Discussion and Possible Action to comply with the Writ of Mandate Regarding the Gap Examination
- IV. Public Comment for Items Not on the Agenda
- V. Adjournment

Public Comment on items of discussion will be taken during each item. Time limitations will be determined by the Chairperson. Items will be considered in the order listed. Times are approximate and subject to change. Action may be taken on any item listed on the Agenda.

THIS AGENDA AS WELL AS BOARD MEETING MINUTES CAN BE FOUND ON THE BOARD OF BEHAVIORAL SCIENCES WEBSITE AT www.bbs.ca.gov.

NOTICE: The meeting is accessible to persons with disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Christina Kitamura at (916) 574-7835 or send a written request to Board of Behavioral Sciences, 1625 N. Market Blvd., Suite S-200, Sacramento, CA 95834. Providing your request at least five (5) business days before the meeting will help ensure availability of the requested accommodation.



Governor
Edmund G. Brown Jr.
State of California
State and Consumer
Services Agency
Department of
Consumer Affairs

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1625 North Market Blvd., Suite S-200
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(916) 574-7830, (916) 574-8625 Fax
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To: Board Members

Date: March 15, 2011

From: Kim Madsen
Executive Officer

Telephone: (916) 574-7841

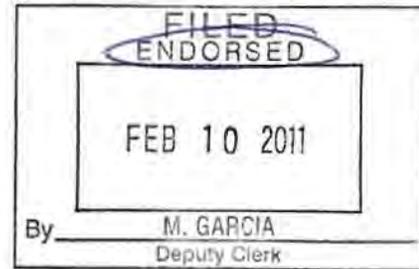
Subject: Writ of Mandate Compliance – Gap Examination

Attached for your review are the following documents.

- Judgment *California Association of Marriage and Family Therapists, a California Non-Profit Mutual Benefit Corporation vs. Board of Behavioral Sciences, Case Number 34-2010-80000689, Sacramento Superior Court*
- Peremptory Writ of Mandate *California Association of Marriage and Family Therapists, a California Non-Profit Mutual Benefit Corporation vs. Board of Behavioral Sciences, Case Number 34-2010-80000689, Sacramento Superior Court*
- Office of Professional Examination Services memo dated February 11, 2011

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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SACRAMENTO
13

14 **CALIFORNIA ASSOCIATION OF**
15 **MARRIAGE AND FAMILY**
16 **THERAPISTS, a California Non-Profit**
Mutual Benefit Corporation,

17 Plaintiff and Petitioner,

18 v.

19 **BOARD OF BEHAVIORAL SCIENCES,**
20 **and DOES 1-50,**

21 Defendants and Respondents.
22

Case No. 34-2010-80000689

~~PROPOSED~~ JUDGMENT

Judge: Honorable Allen H. Sumner
Dept.: 42

23 Pursuant to the Verified Petition for Writ of Mandate of Petitioner California Association of
24 Marriage and Family Therapists having been granted in part and denied in part, as reflected by the
25 ruling of this Court dated January 28, 2011, a copy of which is attached hereto as Exhibit "A" and
26 is incorporated herein by this reference, the Court now enters judgment in favor of Petitioner
27 California Association of Marriage and Family Therapists and against Respondent Board of
28 Behavioral Sciences as follows:

1 Let a peremptory writ of mandate issue, commanding Respondent Board of Behavioral
2 Sciences to set aside its decision requiring a Gap Examination for currently licensed marriage and
3 family therapists who seek to be licensed as professional clinical counselors. The peremptory
4 writ of mandate shall further command Respondent Board of Behavioral Sciences to file a return
5 within 60 days after issuance of the writ, setting forth the actions Respondent has taken to comply
6 with the writ.

7 APPROVED AS TO FORM:

8
9 DATED: February 7, 2011

PILLSBURY WINTHROP SHAW
PITTMAN LLP



RICHARD M. SEGAL
Attorneys for Plaintiff and Petitioner
CALIFORNIA ASSOCIATION OF
MARRIAGE AND FAMILY THERAPISTS

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13
14 DATED: February 8, 2011

KAMALA D. HARRIS, Attorney General
of the State of California



ARTHUR D. TAGGART
Supervising Deputy Attorney General
Attorneys for Defendants and Respondents
BOARD OF BEHAVIORAL SCIENCES

15
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20 IT IS SO ORDERED.

21
22 DATED: February 10, 2011



THE HONORABLE ALLEN H. SUMNER
JUDGE OF THE SUPERIOR COURT

Exhibit A
Minute Order dated January 28, 2011

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 01/28/2011 TIME: 11:00:00 AM DEPT: 42

JUDICIAL OFFICER PRESIDING: Allen Sumner
CLERK: M. Garcia
REPORTER/ERM: L. Kennedy CSR# 8927
BAILIFF/COURT ATTENDANT: J. Travis

CASE NO: 34-2010-80000689-CU-WM-GDSCASE INIT.DATE: 10/18/2010
CASE TITLE: California Association Of Marriage And Family Therapists a California Non Profit
Mutual Benefit Corporation vs. Board Of Behavioral Sciences
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Petition for Writ of Mandate - Writ of Mandate

APPEARANCES

Arthur Taggart, counsel, present for Respondent(s).
Richard Segal on behalf of the Petitioner
Janice Lachman on behalf of the Respondent

The above-entitled action came before this court on this date for writ hearing. The above named parties were present.

The Court issued a tentative ruling on January 27, 2011 as follows:

The petition for writ of mandate by Petitioner California Association of Marriage and Family Therapists challenging the decision by Respondent Board of Behavioral Sciences to require an examination for obtaining licensure as a Licensed Professional Clinical Counselor is granted in part and denied in part.

This shall constitute the court's tentative ruling on the petition, which is scheduled for hearing on January 28, 2011, in Department 42. The tentative ruling shall become the final ruling of the court, unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

BACKGROUND

The Licensed Professional Clinical Counselor Act

In 2009, the Legislature enacted the Licensed Professional Clinical Counselor Act ("Act"), creating a new licensed profession -- professional clinical counselors ("LPCCs"). (SB 788 (Wyland), Chap. 619, Stats. 2009 [Adding Bus. & Prof. Code §§ 4999.10 *et seq.*][1].) The Act authorizes the Board of Behavioral Sciences ("Board") to issue an LPCC license to those who meet certain enumerated requirements. [2] (§§ 4999.50(a)(1)-(3).)

The Act also contains a "grandfathering" clause authorizing the Board to issue LPCC licenses to those currently licensed as marriage and family therapists ("MFTs") or clinical social workers ("LCSWs"). (§ 4999.54(a)(2).) To qualify for an LPCC license, current MFTs and LCSWs must meet specific

DATE: 01/28/2011
DEPT: 42

MINUTE ORDER

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Calendar No.

coursework requirements. Additionally, the Board is to determine whether current MFTs and LCSWs should have to take an examination on the differences between the practice of professional clinical counseling, the practice of marriage and family therapy, and the practice of clinical social work. (§ 4999.54(b).) This is known as the "Gap Examination."

On September 9, 2010, the Board determined that a Gap Examination is necessary for those current MFTs and LCSWs who wish to be licensed as LPCCs.

Petitioner, the California Association of Marriage and Family Therapists, filed this action challenging the Board's determination. [3] Petitioner argues the Board erred in three respects in determining that the Gap Examination is required:

First, the Board erred in assessing purported differences between the *professions* of clinical counseling, clinical social work, and marriage and family therapy, instead of assessing the differences, if any, between the *practice* of clinical counseling, clinical social work, and marriage and family therapy.

Additionally, the Board failed to consult with the Office of Professional Examination Services ("OPES") in determining whether the Gap Examination is necessary.

Finally, the Board failed to exercise its independent judgment in determining whether the Gap Examination is necessary.

As discussed below, the court finds the Board did not abuse its discretion in determining that a Gap Examination is necessary if any differences were discovered between the MFT and LPCC "practices" as defined by statute. However, the court concludes the Board abused its discretion in failing to determine whether a Gap Examination was required "in consultation with" the OPES.

Board Proceedings

In November 2009, the Board's Executive Officer met with OPES staff to discuss whether OPES had the resources to conduct the audit required to identify the differences, if any, in the practice of MFTs, LCSWs and LPCCs. (Declaration of Kim Madsen in Opposition to Petition ("Madsen Decl."), at ¶ 9; Declaration of Amy Welch Gandy in Opposition to Petition ("Gandy Decl."), ¶ 3.) OPES determined it was not able to perform the audit. (Madsen Decl. at ¶ 9; Gandy Decl. at ¶ 6.)

The Board then obtained bids from outside vendors to perform a comprehensive analysis of the MFT, LCSW and LPCC professions under contract with the Board. (Madsen Decl. at ¶ 10.) Under the Board's Statement of Work, the contractor was to "determine whether any meaningful differences" exist between the LPC and MFT professions. (Madsen Decl. at Exh. 2; Declaration of Tracy A. Montez in Opposition to Petition ("Montez Decl."), Exh. 1.) In January 2010 the Board awarded the contract to Applied Measurement Services LLC ("AMS"). (Madsen Decl. at ¶ 10; Montez Decl. at ¶ 11.)

Between January and April 2010, AMS conducted its review, which AMS described as a "professions analysis." On April 29, 2010, AMS notified the Board that AMS had completed the first phase of its review, providing a report on the results of its analysis and recommendations. (Petitioner's Notice of Lodgment of Exhibits in Support of Petition ("NOL"), Exh. "B.") AMS found that the expectations for entry-level practice as an MFT or LPCC differed in three categories: diagnostic and assessment services; professional practice activities; and professional development. (Montez Decl. at ¶ 30.) However, AMS concluded these differences for MFTs and LPCCs could be remediated by additional coursework, training, and certification. [4] (*Id.* at ¶ 34.) Accordingly, AMS recommended that the Board

not adopt require a separate Gap Examination for MFTs seeking to be grandfathered in as LPCCs. (*Id.* at ¶ 36; NOL at Exh. "B.")

On September 9, 2010, the Board voted 5-3 to require a Gap Examination for licensed MFTs and LCSWs who wanted to be licensed as LPCCs. (Madsen Decl. at Exhs. 16, 17; NOL at Exh. "K.") At its hearing, the Board received testimony from Dr. Tracy Montez of AMS regarding the differences she found between the practice of MFTs, LCSWs and LPCCs, and why Dr. Tracy believed a Gap Examination was not warranted. (Madsen Decl. at Exh. 17.) The Board also questioned Dr. Montez on the distinction, if any, between a "profession" and a "practice." (*Ibid.*) Additionally, the Board requested advice from its legal counsel as to whether the Board had any discretion in requiring a Gap Examination if the Board determined there were differences in the practice of MFTs, LCSWs and LPCCs. (*Ibid.*)

On October 18, 2010, Petitioner filed the instant petition seeking a peremptory writ of mandate compelling the Board to set aside its decision requiring a Gap Examination for MFTs. (Petition at ¶ 10; Memorandum at 28:25-29:1.) [5].

DISCUSSION

The petition turns upon the construction of the "grandfathering" language in section 4999.54, subd. (b), which states in relevant part:

(1) The board and the Office of Professional Examination Services shall jointly develop an examination on the differences, if any differences exist, between the following:

(A) The practice of professional clinical counseling and the practice of marriage and family therapy.

(2) If the board, in consultation with the Office of Professional Examination Services, determines that an examination is necessary pursuant to this subdivision, an applicant described in paragraphs (2) and (3) of subdivision (a) shall pass the examination as a condition of licensure. [6]

Standard of Review

The court's review of the Board's quasi-legislative action is limited to an inquiry into whether the Board's decision was "arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires." (*Cal. Water Impact Net. v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1483 (citation omitted); *Wirth v. State* (2006) 142 Cal.App.4th 131, 138 (citation omitted).)

- **The Board did not abuse its discretion in determining that "practice" and "profession" are essentially the same.**

The crux of Petitioner's argument centers on the distinction, if any, between a *profession* and a *practice*. Petitioner contends the Board abused its discretion in requiring a Gap Examination because AMS incorrectly analyzed the MFT, LCSW and LPCC *professions* instead of the MFT, LCSW and LPCC *practices*.

Petitioner argues section 4999.54, subd. (b), requires the analysis to focus on the "practice of professional clinical counseling and the practice of marriage and family therapy," which Petitioner construes as "what those professionals may *do* after they are licensed." (Memorandum at 11:16-18, 11:27-28.) Petitioner thus argues the Board erred when AMS analyzed the differences between the requirements to *become licensed* as an MFT and to *become licensed* as a professional clinical

counselor, rather than the differences between what those professions may *do once licensed* (i.e., the practices of those professions). (Memorandum at 15:5-8.)

The Board responds that the terms *practice* and *profession* share the same meaning. The Board argues Petitioner mistakenly focuses on the actual practices of the professions rather than the "practice of the professions" as defined by statute. The Board contends that AMS's analysis of these professions appropriately focused on the practice of the professions as defined by statute.

As is evident from the parties' dispute, the Legislature failed to define the terms *practice* and *profession* as used in section 4999.54. Both constructions argued by the parties are reasonable. The language of section 4999.54 is thus ambiguous. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal. 4th 763, 775 ["A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable."].)

Faced with this ambiguity, the court's analysis is now to attempt to ascertain and effectuate the Legislature's intent by first evaluating the language of the relevant statutes. (*Hughes v. Board of Architectural Examiners, supra*, 17 Cal. 4th at 775.) In doing so, the court may look to the entire statutory scheme, as well as the history and background of the statute, and its apparent purpose. (*Ibid.*) Additionally, the Board's construction of the statute it is charged with implementing, while not binding on the court, is entitled to "consideration and respect" by the court unless "clearly erroneous." (*Bonnell v. Med. Bd.* (2003) 31 Cal.4th 1255, 1264 and 1265.

In the absence of clear definition or direction by the Legislature as to what it meant by the terms *practice* and *profession*, the Board's construction was reasonable. Petitioner's argument and alternative definition fail for several reasons.

The Legislature defines the "practice of marriage and family therapy" in section 4980.02:

[T]he practice of marriage and family therapy shall mean that service performed with individuals, couples, or groups wherein interpersonal relationships are examined for the purpose of achieving more adequate, satisfying, and productive marriage and family adjustments. This practice includes relationship and premarriage counseling.

The application of marriage and family therapy principles and methods includes, but is not limited to, the use of applied psychotherapeutic techniques, to enable individuals to mature and grow within marriage and the family, the provision of explanations and interpretations of the psychosexual and psychosocial aspects of relationships, and the use, application, and integration of the coursework and training required by Sections 4980.36, 4980.37, and 4980.41, as applicable.

The practice of "professional clinical counseling" as newly recognized by the Act is defined in section 4999.20:[7]

(1) "Professional clinical counseling" means the application of 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. "Professional clinical counseling" includes conducting assessments for the purpose of establishing counseling goals and objectives to empower individuals to deal adequately with life situations, reduce stress, experience growth, change behavior, and make well-informed, rational decisions.

(2) "Professional clinical counseling" is focused exclusively on the application of counseling interventions and psychotherapeutic techniques for the purposes of improving mental health, and is not intended to

capture other, nonclinical forms of counseling for the purposes of licensure. For purposes of this paragraph, "nonclinical" means nonmental health.

(3) "Professional clinical counseling" does not include the assessment or treatment of couples or families unless the professional clinical counselor has completed all of the following additional training and education, beyond the minimum training and education required for licensure:

(A) One of the following:

(i) Six semester units or nine quarter units specifically focused on the theory and application of marriage and family therapy.

(ii) A named specialization or emphasis area on the qualifying degree in marriage and family therapy; marital and family therapy; marriage, family, and child counseling; or couple and family therapy.

(B) No less than 500 hours of documented supervised experience working directly with couples, families, or children.

(C) A minimum of six hours of continuing education specific to marriage and family therapy, completed in each license renewal cycle.

Petitioner argues the *practice* of these professions includes only those tasks that a licensee may conduct once licensed – excluding the training and education requirements necessary in order to obtain a license. (See Memorandum at 11:16-18, 11:27-28, 15:5-8.) This, however, is inconsistent with the definitions of the *practices* of MFTs and LPCCs quoted above, where the Legislature includes education and training requirements in defining these practices.

For example, the "practice of marriage and family therapy" is defined as including ". . . integration of the coursework and training required" for licensure. (§ 4980.02.) [8] Similarly, the *practice* of LPCCs includes completion of specified and education requirements. (§ 4999.20(a)(3).)

Therefore, the statutory scheme defining and regulating MFTs and LPCCS does not support Petitioner's restricted construction of *practice* as focusing only upon what the individual does after he or she has obtained their license.

Petitioner's challenge to the terminology used by the AMS analysis is similarly unpersuasive. In response to this issue, Dr. Montez informed the Board "[a]lthough the terms *practice* and *profession* have different meanings, they are often used interchangeably in occupational analysis work." (Montez Decl. at Ex. 3 [emphasis original].) Dr. Montez explained:

In licensing, an *occupational analysis* (also known as a job analysis or practice analysis) defines the *practice of a profession* in terms of the actual tasks that licensees must be able to perform safely and competently. The underlying knowledge required to perform those tasks in the practice of the profession is also delineated. [¶.]

. . . [T]he professions analysis findings and associated recommendation are based on the occupational analysis of the four professions involving hundreds of [Subject Matter Experts] from each profession and their input about the tasks performed in the *practice* of the respective *professions*." (*Ibid.* [emphasis original].)

The AMS analysis of the *practices* of the MFT and LPCC *professions*, including their respective education and training requirements and post-licensing tasks, gave the Board ample basis for its decision.[9]

Finally, the Legislature's own declaration of findings and intent supports the Board's construction:

In enacting this chapter, the Legislature recognizes that licensed professional clinical counselors **practice a separate and distinct profession** from the **professions practiced** by licensed marriage and family therapists and licensed clinical social workers. As such, the Legislature recognizes the need to appropriately test licensed marriage and family therapists and licensed clinical social workers seeking to become licensed professional clinical counselors on **the difference in practice between the professions**. (§4999.11 [emphasis added].)

In recognizing that LPCCs and MFTs practice "separate and distinct profession[s]," the Legislature declined to specifically identify the differences between these professions. Instead, in enacting section 4999.54, subd. (b), the Legislature delegated to the Board the authority to determine the precise differences between the professions that warranted testing and to then develop the appropriate Gap Examination covering those differences. (See, e.g., *Credit Ins. General Agents Ass'n. v. Payne* (1976) 16 Cal. 3d 651, 656 ["Courts have long recognized that the Legislature may elect to defer to and rely upon the expertise of administrative agencies"].)

The Board's construction and application of the terms *profession* and *practices* is consistent with the statutory scheme and the Legislature's own declaration. The Board did not err in finding that there were differences between these two professions.

- The Board abused its discretion in failing to consult with OPES in determining whether the Gap Examination is necessary.

Petitioner contends the Board failed to comply with the statutory directive of section 4999.54, subd. (b)(2), which states in relevant part: "if the board, **in consultation with the Office of Professional Examination Services**, determines that an examination is necessary pursuant to this subdivision" (Emphasis added.) The Board disagrees, contending it "fully complied with the requirements of [section 4999.54(b)] by consulting with OPES." (Opposition at 20:6-7.)

The Board's position is not supported by the record.

Section 4999.54, subd. (b), plainly requires the Board to (1) make its initial determination whether the Gap Examination is required "in consultation with" OPES; and (2) if the Board determines that an examination is required, to then "jointly develop" the examination with OPES. (§ 4999.54(b)(1) and (2).)

The record shows only that the Board's executive officer met with staff from OPES to discuss whether OPES would be able to conduct an audit to identify any differences in the practice of LPCCs, MFTs and LCSWs. (Madsen Decl. at ¶ 9; Gandy Decl. at ¶ 3.) It was ultimately determined that OPES did not have the resources to conduct this audit. However, OPES would be able to develop a California law and ethics examination for candidates licensed as LPCCs in another state who wished to be grandparented into California as LPCCs. (Gandy Decl. at ¶¶ 5, 6.)

As a result, the Board contracted with AMS to analyze the MFT, LPCC and LCSW professions. The record contains no further reference to any participation by OPES in the Board's decision to require a Gap Examination. The minutes from the Board's September 9, 2010, meeting where the Board made its decision, indicate no participation or comment by OPES on this question. (Madsen Decl. at Exh. 17.) Additionally, the Board presented no evidence or argument that it did in fact make this decision "in consultation" with OPES.

In directing the Board to make its decision "in consultation with" OPES, the Legislature clearly required

the Board to confer with OPES in making the threshold determination whether an examination is necessary. (See, e.g., "Consult." *Merriam-Webster Online Dict. 2011*: "Consult" means "to ask the advice of opinion of" [Merriam-Webster Online, Jan. 25, 2011. <http://www.merriam-webster.com/dictionary/consult>].)

There is no evidence in the record, or argument asserting, that the Board in fact consulted with OPES before the Board made its determination. It appears that once the Board contracted with AMS to analyze the professions, the Board had no further contact with OPES before the Board unilaterally determined the Gap Examination was necessary.

- The Board did not abuse its discretion in determining the Gap Examination is required if the Board determines there are "any" differences between the professions.

Petitioner argues the Board abused its discretion in concluding the Gap Examination was required if the Board found **any** differences between the profession, even if any differences are insignificant. Petitioner argues that in requiring the Board to determine whether the Gap Examination is "necessary," section 4999.54, subd. (b), gives the Board discretion to determine whether any differences between the professions are significant enough to warrant examination. Petitioner thus argues the Board's decision to require the Gap Examination was an abuse of discretion because the Board failed to exercise its discretion at all.

Section 4999.54, subd. (b), provides:

(1) The board and the Office of Professional Examination Services shall jointly develop an examination on the differences, **if any differences exist**, between the following:

(A) The practice of professional clinical counseling and the practice of marriage and family therapy.

(2) If the board, in consultation with the Office of Professional Examination Services, determines that an examination is necessary pursuant to this subdivision, an applicant described in paragraphs (2) and (3) of subdivision (a) shall pass the examination as a condition of licensure. (Emphasis added.)

This language, while hardly a model of clarity, reasonably supports the Board's interpretation that the Gap Examination is required if the Board determines there are any differences between the MFT, LPCC, and LCWS professions. The Board's interpretation is supported by the Legislature's finding:

... the Legislature recognizes that licensed professional clinical counselors practice a separate and distinct profession from the professions practiced by licensed marriage and family therapists and licensed clinical social workers. As such, the Legislature recognizes the need to appropriately test licensed marriage and family therapists and licensed clinical social workers seeking to become licensed professional clinical counselors on the difference in practice between the professions. (§ 4999.11.)

The construction of an act by the agency charged with its enforcement is given deference, and will be followed unless erroneous. (See *Bonnell, supra*, 31 Cal.4th at 1265 (citation omitted); *League of Women Voters of Cal. v. Countywide Criminal Justice Coordination Comm.* (1988) 203 Cal.App.3d 529, 548; *Edgar v. Workers Comp. Appeals Bd.* (1988) 65 Cal.App.4th 1, 9.) Here, the Legislature directed the Board to require the Gap Examination on "any" differences between these professions. The Board concluded that it was to exercise its judgment and expertise on the threshold question of whether differences exist between the professions. But, should the Board determine that differences do exist, the Board concluded it was then mandated to require the Gap Examination. This is a reasonable construction of the statute.

DISPOSITION

The petition for a peremptory writ of mandamus is GRANTED in part and DENIED in part.[10]

A judgment shall issue granting a peremptory writ commanding Respondent Board to set aside its decision requiring the Gap Examination due to the Board's failure to comply with the requirement in section 4999.54, subd. (b), that the Board shall make its determination whether the Gap Examination is required "in consultation with" OPES. The writ shall further command Respondent to file a return within 60 days after issuance of the writ, setting forth what it has done to comply with the writ. The court reserves jurisdiction in this action until there has been full compliance with the writ.

In accordance with Local Rule of Court, rule 9.16, Petitioner is directed to prepare a formal order and judgment, incorporating this court's ruling as an exhibit, and a peremptory writ of mandamus; submit them to opposing counsel for approval as to form in accordance with California Rule of Court, rule 3.1312(a); and thereafter submit them to the court for signature and entry of judgment in accordance with California Rule of Court, rule 3.1312(b).

/n

[1] All statutory citations are to the Business & Professions Code.

[2] LPCC licensing requirements include: (1) receipt of a master's or doctoral degree; (2) completion of at least 3,000 hours of supervised experience in the practice of professional clinical counseling; and (3) evidence of a passing score on examinations designated by the Board. (See § 4999.50.)

[3] Petitioner's members include individuals who hold licenses as MFTs or are preparing for licensure as MFTs. (Petition at ¶¶ 11, 13.)

[4] "In AMS's opinion, MFTs could fulfill the requirements outlined in SB 788 if they completed the additional coursework and stayed within their scopes of practice and competence as an MFT." (Montez Decl. at ¶ 34.)

[5] Petitioner also asserts causes of action for declaratory and injunctive relief, which are duplicative of its request for a peremptory writ of mandate.

[6] As Petitioner's claims are brought on behalf of MFTs only, and not LCSWs, the court addresses section 4999.54, subd. (b), only as it relates to MFTs.

[7] Unlike section 4980.02, which defines the "practice of marriage and family therapy," section 4999.20 does not utilize the term "practice" in defining "professional clinical counseling." The parties agree, however, that this provision nevertheless defines the "practice" of LPCCs. (See Memorandum at 18:23-19:4; Opposition at 13:19-28.)

[8] For example, section 4980.02 expressly references section 4980.36, which requires an MFT license applicant to have participated in a doctor's or master's degree program that meets certain requirements.

[9] AMS explained that it evaluated the three professions by following a "psychometrically valid method," which included evaluating the actual tasks performed by licensed MFTs and LPCCs; background information regarding the professions, including prior occupational analysis work, education and training requirements, and the philosophy and scope of the profession; focus groups with subject matter experts who define the profession in terms of actual work behaviors performed in the practice of the profession; and information regarding the qualitative tasks that are considered important for entry-level competence. (Montez Decl. at ¶¶ 15, 17, 19 and 20.)

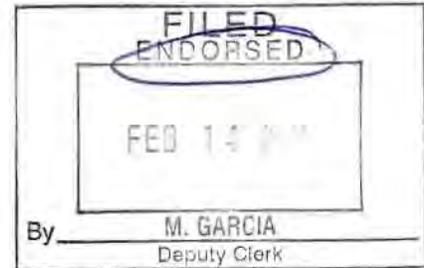
[10] Petitioner's Objections to Evidence are SUSTAINED.

The Court heard oral argument, as fully stated on the record.

The Court adopted its tentative ruling and ordered the Respondent to prepare the judgment.

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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SACRAMENTO

13
14 **CALIFORNIA ASSOCIATION OF**
15 **MARRIAGE AND FAMILY**
16 **THERAPISTS, a California Non-Profit**
Mutual Benefit Corporation,

17 Plaintiff and Petitioner,

18 v.

19 **BOARD OF BEHAVIORAL SCIENCES,**
20 **and DOES 1-50,**

21 Defendants and Respondents.
22

Case No. 34-2010-80000689

~~PROPOSED~~ PEREMPTORY WRIT
OF MANDATE

Judge: Honorable Allen H. Sumner
Dept.: 42

23 **TO THE BOARD OF BEHAVIORAL SCIENCES:**

24 The petition for writ of mandate on file herein having been considered, and this Court
25 having ordered that a peremptory writ of mandate issue, YOU ARE COMMANDED forthwith
26 upon receipt of this writ to set aside your decision requiring a Gap Examination for currently
27 licensed marriage and family therapists who seek to be licensed as professional clinical
28 counselors, consistent with the views expressed in this Court's January 28, 2011 ruling. YOU

1 ARE FURTHER COMMANDED to file a return within sixty (60) days after issuance of this
2 peremptory writ of mandate, setting forth the actions you have taken to comply herewith.

3 By order of the Court.

4
5 DATED: FEB 14 2011



Witness
The Honorable Allen H. Sumner
Judge of the Superior Court of the State of
California in and for the County of Sacramento

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9 Attest my hand and seal of this Court this ___ day of _____, 2011.

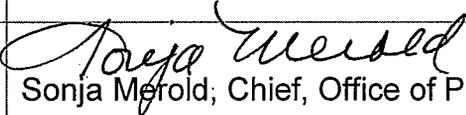
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Clerk Administrator

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Deputy Clerk

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MEMORANDUM

DATE	February 11, 2011
TO	Kim Madsen, Executive Officer, Board of Behavioral Sciences
FROM	 Sonja Merold, Chief, Office of Professional Examination Services
SUBJECT	Comments on Applied Measurement Services' Licensed Professional Clinical Counselor Gap Analysis

Thank you for extending the time-frame for our response from February 7 to February 11, 2011 to allow us time to meet with Dr. Tracy Montez from Applied Measurement Services.

On Tuesday, February 8, 2011, Amy Welch Gandy, Personnel Selection Consultant II, Supervisory and Bob Holmgren, Ph.D., Supervising Personnel Selection Consultant met with Dr. Montez to review Dr. Montez' files concerning her work on the Licensed Professional Clinical Counselor (LPCC) "gap" analysis. The goal of the meeting was to review Dr. Montez' files, discuss her procedures for conducting the gap analysis, and listen to her reasons for making her recommendations.

Dr. Montez reviewed with Bob and Amy the procedures she followed in conducting the LPCC gap analysis. Procedures included:

- Conducting six, one-on-one interviews of current LPCCs. (Two live in California; all are licensed in other states);
- Conducting interviews with Paul Riches, former BBS Executive Officer and Tracy Rhine, BBS Assistant Executive Officer;
- Conducting interviews with Linda Hooper, former OPES Supervisor and Karen Okicich, former OPES Personnel Selection Consultant;
- Reviewing several documents, including secure documents related to the detailed test plans for the National Counselors Examination (NCE) and the National Clinical Mental Health Counselors Examination (NCMHCE) published by National Board for Certified Counselors (NBCC);
- Conducting a workshop on April 8, 2010 at the OPES offices with seven California Licensed Clinical Social Workers (LCSWs) and one out-of-state (Texas licensed) LPCC subject matter experts (SMEs). This workshop was documented in confidential meeting notes entitled, "April 8, 2010 Licensed Clinical Social Worker Workshop"; and

- Conducting a workshop on April 22, 2010 at the OPES offices with six Marriage and Family Therapists (MFTs) and two out-of-state (Texas licensed) LPCC SMEs. This workshop was documented in confidential meeting notes entitled, "April 22, 2010 Marriage and Family Therapist Workshop."

According to Dr. Montez' information, the two workshops compared the California MFT or LCSW examination plans with the examination plans for the LPCC; identified a number of topics covered in the LPCC exam plan that are not covered in the California LCSW licensure examination or the California MFT licensure examination; reviewed the requirements for LCSW, MFT, and LPCC licensure; and concluded that any need for a gap examination for grand parented LCSWs or MFTs is not required, provided that each to-be-grand parented counselor:

- (1) Meet the educational, training, and certification requirements for licensure as an LPCC; and
- (2) Adhere to the Board statutes requiring the licensee to practice within one's scope of competence.

The procedures followed by Dr. Montez appear to be psychometrically sound and similar in practice to those that would have been followed by OPES staff had we conducted the study.

Dr. Montez stated in her April 29, 2010 cover letter to the Public Progress Report directed to your attention, that "BBS *not* adopt a separate examination requirement for Licensed Clinical Social Workers and Marriage and Family Therapists seeking to be grandparented as Licensed Professional Clinical Counselors." (emphasis in original). Dr. Montez explained that the reasoning behind the recommendation not to require a gap examination for to-be-grand parented MFTs and LCSWs related to cost efficiency.

While the procedures followed by Dr. Montez are sound, the conclusion drawn appears to depend on trusting in the professionalism of the currently licensed MFTs and LCSWs not to practice outside the scope of one's professional competence. However, given that some currently licensed MFTs and/or LCSWs will require remedial coursework in areas critical for minimum acceptable competence as LPCCs, OPES, based on Dr. Holmgren's analysis, would draw a different conclusion from these data based on his understanding of the relevant portions of the ***Standards for Educational and Psychological Testing*** (AERA, APA, NCME 1999).

According to the ***Standards***, "Licensing requirements are imposed by state and local governments **to ensure** that those licensed possess knowledge and skills in sufficient degree to perform important occupational activities safely and effectively" (AERA, APA, NCME *Standards*, p.156, emphasis added). From his perspective, licensure examinations are used to verify ("ensure") that potential licensees have the minimum acceptable competence needed to practice safely and competently. The remedial training received by LCSWs and MFTs would be the mechanism for gaining the

required knowledge and skills. A "gap" licensure examination would be the mechanism used to ensure or verify that this knowledge and skill was gained at least to the level of minimum acceptable competence.

Based on the information presented by Dr. Montez' on the gap analysis and the related professional standards, OPES supports the psychometric soundness of the project completed by Dr. Montez, but nonetheless recommends a gap examination in this situation.

Please contact me at (916) 575-7265 if you have any questions or need further information.

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