

November 4, 2019

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VIA EMAIL & US MAIL

Daniel Collins, J.D.
Executive Director
N.C. Psychology Board
895 State Farm Road, Suite 101
Boone, NC 28607

RE: Supplemental Statement regarding Supervision of Licensed Psychological Associates;
Proposal re 21 NCAC 54.2008 (h)(3)

Dear Mr. Collins:

As you know, I represent the North Carolina Psychological Association (“NCPA”) regarding proposed changes to the North Carolina Psychology Board’s regulations governing supervision of licensed psychological associates, changes which would eliminate all required supervision of licensed psychological associates after an LPA has been supervised for a specified period of time and the LPA’s most recent supervisor recommends supervision end. *See*, 21 N.C. Admin. Code 54.2008 (h)(3); *N.C. Register*, vol. 34, no. 5, pp. 397, *et seq.*, at p. 413. NCPA appreciates the chance to supplement its previous comments and written statement to the Board.

To begin, let me sum up my earlier letter. A board can only exercise the powers given to it in its authorizing statute, and what those powers are is a matter of statutory law and legislative intent. According to this standard, the N.C. Psychology Practice Act, N.C. Gen. Stat., § 90-270.1, *et seq.*, requires supervision for every LPA throughout the LPA’s career, and so the Board does not have the authority to dispense with this.

To illustrate, the Act says applicants for licensure as an LPA “. . . *shall be supervised* for all activities comprising the practice of psychology” until they are permanently licensed. N.C. Gen. Stat., § 90-270.5(c) (emphasis added). Then it goes on to say that after LPAs are permanently licensed, supervision is “*required* only for those activities specified in subsection (e) of this section.” N.C. Gen. Stat., § 90-270.5(c)(2) (emphasis added).

Turning to N.C. Gen. Stat., § 90-270.5 (e), it repeats the requirement that an LPA “*shall be supervised*” (emphasis added) and adds that it shall be by a “qualified psychologist,” according to Board rules specifying the “format, setting, content, time frames, [and] amounts of

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supervision,” among other things. Subsection (e) goes on to specify the key, i.e., the “only,” activities in psychology that require ongoing supervision after licensure. It says supervision

is required only when a licensed psychological associate engages in: assessment of personality functioning; neuropsychological evaluation; psychotherapy, counseling, and other interventions with clinical populations for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior; and, the use of intrusive, punitive, or experimental procedures, techniques, or measures. The Board shall adopt rules implementing and defining this provision, and as the practice of psychology evolves, *may identify additional activities¹ requiring supervision in order to maintain acceptable standards of practice.*

N.C. Gen. Stat., § 90-270.5(e) (emphasis added). The idea that some aspects of an LPA’s practice require supervision, while others do not, shows that supervision for these activities must continue throughout the LPA’s career.² If the Legislature had wanted to end supervision for these most sophisticated aspects of practice after some amount of time, it would have said so, just as it did say supervision for other parts of LPA practice ends once the LPA is permanently licensed.

Against all these indications that the Act requires supervision of LPAs throughout their careers, for certain key aspects of the practice of psychology, the Board believes that it has the authority to eventually end all supervision of all LPAs who complete a specified period of successful supervision. The Board finds this authority in the words of the Act that say it “shall adopt rules *implementing* and defining” the supervision of psychological services, and “shall specify in its rules [the] time frames [and] *amounts of supervision.*” N.C. Gen. Stat. § 90.270.5(e) & (c) (emphasis added). In the Board’s view, the Act lets it decide that the required amount of supervision for most LPAs will be, eventually, no supervision at all.

I trust the Board will agree that the preceding paragraphs correctly summarize its position and NCPA’s. Now, let me say more about NCPA’s reasons for thinking the Board’s position is incorrect as a matter of law.³

Rules for Statutory Construction. The Board, like other agencies, only has the authority the General Assembly intended to give it. Deciding what authority the General Assembly intended

¹ There is no section in the Act that gives the Board the authority to delete any activities from that list or to eliminate supervision of LPAs for the more complex matters.

² This distinction between activities that require supervision and those that do not traces back to the original Practice Act of 1967. See pages 3 & 4, below.

³ Many comments at the Board’s public hearing on the rule changes explained that they would be useful, but since the Board does not have the authority to adopt the changes, usefulness is a matter for the legislature.

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to give the Board is a question of law, and ultimately a question that courts will decide. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, ___ N.C. ___, ___, 821 S.E.2d 376, 379 (2018). To make this decision, courts will “apply the enabling legislation practically so that the agency’s power includes all those powers the General Assembly intended the agency to exercise.” *Id.*, quoting *High Rock Lake Partners v. N.C. Dep’t of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012). Sometimes courts say they will give “great weight” to an agency’s interpretation of the statute it administers, *id.*, and sometimes courts say they will give the agency interpretation “some deference,” *Martin v. N.C. Dep’t of Health & Human Services*, ___ N.C. App. ___, ___, 670 S.E.2d 629, 632 (2009), quoting *Total Renal Care v. N.C. Dep’t of Health & Hum. Servs.*, 171 N.C.App. 734, 740, 615 S.E.2d 81, 85 (2005), but courts always say that the agency interpretation is “not binding” on them. *N.C. Acupuncture, supra, Martin, supra*. “The weight of [a board’s interpretation] will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control.” *N.C. Acupuncture, supra*; quoting *N.C. Sav. & Loan League, v. N.C. Credit Union Comm’n*, 302 N.C. 458, 5466, 276 S.E.2d 404, 410 (1981). All this is to be sure the courts understand and implement the General Assembly’s intentions in passing a law, and the “best indicia of . . . legislative purpose [are] the language of the statute, the spirit of the act, and what the act seeks to accomplish.” *N.C. Acupuncture, supra*, at ___, 821 S.E.2d at 380, quoting *Watkins v. N.C. State Bd. of Dental Exam’rs*, 358 N.C. 190, 207, 593 S.E.2d 593 S.E.2d 764, 774.

Purpose and Spirit of the Practice Act. To explain its position, NCPA begins with the purpose and spirit of the Practice Act. The Act dates from 1967, but it was substantially rewritten in 1993, at which time the General Assembly. The Act as rewritten says the legislature’s purpose was to “protect the public from the practice of psychology by unqualified persons.” N.C. Gen. Stat. § 90-270.1(b); 1993 Session Laws, c. 375, s. 1. There is nothing in the Act about making LPA services more widely available or giving LPAs better access to payor panels, even though these are good things that NCPA wants for LPAs every bit as much as the proponents of the new rules. But the entire 1993 version of the Act that shows the General Assembly decided for itself that there should be two categories of licensed professionals in psychology (just as there always had been since 1967), and that the more extensively trained category needs to supervise the other. In other words, because the Act is intended to protect the public, and because the Act divides practitioners into two groups, one of which can practice without supervision, and one which requires supervision, it is clear that, in the words of *Watkins*, as quoted just last year in *N.C. Acupuncture*, the Act “seeks to accomplish” safety through supervision. *Watkins, supra*, at 207, 593 S.E.2d at 774.

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History of the Act. The entire history of the Practice Act is consistent with this.⁴ When the Act was written in 1967, it did not speak of LPAs, but it did describe and regulate their predecessors, which were known then as “Psychological Examiners.” Once fully licensed, these psychological examiners could do things such as interviews and testing without supervision, but they could only do the more sophisticated things such as appraisals and counseling “under qualified supervision” by licensed practicing psychologists. 1967 Session Laws, c. 910, s. 2(d) (codified as N.C. Gen. Stat. § 90-270.2(f)). In 1979, the Act was amended to remove all references to a psychological examiner and replace them with the term “Psychological Associate.” 1979 Session Laws, s. 670, s. 1. The Act carried forward the requirement of “qualified supervision” and said this:

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

1979 Session Laws, c. 670, s. 1. Then in 1993, the Act was extensively rewritten and recodified. 1993 Session Laws, c. 375. The Act said explicitly that it was intended to protect the public. N.C. Gen. Stat. § 90-270.(1)(b). The profession of psychological associate was re-named as “licensed psychological associate,” redefined, and re-codified in N.C. Gen. Stat. § 90-270.2(7). Also, the supervision requirement that had been in § 90-270.2(f) was moved to N.C. Gen. Stat. § 90-270.5(e), where it remains, and says that LPAs “shall be supervised by a qualified licensed psychologist in accordance with Board rules”⁵ Note that need for a “qualified” supervisor was brought forward again.

Text of the Act. Having sketched the history of the Act, I want to return briefly to the text. The Act has all the references to mandatory supervision of LPAs listed above, and particularly the reference to mandatory supervision of the sophisticated activities listed in N.C. Gen. Stat. § 90-270.5 (e). The Board cannot give itself the authority to eliminate this requirement by saying that eliminating supervision is somehow “implementing” it. See N.C. Gen. Stat. § 90-270.5(e). To “implement” means to “carry out; accomplish,” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/implement> (2019), “to give practical effect to and ensure of actual fulfillment by concrete measures,” *Webster’s Ninth New Collegiate Dictionary* (1983), and to “provide a definite plan or procedure to ensure the fulfillment of a purpose.” *American Heritage Dictionary* (1973). No one can implement, carry out, accomplish, give effect to, or ensure the fulfillment of plans to build a bridge, run for office, or attend college by not building, not running, and not attending. Nor can the Board or anyone implement, carry out, or accomplish

⁴ For more on the history of the Act, see the letter of William Burlingame, Ph.D., to be submitted by him personally.

⁵ The Practice Act was also amended in 1977, 1985, and 2012, but the amendments did not affect supervision of LPAs or their predecessors.

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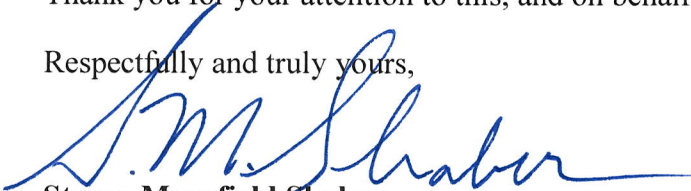
supervision by not supervising. In the same way, it also seems to NCPA that the complete absence of supervision is not an “amount” of supervision. But even if reasonable people might disagree and say that zero is an amount, the entire Act has to be read in context, and since there is a purpose to protect and a requirement to supervise, then, for purposes of the Practice Act, the absence of supervision is not an amount of supervision as that word is used there.

The Board’s Longstanding Position. Turning to the Board’s prior pronouncements about supervision, the Board must agree that, under its rules, it has always required some significant level of supervision – first for psychological examiners, then for psychological associates, and now for licensed psychological associates.⁶ The Board’s proposed rule is a complete change of course. Therefore, no other authority – not the Rules Review Commission, and certainly not the courts – should defer to the present Board’s view of its authority under the Practice Act. This view is new and unique, and there have not been any changes in the law that justify it.

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

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

Respectfully and truly yours,



Steven Mansfield Shaber
Partner

SMS/dt

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

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

⁶ If the Board had come forward with a new rule in the mid-1990’s and said that the 1993 rewrite gave it the authority to dispense with supervision for the newly named LPAs, that would at least have been a timely argument, though not a persuasive one. But now it is sixteen years since the Act changed.