

Regulatory Board Evaluation

**Board of Examiners
in Counseling**

**The Board of Examiners in Counseling
is Necessary to Protect the Public**

**The Board Needs to Improve Compliance
with Some Provisions of Chapter 30 and
Other Applicable Laws**



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John Sylvia
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January 9, 2006

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable J.D. Beane
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Regulatory Board Evaluation of the *Board of Examiners in Counseling*, which will be presented to the Joint Committee on Government Operations on Monday, January 9, 2006. The issues covered herein are "The Board of Examiners in Counseling is Necessary to Protect the Public;" and "The Board Needs to Improve Compliance with Some Provisions of Chapter 30 and Other Applicable Laws."

We transmitted a draft copy of the report to the Board of Examiners in Counseling on December 16, 2005. We held an exit conference with the Board on December 23, 2005. We received the agency response on December 28, 2005.

Let me know if you have any questions.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

Issue 1: The Board of Examiners in Counseling is Necessary to Protect the Public.

Since 2002, two West Virginia counselors surrendered their licenses following determinations by the Board that they acted inappropriately within the counseling relationship with clients.

The Legislative Auditor has concerns with the Board operating out of the Executive Director's home.

Of additional concern to the Legislative Auditor is the Board's storage of records with personal information, social security numbers, mental health diagnoses and case therapy notes in a self-storage facility and in the executive director's home, where the records could be lost, stolen, or damaged.

The Legislative Auditor has determined that there is need for the Board of Examiners in Counseling. In establishing a board to regulate counseling, the Legislature has declared that the practice of counseling affects the general welfare and the public interest of the state and its citizens. Without regulation, the public can be harmed through the unauthorized, unqualified or unprofessional practice of counseling through the failure to recognize and provide assistance for serious mental health conditions, or through financial or emotional exploitation of vulnerable citizens. Since 2002, two West Virginia counselors surrendered their licenses following determinations by the Board that they acted inappropriately within the counseling relationship with clients. Another counselor was found to have used inappropriate techniques in the treatment of an autistic client and stopped practice after allowing his license to expire, and two other counselors signed consent agreements due to negligence and irresponsible behavior in regard to clients. The Legislative Auditor finds that the Board of Examiners in Counseling is necessary to protect the public and should be continued.

Issue 2: The Board Needs to Improve Compliance with Some Provisions of Chapter 30 and Other Applicable Laws.

The Board of Examiners in Counseling is in compliance with most general provisions of Chapter 30. However, the Legislative Auditor has concerns with the Board operating out of the Executive Director's home since the Board used office space available to it through Marshall University in the past and currently is allowed to use the Marshall University facility for Board meetings. In addition, the Board requires notarization of all complaints before it accepts complaints from the public which is an unnecessary requirement that may restrict individuals from filing a complaint. The Board has a well-defined process to investigate and resolve complaints. The Board is financially self-sufficient.

Of additional concern to the Legislative Auditor is the Board's storage of records with personal information, social security numbers, mental health diagnoses and case therapy notes in a self-storage facility and in the executive director's home, where the records could be lost, stolen, or damaged. These records may include essential records that should be stored according to the state Records Management and Preservation of Essential Records Act, and some records that may need to meet the federal requirements for records

privacy established under the federal Health Insurance Portability and Accountability Act.

Recommendations

1. *The Legislative Auditor recommends that the Legislature continue the Board of Examiners in Counseling, either as an independent board or as part of a centralized regulatory agency.*
2. *The Board of Examiners in Counseling should seek office space in a building where the public has access.*
3. *The Board of Examiners in Counseling should consider removing the requirement that complaints must be notarized.*
4. *The Board of Examiners in Counseling should review its applicant register to ensure that all required information for all applicants is documented in the register.*
5. *The Legislature should consider amending the West Virginia Code to enable the Board of Examiners in Counseling to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new counseling licenses, and existing licensees at the time of license renewal.*
6. *The Board of Examiners in Counseling should require a criminal background check through the State Police on all applicants for a professional counseling license, and all existing licensees at the time of license renewal.*
7. *The Board of Examiners in Counseling should obtain assistance from the Department of Administration to conform to the requirements of the Records Management and Preservation of Essential Records Act, and to determine if any of its records must be handled or stored according to standards of the federal Health Insurance Portability and Accountability Act of 1996.*

Review Objective, Scope and Methodology

Objective

This Regulatory Board Evaluation of the Board of Examiners in Counseling is authorized by the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia Code. As stated in the Code, a regulatory board evaluation is to determine whether a Board: 1) complies with the general policies and provisions of Chapter 30, Article 1 of the West Virginia Code and other applicable laws and rules; 2) follows disciplinary procedures which observe due process rights and protect the public interest; and 3) whether public health and safety require that the Board be continued.

Scope

This regulatory board evaluation covers the period from fiscal year 2000 through fiscal year 2005. This evaluation examined the Board's compliance to Chapter 30 requirements, the Board's financial self-sufficiency, the Board's public accessibility, the Board's complaint process and the Board's conformance to the Records Management and Preservation of Essential Records Act.

Methodology

Information compiled in this evaluation was acquired from the West Virginia Code, interviews with the Board's executive director, examination of annual reports, meeting minutes, expenditure schedules, complaint files, information from other states' licensing boards and web sites, and a visit to the home office location and self-storage facility used by the Board. Information was also obtained from the State Auditor, the Secretary of State and the Department of Administration. Every aspect of this evaluation complied with Generally Accepted Government Auditing Standards (GAGAS).

Issue 1

The Board of Examiners in Counseling is Necessary to Protect the Public.

Issue Summary

Without regulation, the public can be harmed through the unauthorized, unqualified or unprofessional practice of counseling.

The profession of counseling is regulated in 48 states and the District of Columbia. Nevada and California do not license professional counselors. In West Virginia, a seven-member appointed Board of Examiners in Counseling is the regulatory agency that licenses counselors. In establishing a board to regulate counseling, the Legislature has declared that the practice of counseling affects the general welfare and the public interest of the state and its citizens, and persons without the necessary qualifications, training, education, experience and good moral character should not engage in the practice of counseling. Without regulation, the public can be harmed through the unauthorized, unqualified or unprofessional practice of counseling. The Legislative Auditor finds that the Board of Examiners in Counseling is necessary to protect the public and should be continued.

Regulation of Counseling is Necessary

In West Virginia, the Board of Examiners in Counseling is responsible for licensing all professional counselors, including those who provide marriage and family therapy. The Board presently has 1,005 licensees and renews licenses every two years.

The regulation of professional counseling is relatively recent, with Virginia being the first state to license professional counselors beginning in 1976. Hawaii passed legislation to license professional counselors in 2004, while both Nevada and California do not recognize a category of licensed professional counselor as distinct from marriage and family therapists, or social workers. Without regulation, the State has no way to address harmful activities on the part of counselors. Unqualified counselors can cause harm to the public through failure to recognize and provide assistance for serious mental health conditions, or through financial or emotional exploitation of vulnerable citizens. Since 2002, two West Virginia counselors have surrendered their licenses following determinations by the Board that they acted inappropriately within the counseling relationships with clients. Another counselor was found to have used inappropriate techniques in the treatment of an autistic client and stopped practice after allowing his license to expire, and two other counselors signed consent agreements due to negligence and irresponsible behavior in regard to clients. The fundamental purpose of licensure is to protect the public.

In West Virginia, the Board of Examiners in Counseling is responsible for licensing all professional counselors, including those who provide marriage and family therapy. The Board presently has 1,005 licensees and renews licenses every two years. In addition, the Board has issued a restricted practice license for addictions counselors operating in a supervised setting. This

license is no longer being issued by the Board since few counselors applied for it, and the opportunity to apply for this license expired July 1, 2003. In order to receive a professional counseling license, an applicant must meet the following requirements:

- have a graduate degree¹ which incorporates specific educational requirements;
- have supervised educational and professional experience that is documented;
- successfully complete a standardized national examination; and
- have recommendations from three professional counselors and three personal reference letters attesting to the applicant's skills and moral character.

West Virginia's Board should consist of seven appointed members. However, the Board is presently composed of six members:

- three licensed professional counselors;
- two members of the public; and
- one counselor educator. The second counselor educator position is presently vacant.

The Board has operated with a vacancy in the counselor educator position since September 1, 2005. When this vacancy occurred the Board proposed a new member to be appointed by the Governor and is awaiting the appointment. The paid staff consists of the executive director, and one temporary part-time staff member.

Ohio is the only surrounding state that maintains an independent board, although a bill presently pending in the Ohio legislature calls for the consolidation of all Ohio regulatory boards under the state Department of Commerce.

Most Surrounding States Do Not Use An Independent Board to Regulate Counselors

Four of the five states surrounding West Virginia regulate the practice of counseling through a centralized state agency. Ohio is the only surrounding state that maintains an independent board, although a bill presently pending in the Ohio legislature calls for the consolidation of all Ohio regulatory boards under the state Department of Commerce. The surrounding state board types are seen in Table 1.

¹A few practitioners with bachelor's degrees were granted licenses in the first years of the Board's existence.

Issue 1

State	Regulatory Board Type
Kentucky	State Agency: Division of Occupations and Professions
Ohio	Independent
Pennsylvania	State Agency: Bureau of Professional and Occupational Affairs
Maryland	State Agency: Department of Health and Mental Hygiene
Virginia	State Agency: Department of Health Professions

Data Source: Analysis developed from Performance Evaluation and Research Division review of 5 state web sites.

The Board acts to protect the public through requiring the surrender of licenses, the cessation of practice or the development of formal agreements.

The states that utilize a centralized agency for regulation take advantage of economies of scale by consolidating administrative functions such as human resources, purchasing and accounting. Additional efficiency and expertise are gained through the consolidation of the agency's regulatory functions such as licensing, complaint investigations and enforcement.

Conclusion

The Board of Examiners in Counseling is necessary to regulate the profession of counseling in the state. Without regulation, the public can be harmed by counselors with a lack of training, or those who would financially or emotionally exploit citizens needing counseling services. The Board acts to protect the public through requiring the surrender of licenses, the cessation of practice or the development of formal agreements. Since 2002, two West Virginia counselors have surrendered their licenses due to inappropriate relationships with clients, one counselor stopped practice and allowed his license to expire after using inappropriate techniques on an autistic client and two other counselors signed consent agreements due to negligence and irresponsible behavior in the counseling relationship. The Legislative Auditor concludes that the public interest is served by the continuation of the Board of Examiners in Counseling.

Recommendation

1. *The Legislative Auditor recommends that the Legislature continue the Board of Examiners in Counseling, either as an independent board or as part of a centralized regulatory agency.*

Issue 2

The Board Needs to Improve Compliance With Some Provisions of Chapter 30 and Other Applicable Laws.

The Legislative Auditor has concerns with the Board operating out of the Executive Director's home.

The Board requires notarization of all complaints before it accepts complaints from the public which is an unnecessary requirement that may restrict individuals from filing a complaint.

Of additional concern to the Legislative Auditor is the Board's storage of records with personal information, social security numbers, mental health diagnoses and case therapy notes in a self-storage facility and in the Executive Director's home, where the records could be lost, stolen, or damaged.

Issue Summary

The Board of Examiners in Counseling is in compliance with most general provisions of Chapter 30. However, the Legislative Auditor has concerns with the Board operating out of the Executive Director's home since the Board used office space available to it through Marshall University in the past and currently is allowed to use the Marshall University facility for board meetings. In addition, the Board requires notarization of all complaints before it accepts complaints from the public which is an unnecessary requirement that may restrict individuals from filing a complaint. The Board has a well-defined process to investigate and resolve complaints. The Board is financially self-sufficient.

Of additional concern to the Legislative Auditor is the Board's storage of records with personal information, social security numbers, mental health diagnoses and case therapy notes in a self-storage facility and in the Executive Director's home, where the records could be lost, stolen, or damaged. These records may include essential records that should be stored according to the state Records Management and Preservation of Essential Records Act, and some records that may need to meet the federal requirements for records privacy established under the federal Health Insurance Portability and Accountability Act.

The Board Complies With Most General Provisions of Chapter 30

During the current evaluation, the Board was found to be in compliance with the following general provisions of Chapter 30:

- Board staff members attended the State Auditor's training within the required two-year time frame (WVC §30-1-2(a));
- An official seal has been adopted (WVC §30-1-4);
- The Board has two lay members to represent the interests of the public (WVC §30-1-4a);
- The Board meets at least once annually (WVC §30-1-5(a));
- The Board has established continuing education requirements (WVC §30-1-7a);

While it had office space available to it at Marshall University in the past, the Board has not maintained a public office since February, 2002. At that time the Executive Director moved all of the Board's equipment and files to her home and to a local self-storage facility. The Board approved this relocation.

The public is not expected to come to the Executive Director's home, the residential address is not listed in any telephone directory, and only a toll-free telephone number is listed.

- Rules have been promulgated specifying the investigation and resolution procedure of all complaints (WVC §30-1-8(h));
- The Board is financially self-sufficient in carrying out its responsibilities (WVC §30-1-6(c));
- The Board maintains a record of its proceedings (WVC §30-1-12(a));
- The Board submits an annual report to the Governor and Legislature describing budget data and transactions for the preceding two years (WVC §30-1-12(b));
- The Board maintains a complete roster of the names and addresses of all persons licensed and practicing in this state, arranged alphabetically by name and also by the cities or counties in which their offices are located (WVC §30-1-13).

Operating Out of a Residential Home Restricts Public Access

In order to facilitate public access, Chapter 30 has several provisions requiring that a telephone number and address be listed in the Capitol and Charleston telephone directories and having records open to the public for inspection during reasonable times. Most boards maintain a public location where the public is able to communicate with the board. This is not the situation in regard to the Board of Examiners in Counseling. While it had office space available to it at Marshall University in the past, the Board has not maintained a public office since February, 2002. At that time the Executive Director moved all of the Board's equipment and files to her home and to a local self-storage facility. The Board approved this relocation. In August, 2004, the Executive Director moved some files and equipment from the local self-storage facility to a closer self-storage facility which she owns with her husband². The Board is charged \$45 monthly for use of the self-storage facility. This was originally done due to illness in the Executive Director's family. The conditions that necessitated this arrangement no longer exist, but the Board continues to operate from the Executive Director's home. Open Board meetings continue to be held in space provided, free of charge, at the Marshall University Graduate College in South Charleston. The public is not expected to come to the Executive Director's home, the residential address is not listed in any telephone directory, and only a toll-free telephone number is listed. The Board also maintains a website that contains the toll-free telephone number and a post office box address. The Executive Director has noted that upon request she will make an appointment to meet with any member of the public at either the

²An Advisory Opinion by the Ethics Commission granted an exemption and allowed the executive directive to rent storage from herself. This is advisory opinion 2004-14 dated August 5, 2004.

Marshall University Graduate College in South Charleston, or on the Marshall University main campus in Huntington.

An additional barrier to public access is the requirement to have complaints notarized before they are accepted by the Board. Notarization of complaints is not required in state code. The Legislative Auditor concludes that notarization is an unnecessary step that may restrict individuals from filing a complaint because notarization is not intended to confirm the content of the complaint, only the signature of the individual making the complaint.

An additional barrier to public access is the requirement to have complaints notarized before they are accepted by the Board. Notarization of complaints is not required in state code.

The Register of Applicants Is Incomplete

In WVC §30-1-12(a), all boards are required to keep a register of all applicants for license or registration, showing the following information:

- date of application;
- name;
- age;
- educational or other qualifications;
- whether an examination is required;
- whether the applicant was rejected or accepted, and a license granted;
- the date of the license;
- the registration number of the license;
- all renewals of the license;
- any suspension or revocation of the license.

The Board of Examiners in Counseling provided the Legislative Auditor with a register that does not list applicants who have received any suspension, or revocation of their license. Renewals are listed only by date of the most recent renewal. In addition, a number of licensees listed on the register are missing information in one or more of the required areas.

The Board of Examiners in Counseling provided the Legislative Auditor with a register that does not list applicants who have received any suspension, or revocation of their license. Renewals are listed only by date of the most recent renewal. In addition, a number of licensees listed on the register are missing information in one or more of the required areas. The following areas were either missing information, or the information was not clear:

- Date of application. Sixteen licensees on the register do not have a date of application listed.
- Date of birth. Seventy-one licensees do not list a date of birth.

Since 2001 the Board has received 36 complaints filed against either licensees, or applicants for licensure.

- Educational qualifications. Twenty-five current licensees do not list educational qualifications, and twelve licensees have educational qualifications that are not clearly graduate degrees such as “counseling,” “agency counselor” or “community counselor.” Missing or unclear information in this area is of concern because all licensed professional counselors must meet stringent educational requirements that should be documented in the register for all licensees.

The Board of Examiners in Counseling needs to improve its register to provide all information on all licensees required by WVC §30-1-12(a).

The Complaint Process

In general, counselors are investigated to determine whether they have violated the American Counseling Association’s Code of Ethics in their practice.

The Board is required to resolve each complaint while protecting the due process rights of the licensee and conducting a thorough review of the events that brought the complaint to the attention of the Board (WVC §30-1-5(b); §30-1-8). Since 2001 the Board has received 36 complaints filed against either licensees, or applicants for licensure. Complaints generally fall into four categories: inappropriate personal and sexual relationships with clients; breaches of confidentiality; concerns about counselors not determining who is the custodial parent when working with minor children when court-ordered counseling has been required; and payment disputes. In general, counselors are investigated to determine whether they have violated the American Counseling Association’s Code of Ethics in their practice. The Board facilitates the complaint process by requiring all counselors to post a disclosure statement that not only lists the counselor’s license number and educational attainment, but also lists the toll-free telephone number for the Board of Examiners in Counseling so that clients have a clear understanding on where to get questions answered or complaints lodged.

The Board determines if it has jurisdiction, and assigns the complaint to the Investigative Committee, which is composed of licensed counselors who are not Board members.

The Board has established a written complaint procedure that begins once a complaint is filed with the Board. The procedure is specified in the Code of State Rules §27-5 and proceeds as follows: The Board receives a complaint that is logged in the Board’s complaint log. The Board also determines if it has jurisdiction, and assigns the complaint to the Investigative Committee, which is composed of licensed counselors who are not Board members. A copy of the complaint is sent to the licensed professional counselor (respondent) against whom the complaint has been lodged. The respondent is given 30 days to respond in writing to the complaint. Once the respondent replies to the Board, a copy of the reply may be sent to the complainant. This committee has 60 days to review and investigate the complaint, and make a report to the Board. The report and all other information is then forwarded to the Complaint Review Committee, composed

of two Board members. This committee rotates membership on a case-by-case basis. Finally, the Complaint Review Committee delivers a written recommendation report to the full Board preserving anonymity of all parties involved. The Board then votes on appropriate action to be taken. The Board makes the final decision on the resolution of a complaint. Members of the Complaint Review Committee abstain from voting.

A review of 20 complaints established that an individual complaint took an average of 165.6 days, or 5.5 months to resolve.

The Legislative Auditor reviewed 15 completed complaints and determined that complaints followed the established procedures to protect the due process rights of the licensee. A review of 20 complaints established that an individual complaint took an average of 165.6 days, or 5.5 months to resolve. The median length of time to resolve a case is 149 days. In addition, of the 30 complaints resolved by the Board between FY 2001 and FY 2005, 10 complaints resulted in disciplinary action against licensees (see Table 2).

Action	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006*
Number of complaints	3	10	10	9	3
License Surrenders	0	2	0	0	0
License Revocations	0	0	0	0	0
Consent Decrees	0	3	1	0	0
Settlement Agreements	2	0	0	2	0
No Jurisdiction	0	2	2	0	0
Complaints Dismissed	1	2	6	4	1
Complaints Pending	0	0	0	3	2
Cease/Desist	0	1	1	0	0
<i>Data Source: Board of Examiners in Counseling. *Information for 2005-2006 is for a partial year.</i>					

The Board of Examiners in Counseling has not levied fines against any of the licensees against whom it has taken disciplinary action. According to the Executive Director, the issuance of fines has never been discussed during a Board meeting. However, the Board does levy administrative fee charges when necessary to defray the costs of disciplinary action.

The Board Does Not Require Criminal Background Checks

The Board is required to issue licenses to new applicants and renew licenses only for practitioners who are of good moral character. In fact, many complaints made against counselors are in regard to the counselor's violation of ethical standards and inappropriate behavior. Since licensed professional counselors are in direct contact with vulnerable citizens who require mental health assistance, it is important that the Board determine in all ways available to it that such counselors are in fact of good moral character. The Board can suspend or revoke a license from any counselor convicted of a felony. However, the Board presently relies on information from the applicant, or the in-state licensee to determine legal status and lack of a felony conviction. By not requiring criminal background checks for counselors practicing within the state, or out-of-state counselors receiving reciprocal certification, the Board fails to gather all information available to it to assure that the public is protected.

The Board presently relies on information from the applicant, or the in-state licensee to determine legal status and lack of a felony conviction. By not requiring criminal background checks for counselors practicing within the state, or out-of-state counselors receiving reciprocal certification, the Board fails to gather all information available to it to assure that the public is protected.

In its licensing process, the Board could access the State Police criminal history database to show all violations of the law within the state of West Virginia. At a cost of \$20, this fee is low and could be borne by the applicants and licensees who are renewing their licenses. The Board of Examiners in Counseling should also consider criminal background checks for all counselor applicants utilizing the Federal Bureau of Investigation (FBI) nationwide criminal history database. The cost of this service ranges between \$16 and \$22 and yields results within 24 hours. While the Board can require a State Police background check, Public Law 92-544 asserts that no state may access the FBI's criminal history database in the absence of an enabling statute. **Because of the potential for individuals to provide false information on license applications, the Legislative Auditor recommends that the Legislature consider amending the West Virginia Code to enable the Board of Examiners in Counseling to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new counseling licenses and all existing licenses at the time of renewal.**

The Board Is Financially Self-Sufficient

The Board of Examiners in Counseling sets its fees by rule, and in October, 2002 filed an emergency request for a fee increase from \$75 to \$150 for license renewals.

All Chapter 30 boards are required by WVC §30-1-6(c) to set fees that are sufficient to enable them to effectively carry out their responsibilities. The Board of Examiners in Counseling sets its fees by rule, and in October, 2002 filed an emergency request for a fee increase from \$75 to \$150 for license renewals. Licenses for this Board are renewed biennially. The license fee increase was implemented in the 2003 renewal year. The Board then went through the regular process to raise its fees, and changes to all fees charged by the Board were approved in April, 2004. The Board is presently financially self-sufficient. The revenue, expenditures and ending balances for the past six fiscal years are seen in Table 3.

Fiscal Year	Beginning Balance	Revenues	Expenditures	Ending FY Balance
FY 2000	\$36,737	\$50,311	(\$46,088)	\$40,960
FY 2001	\$40,960	\$65,512	(\$64,991)	\$41,481
FY 2002	\$41,481	\$44,055	(\$69,359)	\$16,177
FY 2003	\$16,177	\$107,713	(\$62,215)	\$61,675
FY 2004	\$61,675	\$85,946	(\$82,559)	\$65,062
FY 2005	\$65,062	\$115,023	(\$85,088)	\$94,996

Data Source: West Virginia State Auditor's Office

Improvement is Needed in Complying With Other Applicable Laws

The storage of the Board's records is not in accordance with the requirement of WVC §5A-8-2.

Records Management and Preservation of Essential Records Act

The Board of Examiners in Counseling is presently storing some of its records at a self-storage facility and some records in the executive director's home, since the Board is not located in an office or state facility. **The storage of these records places them at risk for loss through the conditions of the storage locations.** The storage of the Board's records, some of which may be considered essential state records, is not in accordance with the

requirement of WVC §5A-8-2 that states: “records containing information essential to the operation of government and to the protection of the rights and interests of persons must be protected against the destructive effects of all forms of disaster... .” A disaster is defined in code as meaning “any occurrence of fire, flood, storm, earthquake, explosion, epidemic, riot, sabotage or other condition of extreme peril resulting in substantial damage or injury to persons or property within this state, whether such occurrence is caused by an act of God, nature or man....”

The State Auditor provides annual training and a training manual to boards that includes the statement “Board records must be maintained in accordance with state law” and directs boards to the Department of Administration as the agency responsible for implementation of the state Records Management and Preservation of Essential Records Act.

The Board of Examiners in Counseling is required to keep a record of its proceedings, and a register of all applicants. Such records include individual’s social security numbers, addresses and other personal and identifying information. In addition, when the Board investigates complaints, it obtains information that can include mental health diagnoses and records of treatment contained in a counselor’s case notes from therapy sessions. The State Auditor provides annual training and a training manual to boards that includes the statement “Board records must be maintained in accordance with state law” and directs boards to the Department of Administration as the agency responsible for implementation of the state Records Management and Preservation of Essential Records Act. The Department of Administration will advise on techniques in the creation, utilization, maintenance, retention, preservation and disposal of records and direct agencies to the state rules that govern records management. The Department of Administration also maintains a statewide contract for record management services to handle the storage and retrieval of state documents, according to state guidelines and the federal Health Insurance Portability and Accountability Act of 1996. The Board’s records that contain mental health diagnoses and counselor therapy notes may need to meet federal privacy standards for handling and storage.

The Board of Examiners in Counseling is presently storing some records in a facility where break-ins to some self-storage units have occurred.

The Board of Examiners in Counseling is presently storing some records in a facility where break-ins to some self-storage units have occurred. While the Board has attempted to secure these records with frequent on-site checks, and special master disk locks, such locks can be breached. In addition, this self-storage facility has no on-site security patrol, and was open to access without a fence at the time of the Legislative Auditor’s site visit in November, 2005. The owners of the facility have since decided to limit public access to the self-storage facility through the planned installation of a fence. The facility is not equipped to protect records from climate fluctuations, insects, mold and mildew. This type of construction can be vulnerable to severe windstorms and other severe weather conditions.

The Legislative Auditor finds that the Board of Examiners in Counseling is not in compliance with the Records Management and Preservation of Essential Records Act.

Conclusion

The Board of Examiners in Counseling is in compliance with most general provisions of Chapter 30. It needs to improve its register of applicants so that all information contained in the register is complete. The Legislative Auditor has concerns regarding public access to the Board because the Board is presently operating out of the Executive Director's home, and the primary point of access for the public is through a toll-free telephone number and a website. The Board restricts the filing of complaints by requiring that all complaints must be notarized before they are accepted by the Board. The home office has necessitated the use of a self-storage facility for some of the Board's records, and the Legislative Auditor concludes that this places the Board's records at risk. Such storage arrangements do not conform to the state's Records Management and Preservation of Essential Records Act, and may not comply with federal requirements for privacy under the Health Insurance Portability and Accountability Act.

The Legislative Auditor has concerns regarding public access to the Board because the Board is presently operating out of the Executive Director's home, and the primary point of access for the public is through a toll-free telephone number and a website.

Recommendations

2. *The Board of Examiners in Counseling should seek office space in a building where the public has access.*

3. *The Board of Examiners in Counseling should consider removing the requirement that complaints must be notarized.*

4. *The Board of Examiners in Counseling should review its applicant register to ensure that all required information for all applicants is documented in the register.*

5. *The Legislature should consider amending the West Virginia Code to enable the Board of Examiners in Counseling to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new counseling licenses, and existing licensees at the time of license renewal.*

6. *The Board of Examiners in Counseling should require a criminal background check through the State Police on all applicants for a professional counseling license, and all existing licensees at the time of license renewal.*

The home office has necessitated the use of a self-storage facility for some of the Board's records, and the Legislative Auditor concludes that this places the Board's records at risk.

7. *The Board of Examiners in Counseling should obtain assistance from the Department of Administration to conform to the requirements of the Records Management and Preservation of Essential Records Act, and to determine if any of its records must be handled or stored according to standards of the federal Health Insurance Portability and Accountability Act of 1996.*

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

December 16, 2005

Jean Ann Johnson, Executive Director
Board of Examiners in Counseling
Post Office Box 129
Ona, WV 25545


Dear Ms. Johnson:

This is to transmit a draft copy of the Regulatory Board Evaluation of the Board of Examiners in Counseling. This report is scheduled to be presented during the January 8-10, 2006 interim meetings of the Joint Committee on Government Operations. We will inform you of the exact date, time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

We need to schedule an exit conference to discuss any concerns you may have with the report. We would like to have the meeting on Friday, December 23, 2005 at our office in Charleston. Please notify us to schedule an exact time. In addition, we need your written response by noon on Wednesday, December 28, 2005 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Wednesday, December 28, 2005 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,


John Sylvia

Enclosure

Joint Committee on Government and Finance

Appendix B: Agency Response

West Virginia Board of Examiners in Counseling

Post Office Box 129
Ona, West Virginia 25545
800-520-3852
www.wvbec.org
counselingboard@msn.com

December 27, 2005

R E C E I V E D
DEC 28 2005

PERFORMANCE EVALUATION AND
RESEARCH DIVISION

John Sylvia, Director
West Virginia Legislature
Performance Evaluation and Research Division
Building 1, Room W-314
1900 Kanawha Blvd., East
Charleston, WV 25305-0610

RE: West Virginia Board of Examiners in Counseling
Performance Evaluation – Written Response

Mr. Sylvia:

The following is the West Virginia Board of Examiners in Counseling (WVBEC) response to our performance evaluation by your agency. We have addressed each of the separate recommendations, 2 through 7, received after our exit interview with you on December 23, 2005.

2. *The WVBEC should seek office space in a public building where the public has access.*

The concerns of office space will be placed on the next scheduled board meeting agenda for serious discussion.

WVBEC serves a statewide population. In order to maintain efficient and effective access to the statewide public the Board has chosen to have a toll free number published in 12 phone directories (Charleston, Huntington, Beckley, Lewisburg, Morgantown, Princeton, Clarksburg, Martinsburg, Parkersburg, Wheeling, Elkins, and Fairmont), an informative and interactive website (www.wvbec.org), email, fax, mail and appointments by request to meet with any member of the public at either the Marshall University Graduate College in South Charleston, or on the Marshall University main campus in Huntington. The overwhelming bulk of business is through media access. From February 1996 through February 2002, the WVBEC had less than 10 people come to the office to do business. Since February 2002 one party has requested an in-person meeting.

Three important and time consuming job tasks of the Executive Director of WVBEC are processing counselor license renewals, new counselor license applications and working with the individual complaints filed against counselors. Each of these job tasks require confidential space due to the nature of the material received and discussed. Previous cubical office space, although free and gratefully accepted, at Marshall University Graduate College did not provide for confidential exchanges and storage of records. The second office space provided, also free of charge, did provide the space necessary for confidentiality, but unfortunately is no longer available.

WVBEC has read the Legislative Auditor's concerns regarding office space. The matter of office space will be placed on the next scheduled board meeting agenda for serious discussion. The Board's financial position will need to be reviewed. Although the board is currently financially self-sufficient, the monies available are evaluated on a monthly basis to insure WVBEC has enough to operate throughout the non-renewal year. It would be the 2007 session before we could raise fees, if this is needed. A conclusion will be reached regarding office location with consideration for space availability and cost and the ability within those two frameworks to maintain confidentiality during operations. An Advisory Opinion by the Ethics Commission will be sought if needed.

3. *WVBEC should consider removing the requirement that complaints must be notarized.*

This is on the agenda of the next scheduled board meeting. Most likely there will not be problems removing the requirement.

4. *The WVBEC should review its applicant register to ensure that all required information for all applicants is documented in the register.*

Most of the corrections have already been made and the few remaining items will be added as soon as possible.

5. *The Legislature should consider amending the West Virginia Code to enable the Board of Examiners in Counseling to conduct criminal background checks through the Federal Bureau of Investigation on all applicants for new counseling licenses and existing licensees at the time of license renewal.*

This is on the agenda of the next scheduled board meeting for serious discussion. Advice will be sought from our representative through the Attorney General's office.

6. *The Board of Examiners in Counseling should require a criminal background check through the State Police on all applicants for a professional counseling license and all existing licensees at the time of license renewal.*

This is on the agenda of the next scheduled board meeting for serious discussion. Advice will be sought from our representative through the Attorney General's office.

7. *The Board of Examiners in Counseling should obtain assistance from the Department of Administration to conform to the requirements of the Records Management and Preservation of Essential Records Act, and to determine if any of its records must be handled or stored according to standards of the federal Health Insurance Portability and Accountability Act.*

All information in the evaluation and this section will be discussed with the Board at the next scheduled board meeting and then consultation will be sought with relevant parties to ensure that all reasonable and appropriate precautions are taken with regards to records management.

In response to question 7 please consider the following. The evaluation portion regarding the storage of records states that the board is currently storing "some of its records at a self-storage facility and some records in the executive director's home." It is noted earlier in the evaluation document that prior to placing

the records in the self storage facility an Advisory Opinion by the Ethics Commission was sought and granted (2004-14) on August 5, 2004. This opinion allowed WVBE to rent storage space from Ona Storage, owned by the Executive Director. The evaluation portion calls into question the safety of the records stating "the storage of these records places them at risk for loss through the condition of the storage locations". The evaluation continues to state: "The storage of the Board's records, some of which may be considered essential state records, is not in accordance with the requirement of WVC 5A-8-2 that states: 'records containing information essential to the operation of government and to the protection of rights and interests of persons must be protected against the destructive effects of all forms of disaster...' A disaster is defined in code as meaning "any occurrence of fire, flood, storm, earthquake, explosion, epidemic, riot, sabotage or other condition of extreme peril resulting in substantial damage of injury to persons or property with in this state, whether such occurrence is caused by an act of God, nature or man..."

The following is a description of the storage facility in which the Board's off site records are kept:

Ona Storage is built by Heritage Building Systems. The statistics of the facility are as follows:

Heritage Building Systems:

- is the largest steel building Manufacturer in America
- is a member of the Better Business Bureau in all 50 States with no outstanding complaints
- has been in business for 27 years
- has sold 29,000 buildings
- reports that not one of the 29,000 buildings have ever been brought down by weather conditions and they have sold many buildings in Florida and other hurricane prone states.

With regards to the specifics for Ona Storage:

- The Professional Engineer that designed and stamped the blueprints provided to Ona Storage is licensed in all 50 states
- The Professional Engineer sited above followed the International Building Code (IBC).
- According to the Cabell County Commission, Cabell County adopted the IBC a couple of years ago as their building requirement
- The Ona Storage structure is designed utilizing the loads indicated and applied as required by IBC 2000. The building the Board's storage is in is 25' x 200' which is 5,000 sq. ft.
 - The roof holds 20 pounds PSF (per square foot) of live load which is 100,000 lbs of human weight.
 - The roof holds 28 pounds PSF Ground Snow Load
 - The building withstands 90 MPH Wind Speed
 - Rated at level 'C' Exposure – (There are two categories in this section; 'B' and 'C') 'B' Category is used to design the building if there are objects called breakers, like trees or other buildings that will help break the wind. 'C' category means the buildings were designed for an area without objects like trees and other buildings to break the wind. 'C' category means the building is designed to withstand the worst case scenario.
- Is not in a flood plane and there are no water sources nearby
- Has surveillance cameras throughout the property and
- A security fence is being installed with a 6 digit entry system

WVBEC's Individual Unit:

- Is currently equipped with a Motion Sensor Alarm with ear-piercing 120 db siren in the Board's storage facility
- Is locked with 2 High Security disk locks at the site of the Board's storage

At the Ona Storage unit all the cabinets are locked with the exception of a cabinet that came from Marshall University surplus. A key has been ordered from the manufacturer of the cabinet.

The following are the current document storage procedures in the office:

The License Professional Counselor (LPC) database and other important documents are stored on the main computer. The DB and other documents are backed up on a twice weekly basis and also after major changes. The information is backed up on a CD and a zip disk. All information necessary to the operation of the board business is backed up on a 4gb thumb drive and the backed up items are stored in a fire-proof Sentry lock box in the office. The office has two locking file cabinets that store the information used on a daily basis.

Currently all complaint files are now located in a locked cabinet in the office. The complaint files are being scanned onto disk for use at the office and the permanent paper files will be placed in Archival Storage once all the record management procedures are worked out.

WVBEC is researching appropriate records storage. Since receiving a draft of the Audit, WVBEC has obtained copies of Series 12, Rules for the General Administration of Records Management and Preservation; Series 13, Rules for Retention and Disposal Scheduling; and Series 14, Rules for the Management of Records Maintained by the Records Center.

WVBEC is also seeking assistance from our Attorney General representative and individuals in records management about the definition of an "essential record".

To insure that WVBEC complies with the standards of the federal Health Insurance Portability and Accountability Act, an opinion from the Board's council and other appropriate officials will be sought regarding applicability and adherence requirements as it relates to licensing boards as a covered entity. Our research notes the following for the Final Standards for Privacy of Individually Identifiable Health Information; Subpart A - General Provisions §160.101 Statutory basis and purpose; §160.103 Definitions.

Covered entity means:

- 1.) A health plan.
- 2.) A health care clearinghouse.
- 3.) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

Please include this document with your report. Thank you for your time.



Deborah S. Frost, MS, CRC, LPC, QRP
Chair, West Virginia Board of Examiners in Counseling