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Mr. Jason Glasspiegel
Board of Psychology
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RE: COMMENT UPON AND PARTIAL OPPOSITION TO ADDING SECTION 1396.8 TO TITLE 16 OF THE CALIFORNIA CODE OF REGULATIONS

The Children's Advocacy Institute at the University of San Diego School of Law, which for 30 years has worked to improve the well-being of children in California through regulatory, legislative, and judicial advocacy, respectfully opposes the promulgation of the above-referenced proposed regulations. One portion of these regulations may unwittingly, unlawfully, and unwisely cause fewer California resident students taking classes remotely from another state due to the pandemic to obtain mental health services from their California psychologists; services that are needed more now than any time in our nation's recent history.

DISCUSSION

A. The Proposed Regulations Unlawfully Subordinate California Law To The Laws Of Other States When Applied To California Psychologists And California Residents.

The proposed regulation at section 1396.8 (a) laudably clarifies that a licensee may lawfully provide mental health services to a California resident who is out of state. Subdivisions (1) and (2) likewise appropriately acknowledge that the legal concepts of being a "resident" and being "domiciled" are distinct. However, with emphases supplied, the Board proposes to promulgate the following:

(a) A licensee is permitted to provide psychological health care services via telehealth to a client at an originating site in this State, as defined in section 2290.5 of the Code, as well as to a client who is a resident of California who is temporarily located outside of this State, ***subject to the laws and regulations of the other state where either the licensee or the client is located.*** …

(c) Failure to comply with these regulations or the laws and regulations relating to telehealth of the other state, if any, ***where either the licensee or the client is located*** constitutes unprofessional conduct.

Read together, the proposed regulation forbids California licensed psychologists from providing services to California residents temporarily outside California ***even if such practice is permitted by California law,*** if the law of another state prohibits such practice. This means not only that California allows another state's law to trump the relationship ***between a California resident and a California licensee, but California then takes the further step of deeming such conduct illegal under California law regardless of whether another state actually takes a similar view and brings an action against the California licensee, and even if, as discussed below, the federal constitution would prevent another state from taking action against the California licensee.*** Thus, this part of the proposed regulation seeks to subordinate California's laws permitting a California licensee to provide -- and a California student-resident to receive -- psychological services to the possibly over-riding laws of another state *and* seeks to enforce the laws of other states even when another state would not enforce its own laws against the licensee and even when it would be unconstitutional for the other state to do so.

B. The Board Does Not Have The Discretion To Prohibit Its California Licensees From Temporarily Offering Services To Out-of-state California Residents.

Even if the laws of another state might strangely subject a California licensee to discipline for treating a California resident temporarily in another state in a manner consistent with California law, California law does not automatically yield to that other state's unwise and likely unlawful exercise of its jurisdiction over two nonresidents.

First, such a law of another state is terrible policy and California should not, through these regulations, yield to it knowing that will cause the California resident to be cut off from possibly life-saving therapies. As the ISOR correctly states, at p. 3, "[c]onsumer protection and continuity of care dictate that … residents who may receive services in California

initially, should be allowed to receive services via telehealth after returning to the state where they are domiciled."

Second, there is no authority found in California law and none relied upon as authority for the proposed regulations that shows any legislative intent to subordinate California's laws governing California licensed psychologists and California residents to those of another state. The pandemic is not the first time the issue of a California resident being outside California has arisen. Californians travel all the time, including psychologists and their patients, and yet no caveat has been enacted in California law limiting the ability of a licensed psychologist to provide services to California residents ***who lawfully meet the legal definition of resident*** but are temporarily located outside California's borders. Without such statutory authority, the proposed regulations that would prohibit the otherwise lawful ability of a California licensee to provide services to a California resident are outside the Board's discretion.

The italicized language underscores the foundational flaw in how the proposed regulations approach the issue of a psychologist or patient being outside of California temporarily. Currently, California law entitles a California licensed psychologist to treat California residents. There is no categorical exception to this cited or found. Therefore, the Board does not have the legal authority to prohibit services to California residents *because residency is a legal word* – a legal status and conclusion. ***To describe someone as a California resident under current law is ipso facto to describe someone to whom the services of a California psychologist may without qualification be offered by a California licensed psychologist.*** And, absent any legislative intent to caveat what a California licensed psychologist may provide to a California resident, any categorical regulation that would limit services between the California licensee and resident is unlawful.

The other foundational flaw in the way the proposed regulations address a California resident being temporarily outside California is that it presumes that the laws of other states should and must apply when the licensee or patient is outside California. The proposed regulation admits no "wiggle room." If a licensee "fails to comply" with the telehealth laws of the other state, they commit unprofessional conduct and this is true ***even if the law of the other state should have no lawful application to the licensee; even if the California licensee would prevail in their defense that the other state has no power over them; even if the other state declines to pursue an action because its own reading of its own laws differs from that of the Board.***

In order for a licensee to be subject to personal jurisdiction in a state that is not their domicile, the licensee's activities must both fit under the ambit of the state's "long-arm"

statute and be a valid exercise of the state's reach under the Due Process Clause of the Fourteenth Amendment.

Not all states' long arm statutes grant the power to assert jurisdiction over nonresidents to the full amount permitted by the Constitution. "States' long-arm statutes vary, some states have long-arm statutes which allow their courts to exercise jurisdictional power to the full extent allowed under the Due Process Clause of the Constitution. Other states have statutory restrictions that specify enumerated situations when courts may exercise personal jurisdiction over an out-of-state defendant. Some limits are placed on the particular cause of action, while other limits are based on the activities of the defendant." 3 Suffolk J. Trial & App. Adv. 93, 96 (1998). The proposed regulation, in unwelcome contrast, makes no distinction between the long-arm laws of other states and therefore possibly subjects a California licensee to discipline even if the other state would itself be unable under its own laws to punish the conduct.

Additionally, even when a state's long-arm statute might validly reach conduct temporarily occurring between a California licensee and a California resident patient, that does not mean the California licensee would inevitably under every scenario actually be subject to the laws of the other state. The United States Supreme Court set the standard for constitutional exercise of jurisdiction of one state over those in another state in *International Shoe Co. v. Washington* (1945) 326 U.S. 310. Pursuant to the Due Process Clause, a nonresident defendant may not be hailed into the jurisdiction of another state's courts unless the state has first established sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316. As well, the nonresident's "conduct and connection with the forum [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkwagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.[1] Moreover, there exists an entire body of law called the "Conflicts of Law" that would be applied by a court in another state to determine whether a licensing board in another state had the power to enforce its laws against a California licensee temporarily providing psychological services to a California resident briefly in another state. [2]

[1] See, also, the Privileges and Immunities Clause: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alien-age in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." *Paul v. Virginia* (1869) 75 U.S. 168, 180.

[2] The Second Restatement on Conflicts of Laws, § 6. Choice-Of-Law Principles, reads: "(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the

At best, whether under both the Constitution and Conflicts of Laws principles the question of whether another states' laws could lawfully apply is uncertain and fact-intensive; something unacknowledged by the binary prohibition in the proposed regulations against violating another states' laws even if those laws could not actually lawfully apply to the California licensee.

Respectfully, and in sum, observe that the proposed regulations would oddly subject a California licensee to discipline by the California Board for disobeying the telehealth laws of another state ***even if the application of the other state's laws by the other state to the licensee would be unconstitutional*** and, thus, ***even when the licensing authority of the other state might decline to take action against the California licensee for that very reason***. The proposed regulation thus -- to the detriment of California resident-patients such as students temporarily stranded out-of-state – oddly ***gives more automatic weight and binding effect to the telehealth laws of the other states than those other states may themselves give it.***

Third and finally, for the reasons discussed above, the proposed regulation would irrationally and therefore unlawfully discriminate between classes of mentally ill legal California residents both of whom who have exactly the same residency status and the exact same entitlement to psychological services under current California law and, even, under the long-arm laws of some other states. Particular care in drawing lines between kinds of residents must be taken here because some of those California residents affected and denied services will meet the legal definitions of those with disabilities and thus enjoy protections of the Unruh Act, the Americans With Disabilities Act, and other statutes. (*See*, for broad example, https://www.dfeh.ca.gov/peoplewithdisabilities/, and Government Code section 1294(a) "It shall be unlawful for a licensing board to … establish any other qualification for licensing that has an adverse impact on any class by virtue of its race, creed, color, national origin or ancestry, sex, gender, gender identity, gender expression, age, medical condition, genetic information, physical disability, mental disability, or sexual orientation, unless the practice can be demonstrated to be job related.")

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particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." The Comment regarding Section 2 here is particularly instructive: "When there are no adequate directives in the statute or in the case law [about which state's laws apply], the court will take account of the factors listed in this Subsection [2] in determining the state whose local law will be applied to determine the issue at hand. It is not suggested that this list of factors is exclusive. Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law. Also it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law. … At least some of the factors mentioned in this Subsection will point in different directions in all but the simplest case. Hence any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values."

PROPOSED AMENDMENT

CAI supports telehealth as something beneficial to California resident students during the pandemic and supports the aim of the proposed regulations which is to facilitate its use by offering clarity to licensees as to how it may be used. However, for the reasons discussed above, CAI fears that many licensees will be discouraged by the proposed regulations making California Board discipline mandatory if the laws of other states are violated; again, even if California law is not and even if application of the other states' laws would itself be unconstitutional.

A simple change to the regulations fixes the problem while preserving for the Board the ability properly to take action against a licensee who aggressively violates the laws of other states:

Amend proposed subdivision (c) as follows:

> **(1)** Failure to comply with these regulations ~~**or the laws and regulations relating to telehealth of the other state, if any, where either the licensee or the client is located**~~ constitutes unprofessional conduct.
> **(2) Failure to comply with a lawful order from another state prohibiting or conditioning a licensee from providing psychological services through telehealth constitutes unprofessional conduct.**

These amendments are premised on the sister state only electing to bring an action if it believes that its long-arm statute permits it to do so and if application of the statute in the opinion of the sister state would be constitutional to the facts at-hand. The amendments thus have three advantages:

> (1) They ensure that California does not yield to every state's laws and prevent a California psychologist from offering services to a California resident even when (for example) the long-arm statute of the other state would not on its face ever permit the other state to reach the specific conduct of the California licensee.
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> (2) They ensure that California does not yield to every state's laws and prevent a California psychologist from offering services to a California resident when the long-arm statute of the other state might reach the conduct but the other state fails to bring an action because the long-arm statute may not be constitutional in its application.

(3) They ensure that licensees do not have to act as amateur lawyers trying to figure out what the laws of 49 other states say and whether they would lawfully apply to the conduct between a California licensee and a California resident.

CONCLUSION

In these anguishing times, it would be tragic if the Board's praiseworthy effort to encourage telehealth ends-up discouraging it because its licensees are afraid of losing their California license for violating other states' laws our licensees will not be aware of or will not know if they lawfully apply to them.

Respectfully submitted:

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