

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

**PERFORMANCE AUDIT REPORT
NOVEMBER 2004**

ERRATA

On page 18 of this report we erred in reporting a statistic from the 2004 article “Psychology Licensing Board Disciplinary Actions: The Realities” when we wrote:

- **Unlike the result of other licensing agencies, the BMHP investigates 82 percent of complaints against psychologists versus the study’s high of 20 percent of complaints.** (error bolded)

The correct reporting of the statistic should read:

- The BMHP investigated 82 percent of complaints against psychologists between State Fiscal Years 2000-2001. The study reported 70 percent of the complaints made against psychologists were investigated during calendar years 2000-2001.
- We also note we used the findings from this study to compare the New Hampshire Board of Mental Health Practice outcome data to similar disciplinary boards in North America. The change we are now making does not affect any of the observations and recommendations in the report or our conclusion about the overall performance of the New Hampshire Board of Mental Health Practice.

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

**PERFORMANCE AUDIT REPORT
NOVEMBER 2004**

To The Fiscal Committee Of The General Court:

We have conducted an audit of the Board of Mental Health Practice (BMHP) to address the recommendation made to you by the Legislative Performance Audit and Oversight Committee. We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to provide a reasonable basis for our findings and conclusions. Accordingly, we have performed such procedures as we considered necessary in the circumstances.

The purpose of the audit was to determine if the BMHP had adequate procedures for managing complaint resolution, licensing, and office operations. The audit period includes State Fiscal Years 1999-2004.

This report is the result of our evaluation of the information noted above and is intended solely for the information of the BMHP and the Fiscal Committee of the General Court. This restriction is not intended to limit the distribution of this report, which upon acceptance by the Fiscal Committee is a matter of public record.

Office Of Legislative Budget Assistant
Office Of Legislative Budget Assistant

November 2004

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

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ABBREVIATIONS

APU	Administrative Prosecutions Unit
BI	Board Investigator
BMHP	Board Of Mental Health Practice
JLCAR	Joint Legislative Committee On Administrative Rules
LPAOC	Legislative Performance Audit And Oversight Committee
OAG	New Hampshire Office Of The Attorney General
PCC	Professional Conduct Committee
PCI	Professional Conduct Investigator
ROI	Report Of Investigation
RSA	Revised Statutes Annotated
SFY	State Fiscal Year

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

SUMMARY

Purpose And Scope Of Audit

This audit was performed at the request of the Fiscal Committee of the General Court consistent with the recommendation of the joint Legislative Performance Audit and Oversight Committee. It was conducted in accordance with generally accepted government auditing standards applicable to performance audits. The purpose was to evaluate the adequacy of the Board of Mental Health Practice's (BMHP) rules and procedures. We examined three issue areas: complaint resolution, licensing, and office operations.

Background

According to RSA 330-A:1, the BMHP's statutory purpose is "to regulate mental health practice by practitioners in the state to assure that the services provided are effective and of a quality consistent with the standard of care within each profession, and to safeguard the public against harm which may be caused by untrained, unskilled, or unlicensed practitioners." It fulfills this mission by implementing administrative rules establishing licensing and re-licensing requirements and ethical standards for clinical mental health counselors, clinical social workers, marriage and family therapists, pastoral psychotherapists, and psychologists. Additionally, the BMHP is authorized to investigate complaints against licensed practitioners and discipline those found to be in violation of statute and rules.

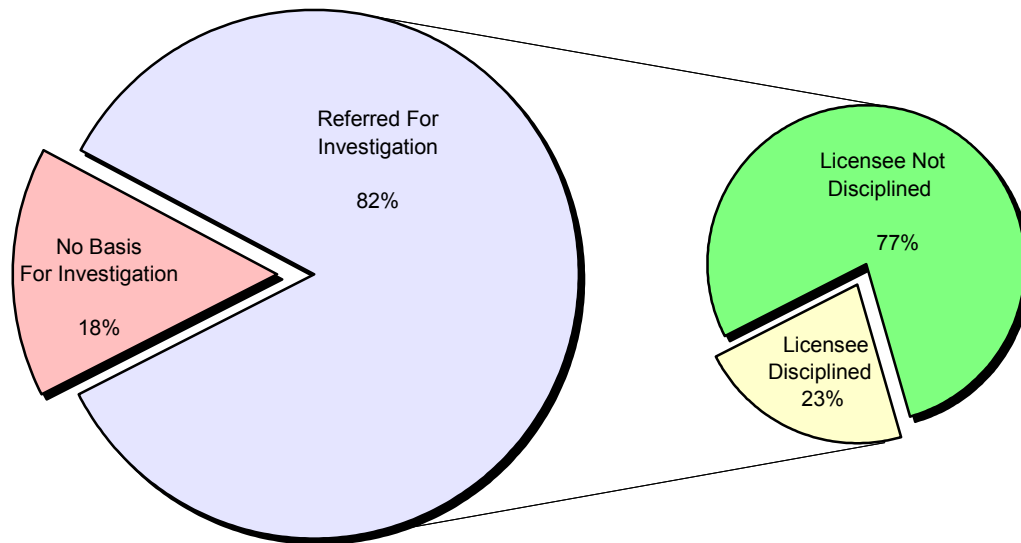
Statutorily, the BMHP consists of seven board members, one from each of the five mental health disciplines and two public members. The BMHP has two full-time staff to perform daily operations, five advisory committees, and eight professional conduct investigators, who, with the help of the administrative prosecutions unit, New Hampshire Office of the Attorney General, investigate complaints against licensees.

As of June 2004, the BMHP provided oversight of 1,898 active mental health providers. The BMHP received 944 applications for licensure, approved 941 applications, and held four application hearings during the audit period. On average, from State Fiscal Years (SFY) 2000-2004, it received 29 complaints against licensees a year, referred 23 for investigation, and disciplined five licensees. Discipline can include license suspension, revocation, supervision, continuing education, a fine, or a combination of the above. Figure 1 presents how complaints were resolved since SFY 2000. On average, it takes the board approximately one year, from when the complaint is filed, to resolve a complaint it investigates.

The BMHP is funded through general fund appropriations. The board collects fines and licensing fee revenue that is accounted for in its licensing database and is recognized as unrestricted general fund revenue in the State accounting system. From SFYs 1999-2004, the BMHP expended \$1,012,457 while collecting \$1,699,060 in fees and fines. Expenditures increased from \$134,160 in 1999 to \$193,479 in 2004.

Figure 1

**Board Action Taken On Complaints
SFYs 2000-2004**



Source: LBA analysis of BMHP complaint data.

Results In Brief

Our audit presents 17 observations with recommendations. Six observations address rules and policies for resolving complaints, three observations address monitoring of complaints and complainants' comments, four observations address controls over office operations, three observations address quorum-related issues, and one observation addresses licensing. Four recommendations require Legislative action. We also present ten other issues and concerns, which were not developed into formal observations, yet we consider noteworthy.

In commenting on this report, the BMHP concurred in whole or in part with all 17 observations and recommendations. The board's overall response to the report is found in Appendix A, while detailed responses to individual observations and recommendations follow each observation.

Implement Sufficient Rules And Policies For Resolving Complaints

We found the BMHP's administrative rules for investigations are inadequate and the process is poorly publicized. As a result, some licensees did not fully understand how the board handles complaints and investigations. The board needs to specifically address how it should handle complaints against board members and other licensees associated with the board, and provide guidance to its investigators on how to document their work. In addition, the board should seek

statutory clarification of the role and responsibility of practitioners who become supervisors of disciplined licensees.

Improve Monitoring Of Complaints And Complainants' Comments

We found the BMHP needs to systematically track complaints to better evaluate the timeliness of board actions. As part of tracking complaints, the board should ensure complainants have an adequate opportunity to comment on potential disciplinary actions.

Improve Controls Over Office Operations

We found the BMHP needs to strengthen controls over revenue processing. Even with two staff, the board can segregate certain duties to improve its handling of hundreds of thousands of dollars. It has been the board's ill-informed practice to withhold large Treasury deposits until the beginning of a new State Fiscal Year. The board also needs to periodically review how much it charges practitioners for licensing and examinations to ensure it only collects an appropriate amount to fund board operations. To ensure consistency and continued operations, the board needs to develop and maintain an office manual. Such a manual should document office procedures and the board's computerized database.

Address Quorum-Related Issues

We found the BMHP and Governor need to ensure the board is operating with seven eligible members. The board chairperson must ensure members file required statements of financial interests. In addition, the board needs a new statutory mechanism to conduct board business when it has to function with less than a quorum. We note the Governor failed to appoint a second public member for at least 20 months.

Other Issues And Concerns

We identified a number of topics for the board's and the Legislature's information and consideration, without making any specific recommendations. These topics include:

- Attorney General Provided Inconsistent Legal Advice,
- Professional Expectations,
- Alternative Providers,
- Administrative Rules,
- Due Process Under Administrative Law,
- Confidentiality Of Complaints,
- Board Investigator,
- Attorney General Representation,
- Administrative Law Judge, and
- Board Stipend.

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

RECOMMENDATION SUMMARY

Observation Number	Page	Legislative Action Required	Recommendation	Agency Response
1	19	No	Develop administrative rules for conducting investigations.	Concur
2	20	No	Promulgate rules addressing how the complaint process will be publicized.	Concur
3	21	Yes	Seek statutory amendment to address conflict of interest and develop rules for handling complaints against board-associated licensees.	Concur In Part
4	23	No	Discontinue the practice of dismissing complaints against board members based on the premise that they are granted immunity from complaints when serving in a board capacity.	Concur
5	24	No	Develop written guidance for documenting investigations.	Concur
6	26	Yes	Statutorily establish the roles and responsibilities of supervisors.	Concur In Part
7	29	No	Develop an efficient system to track complaints.	Concur
8	30	No	Track and monitor the time it takes to resolve complaints and conduct investigations.	Concur
9	32	No	Institute procedures to ensure complainants have adequate opportunity to respond to terms of proposed settlement agreements.	Concur
10	33	Yes	Record and process all financial transactions when they occur and seek statutory amendment to distribute renewal dates more evenly throughout the year.	Concur In Part
11	34	No	Segregate duties over revenue collection and processing.	Concur

Recommendation Summary

Observation Number	Page	Legislative Action Required	Recommendation	Agency Response
12	35	No	Periodically review and adjust licensing and examination fees.	Concur
13	36	No	Develop a comprehensive procedures manual of daily operations.	Concur
14	37	No	Develop policies and procedures to ensure all board and committee members file statements of financial interests annually.	Concur
15	38	Yes	Seek statutory amendment to enable the board to conduct business when less than a quorum can act in a given situation.	Concur
16	39	No	Governor should immediately appoint a public member.	Concur
17	41	No	Determine whether applicants need to answer certain licensing questions.	Concur

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

OVERVIEW

In April 2003, the Legislative Performance Audit and Oversight Committee (LPAOC) recommended an audit of the Board of Mental Health Practice (BMHP). The LPAOC asked the Office of Legislative Budget Assistant, Audit Division to research the topic of how the BMHP performs its mission in accordance with statutes and administrative rules, especially how it handles complaints and investigations. In May 2003, the Fiscal Committee approved the recommendation made by the LPAOC to conduct this performance audit. We held an entrance conference with the BMHP in February 2004.

SCOPE, OBJECTIVES, AND METHODOLOGY

This performance audit was conducted in accordance with generally accepted government auditing standards applicable to performance audits and included such procedures as we considered necessary in the circumstances.

Scope And Objectives

We designed our audit to answer the following question – **Does the board have adequate rules or procedures for managing complaint resolution, licensing, and office operations?** Our audit covers State Fiscal Years (SFY) 1999-2004; however, for some issues we only reviewed activity since January 2002 when the current board rules went into effect.

Methodology

We reviewed statutes and administrative rules pertinent to BMHP operations, board meeting minutes, statements of appropriation, national and local newspaper and journal articles regarding the mental health field, and each mental health discipline's code of ethics. We attended board and committee meetings; conducted interviews with former and current BMHP personnel, licensees, and attorneys familiar with the BMHP; and contacted all five State-level professional associations.

We documented board procedures and controls over daily operations and reviewed BMHP licensing files. We obtained and analyzed a copy of the BMHP's licensing database. We documented the board's administrative rules filing history. We also conducted a file review at the BMHP and the administrative prosecutions unit (APU), New Hampshire Office of the Attorney General (OAG), of complaints active during SFYs 2000-2004. We started with complaint data for the BMHP's first full year of operation (SFY 2000). We compiled investigation data to analyze board performance.

We compared the BMHP with similar boards within and outside of New Hampshire. We contacted mental health licensing boards in other states, reviewed other states' publicized procedures for complaint resolution, and conducted a telephone survey of other State licensing boards to identify their procedures.

BACKGROUND

Chapter 234:1, Laws of 1998, repealed RSA 330-A, the Board of Examiners of Psychology and Mental Health Practice, and reenacted it under the new name of the Board of Mental Health Practice. The new law's stated purpose is "to regulate mental health practice by practitioners in the state to assure that the services provided are effective and of a quality consistent with the standard of care within each profession, and to safeguard the public against harm which may be caused by untrained, unskilled, or unlicensed practitioners." The new law requires mental health practitioners to become licensed. Under the prior statute, practitioners were required to be certified by the State. New federal regulations requiring practitioners to be licensed in order to receive Medicare and Medicaid reimbursement prompted the change. As part of its duties, the BMHP promulgates rules regulating mental health services including licensing and re-licensing requirements and establishes ethical standards for clinical mental health counselors, clinical social workers, marriage and family therapists, pastoral psychotherapists, and psychologists. In addition, the board is authorized to investigate complaints against licensed practitioners and discipline those found to be in violation of statute and rules.

Organization And Membership

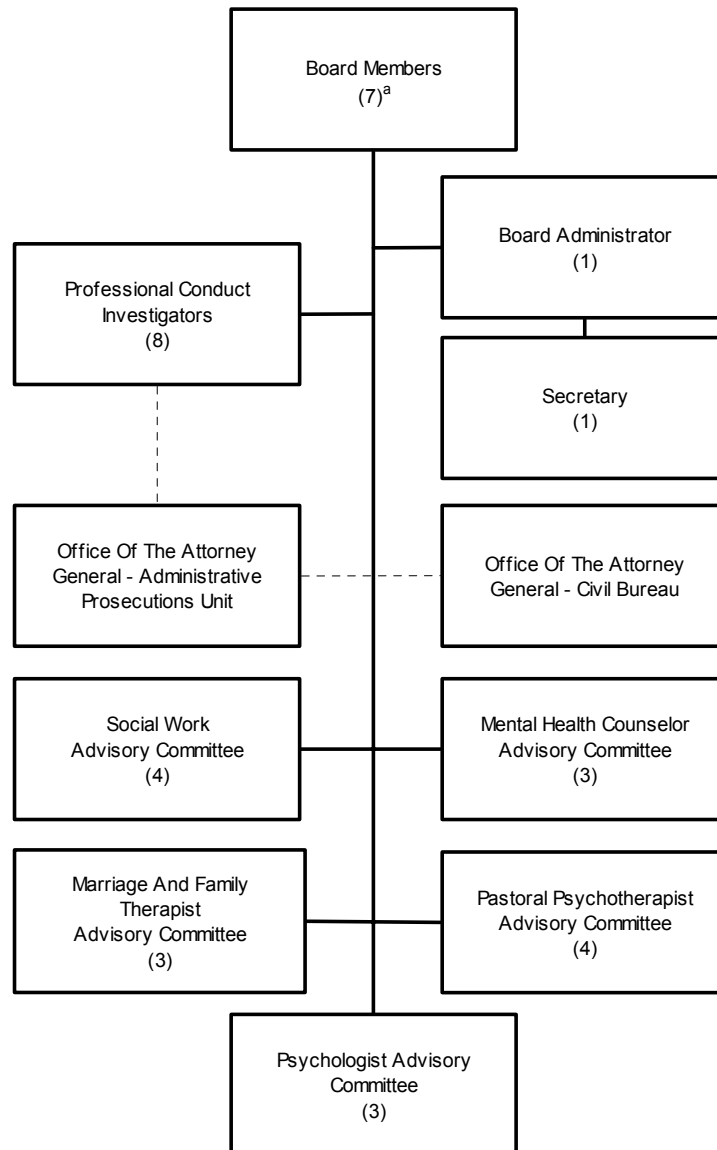
The BMHP is administratively attached to the Department of Health and Human Services. The seven-member BMHP consists of one clinical mental health counselor, one clinical social worker, one marriage and family therapist, one pastoral psychotherapist, one psychologist, and two public members. The Governor, with Executive Council approval, appoints board members to three-year terms with no member serving more than two consecutive terms. The BMHP has two staff running its daily operations, and has an OAG representative from the civil bureau to provide legal advice, and a prosecutor and an investigator from the APU to aid with investigations.

In February 2003, the board established advisory committees for each mental health profession for the stated purpose of assisting in reviewing applications for licensure, administering oral exams, helping educate each profession about how the board works, and bringing forward concerns from their professional associations. Each discipline's State association nominates practitioners for appointment to the advisory committees.

In November 1993, the BMHP created a professional conduct committee (PCC) to handle complaints. The PCC consisted of one board member serving as the board investigator (BI) and board-appointed mental health professionals acting as professional conduct investigators (PCIs). The BMHP assigned responsibility for conducting complaint investigations to the PCC. In February 2003, the board clarified the PCC did not meet as an actual committee, but rather its meetings were information sessions of the PCIs with the BI. According to PCIs, the investigatory process remained the same. Figure 2 illustrates the board's organizational chart.

Figure 2

**BMHP Organizational Chart
As Of June 2004**



Note: ^a Statutorily, the BMHP is comprised of seven members; however, one public member position has been vacant since October 2002.

Source: LBA analysis of BMHP documents.

Revenue And Expenditures

The BMHP is funded through general fund appropriations. The board collects fines and licensing fee revenue that is accounted for in its licensing database and is recognized as unrestricted general fund revenue in the State accounting system. From SFYs 1999-2004, the BMHP expended \$1,012,457 while collecting \$1,699,060 in fees and fines. Expenditures increased from

\$134,160 in SFY 1999 to \$193,479 in SFY 2004. Practitioners renew their license every two years; accordingly, revenues increase in the even-numbered year and decrease in the odd-numbered year. Table 1 shows the board's revenue and expenditures from SFYs 1999-2004.

Table 1

**BMHP Revenue And Expenditures
SFYs 1999-2004**

	1999	2000	2001	2002	2003	2004	Total
Revenue							
Fines/Fees	\$ 127,490	\$ 472,319	\$ 51,977	\$ 495,887	\$ 56,877	\$ 494,510	\$ 1,699,060
Total Revenue	\$ 127,490	\$ 472,319	\$ 51,977	\$ 495,887	\$ 56,877	\$ 494,510	\$ 1,699,060
Expenditures							
Personnel	\$ 45,910	\$ 64,331	\$ 74,902	\$ 78,992	\$ 79,171	\$ 91,686	\$ 434,992
Current Expenses	18,069	22,794	19,591	19,264	13,163	17,699	110,580
Transfers To Other Agencies	65,160	66,524	64,513	60,971	59,233	63,750	380,151
Travel							
In-State	2,693	5,997	7,618	6,756	6,896	3,916	33,876
Out-Of-State	2,206	2,703	3,000	3,363	4,048	3,190	18,510
Other ^a	122	5,643	3,924	5,676	5,745	13,238	34,348
Total Expenditures	\$ 134,160	\$ 167,992	\$ 173,548	\$ 175,022	\$ 168,256	\$ 193,479	\$ 1,012,457

Note: ^a“Other” includes organizational dues, consultants, and equipment costs.

Source: LBA analysis of BMHP Revenue Source Summary and Statements of Appropriation.

Administrative Rules

In 1993, the BMHP's predecessor, the Board of Examiners of Psychology and Mental Health Practice, submitted proposed administrative rules for Legislative approval. The Joint Legislative Committee on Administrative Rules (JLCAR) entered a final objection to sections of the board's rules stating the rules were unclear and not capable of uniform enforcement; however, the director of the Office of Legislative Services accepted the proposed rules and they went into effect in July 1993. The board filed proposed administrative rules with the Office of Legislative Services in 1996 to add new rules for clinical mental health counselors and marriage and family therapists. The JLCAR entered final objections to these proposed rules and the director of the Office of Legislative Services, based on a recommendation from the JLCAR, refused to accept and record the rules as effective because they failed to conform to the uniform system of numbering and drafting. In July 1997, the board appeared before the JLCAR stating the board considered the 1996 proposed rules were in effect. During this meeting, the JLCAR voted to formally petition the board to restart rulemaking. The board did not respond to this petition.

Chapter 234:18, Laws of 1998 became effective in October 1998, allowing administrative rules of the Board of Examiners of Psychology and Mental Health Practice to remain in effect for the newly formed BMHP “until such rules... expire, or are amended or repealed...” According to the administrative rules director, the director of the Office of Legislative Services was of the

opinion the 1993 administrative rules were the only rules in effect and would expire in July 1999. In November 1998, the JLCAR re-petitioned the newly formed BMHP to write rules. The board's legal counsel had incorrectly advised the board that the 1996 proposed rules were in effect; therefore, the board did not start rulemaking. In February 1999, the board declined the JLCAR's petition to start rulemaking.

The new legal counsel appointed to the BMHP in late 1998 told the board its 1996 administrative rules were in fact not in effect and the board needed to start rulemaking. In December 2001, the board appeared before the JLCAR to discuss its newly proposed administrative rules. The JLCAR made final objections to some of the board's proposed rules, notably the mental health client bill of rights and the requirement of a quorum for meetings. The JLCAR petitioned the board to re-write the mental health client bill of rights and voted to sponsor a joint resolution on Mhp 103.05 because the rule did not require the board to convene a quorum to hold a meeting. The board declined the JLCAR's petition to re-write the bill of rights and did not adopt the other changes in administrative rules identified in the joint resolutions. The board's new administrative rules became effective in January 2002.

Mental Health Client Bill Of Rights

RSA 330-A:15 requires the BMHP to "develop a model statement of the patient's mental health rights based on the code of ethics of each licensed professional association..." The board promulgated Mhp 502.02 to satisfy this requirement, directing each practitioner to develop their own statement informing clients of their rights. The JLCAR objected to the adoption of this rule; however, the board adopted it over the JLCAR's objection. According to RSA 541-A:13 (VI), an agency can adopt a rule over the committee's final objection; however, the agency carries the burden of proof if the rule becomes the subject of judicial review. In May 2002, a lawsuit was filed against the BMHP stating it did not develop a bill of rights as directed by RSA 330-A:15, and the bill of rights in its present form did not adequately protect the public from unethical treatment. In December 2002, the BMHP settled the lawsuit and agreed to re-write the bill of rights. The board adopted the final version of the mental health client bill of rights in February 2004.

Licensing

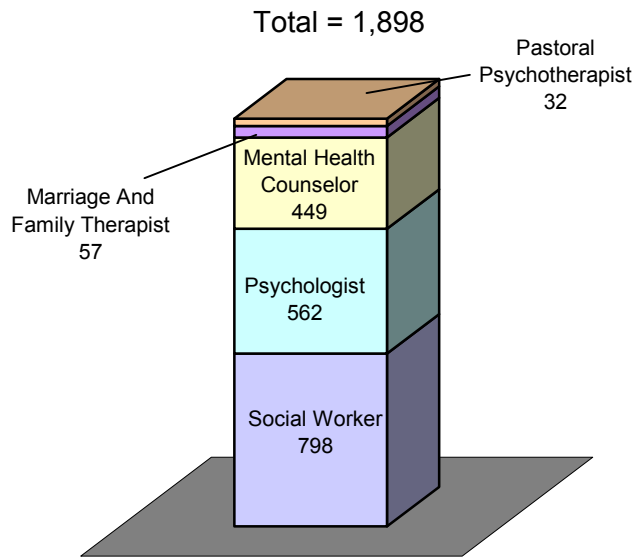
As of June 2004, the BMHP provided oversight of 1,898 practitioners who were in active status and an additional 175 practitioners who were in inactive status. Inactive practitioners pay a reduced fee and cannot practice until they re-activate their status. Figure 3 shows the number of active practitioners licensed by each mental health discipline as of June 2004.

According to RSA 330-A:10, the BMHP must establish a procedure in administrative rules for licensing and re-licensing practitioners. According to administrative rules, the board must approve or deny an application within 120 days of the filing date or, if the board requires further information to make its decision, within 120 days of the date the applicant files the response. All candidates for licensure must submit an application to the board documenting satisfactory completion of educational and clinical experience requirements, as well as satisfactorily passing the appropriate national licensing exam. Candidates for psychology and pastoral psychotherapy

licensure must also pass an oral exam. RSA 330-A:31 requires practitioners to renew their license every two years. The majority of licenses expire on June 30 of every odd-numbered year.

Figure 3

**Active Licensed Practitioners
As Of June 2004**



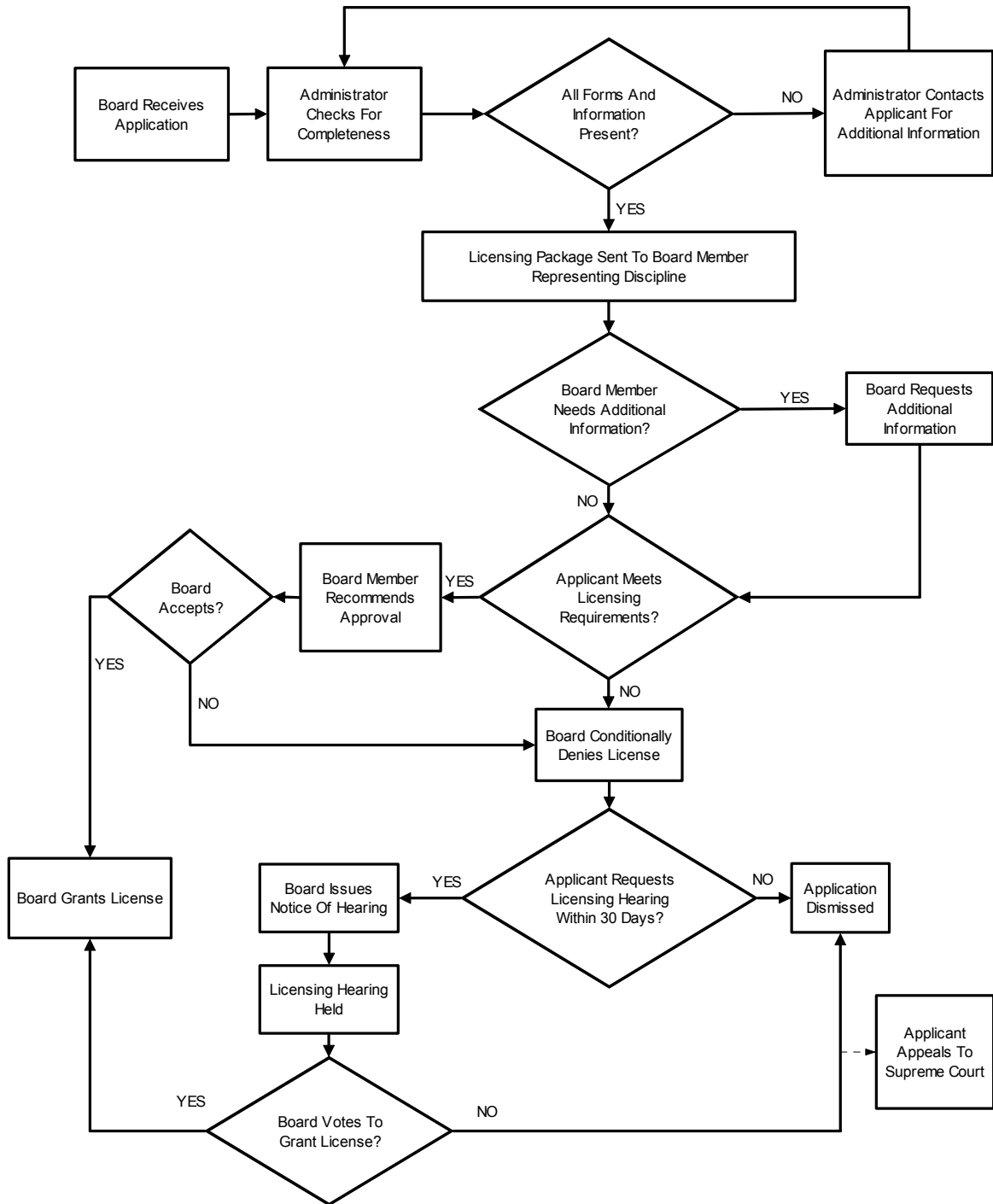
Source: LBA analysis of unaudited BMHP licensing data.

Once the board receives an application, the board administrator reviews the file to ensure all relevant information is present. The administrator then forwards the complete application file to that discipline's board representative, who ensures the candidate's educational and clinical experience satisfies all requirements for licensure under State law. The discipline's board representative submits a recommendation to the board on whether to approve or conditionally deny the license.

If the board votes to conditionally deny licensure, it must outline the candidate's deficiencies and allow the candidate to request a licensing hearing to address these deficiencies within 30 days of the board's decision. The candidate then presents evidence to the full board indicating all the statutory requirements have been met. The board prosecutor or a member of the board serving as prosecutor may present evidence on the board's behalf. Board members serving as prosecutor are recused from decision making in the case. The remaining board members then vote on whether to approve or deny the candidate a license. Figure 4 illustrates the licensing process. During the audit period, the BMHP received 944 applications and issued 941 new licenses.

Figure 4

BMHP Licensing Process



Source: LBA analysis of BMHP administrative rules and interviews with board members.

Complaints

RSA 330-A:10, XVI requires the BMHP to establish procedures in administrative rules for “accepting and responding to written complaints, publicizing the complaint procedure, conducting investigations, and conducting disciplinary hearings....” According to RSA 330-A:28, I, the board can conduct investigations “formally, after issuance of a board order setting forth the general scope of the investigation, or informally without such an order.” Mhp 210.01(a) allows the board to initiate an informal investigation when it receives information indicating a practitioner has or is likely to violate State law or administrative rules, or it needs data for any other lawful purpose. Informal investigations can be conducted at any time or place without prior board order. The board may conduct formal investigations to obtain documents, record testimony, and gather information regarding matters under its jurisdiction when it believes this technique will be more effective than an informal investigation. During the audit period, all investigations were conducted informally.

RSA 330-A:28, VIII authorizes the board to dismiss or settle complaints against practitioners. In practice, the board reviews a complaint to determine whether, if proven true, it would be an ethical violation. If it would not be a violation, the board may dismiss the complaint and notify the complainant it has decided there is no basis for action. Licensees are not notified of these complaints. If the board determines the complaint may be an ethical violation, it usually refers the complaint for investigation. Once it refers the case for investigation, the board does not receive information about the case until the board investigator (BI) brings forth a recommendation.

Investigations

The BMHP has an unwritten process for resolving complaints. It assigns one of its members as the BI to investigate complaints. RSA 330-A:28, II allows the BMHP to “employ or retain hearing officers, legal counsel, medical advisors, mental health advisors, or investigators to assist with any investigation and with the conduct of hearings.” The board uses volunteer mental health practitioners, who serve as professional conduct investigators (PCI), to conduct investigations under the BI’s direction. Beginning in July 2003, the board paid PCIs \$100 for each monthly meeting they attend, in addition to mileage reimbursement, and credited them with 12 continuing education units per year. An attorney from the administrative prosecutions unit (APU), New Hampshire Office of the Attorney General (OAG), attends the monthly meetings and helps guide the investigation by identifying the evidence needed if the case should proceed to a hearing. The APU attorney also drafts and negotiates settlement agreements, as well as prosecutes the case if it proceeds to a hearing.

Once the BMHP decides a complaint must be investigated, the board usually asks the licensee to respond in writing to the complaint. The complaint and licensee’s response are read and discussed by the BI and PCIs. The BI then assigns the case to a PCI. The PCIs have access to an APU investigator to help with their investigation. The APU investigator has a criminal justice background. During the course of the investigation, the PCIs discuss the case in their monthly meetings with the BI and obtain input from other PCIs and the APU attorney. Once the investigation is complete, the PCI assigned to the case usually writes the report of investigation

(ROI), which includes the evidence gathered and a recommendation to the board. APU personnel sometimes write the report if the violation requires disciplinary action. The PCIs and BI discuss the recommendations at their monthly meetings and attempt to reach decisions through consensus; however, the BI makes the final recommendation to the board. Recommendations may include no further action, a letter of concern, or disciplinary action.

Disciplinary Actions

Disciplinary action can include license suspension or revocation, supervision by a board-approved practitioner, requirement for additional continuing education units, a fine, or a combination of the above. The board reviews the ROI and may accept the BI's recommendation or reject it and request a different course of action. Once the complaint is forwarded for investigation, the BI is recused from any subsequent decision making in the case at the board level.

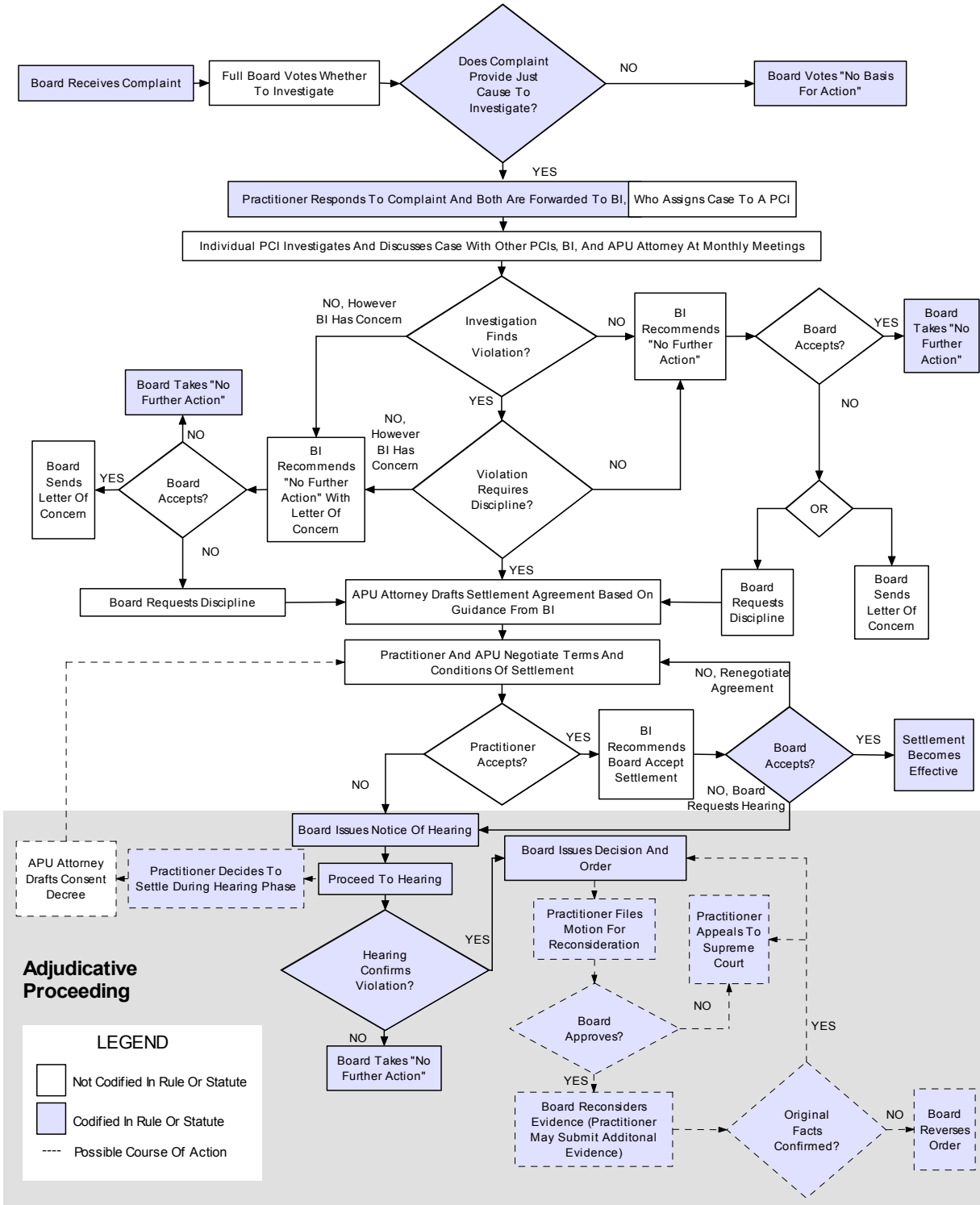
When a recommendation involves imposing disciplinary action, the APU attorney will obtain input from the BI and the PCI assigned to the case and attempt to reach a settlement agreement with the practitioner before proceeding to a hearing. The practitioner does not receive the ROI. The practitioner receives a draft of the proposed agreement and if he or she accepts the agreement, the complainant is given an opportunity to comment on the proposed terms. It is then forwarded to the board for approval. The agreement is not binding until board-approved. If the board rejects the agreement, it can request the APU attorney re-negotiate the settlement agreement and may include specific terms and conditions. The practitioner then receives a copy of the revised agreement and has the option of accepting the agreement or requesting a hearing.

RSA 330-A:29, I states complaints “not dismissed or settled informally” are to be heard by the board in an open and public hearing. Once the case proceeds to a hearing, the practitioner receives the ROI. During the hearing, the practitioner and APU attorney both present evidence. The practitioner can still settle the case during the hearing phase through a consent decree, which is also drafted and negotiated by the APU attorney. A consent decree is also not binding until the board accepts it. If a consent decree is not reached, a hearing is held, the board deliberates, votes, and issues a decision and order. The BI is recused from the discussion and does not vote. Figure 5 illustrates the process for resolving complaints. Blue shaded shapes are directly supported in administrative rules or specific statutes; non-shaded shapes are procedures not specified in rule or law.

As shown in Table 2, from SFYs 2000-2004 the BMHP took initial action on 142 complaints against licensees; 132 (93 percent) of these were reviewed within two months. The board determined 25 (18 percent) complaints did not warrant an investigation (i.e., no basis for further action) and forwarded 117 (82 percent) complaints to the BI and PCIs for investigation. From SFYs 2000-2004, we calculated it took the board approximately one year, from filing to final board action, to resolve investigated complaints. In fact, the board resolved 73 of 114 (64 percent) investigated complaints within one year, while 13 (11 percent) took more than two years.

Figure 5

BMHP Process For Resolving Complaints



Source: LBA analysis.

Table 2**Complaints Against Licensed Practitioners
SFYs 2000-2004**

	2000	2001	2002	2003	2004	Total
Complaints Received	21	39	24	27	31^a	142
Initial Board Action						
No Basis For Further Action	0	11	1	9	4	25
Forwarded For Investigation	21	28	23	18	27	117

Note: ^a Does not include three cases still awaiting board action as of June 30.

Source: LBA analysis of BMHP complaint data.

Our analysis of completed investigations found 86 (75 percent) investigations resulted in no further action, 25 (22 percent) resulted in settlement, one (one percent) proceeded to an adjudicatory hearing resulting in a decision and order, and two investigations (two percent) were ceased for other reasons as shown in Table 3. We also found on average, the board has 25 investigations ongoing at the end of each fiscal year. Starting in SFY 2003, the board issued more confidential letters of concern in conjunction with a finding of no further action. Letters of concern are not considered disciplinary action. The board issues a “soft” letter of concern when the practitioner “comes up to the line” of what would be considered a violation, and the board is concerned if the actions are not corrected the practitioner may be in violation. It issues a “hard” letter of concern when a practitioner has committed a violation that does not harm the public or the practitioner acknowledges the deficiency and has taken action to correct the deficiency.

Table 3**Completed Investigations
SFYs 2000-2004**

	2000	2001	2002	2003	2004	Total
Completed Investigations^a	27	23	17	22	25	114
No Further Action	22	18	10	9	13	72
No Further Action With Letter Of Concern	1	0	0	8	5	14
Settlement	2	5	7	5	6	25
Other	1 ^b	0	0	0	1 ^c	2
Adjudicatory Hearing (Decision And Order)	1	0	0	0	0	1

Notes: ^a Completed investigations may have been filed in previous fiscal years.

^b Licensee deceased during investigation.

^c Board dismissed case.

Source: LBA analysis of BMHP complaint data.

Table 4 shows 18 (69 percent) disciplinary actions taken from SFYs 2000-2004 required some supervision and 14 (54 percent) required the licensee to obtain additional continuing education units. Twelve of the 26 (46 percent) disciplinary actions required both supervision and continuing education. On average, the board disciplines five mental health licensees per year.

Table 4

**Disciplinary Actions
SFYs 2000-2004**

	2000	2001	2002	2003	2004	Total
Disciplinary Actions	3	5	7	5	6	26
Revocation Only	0	1	0	0	1	2
Revocation And Fine	0	0	1	0	0	1
Suspension Only	1	0	1	1	0	3
Supervision Only	0	1	0	2	0	3
Supervision And Continuing Education	2	3	2	1	4	12
Suspension And Supervision	0	0	2	0	0	2
Suspension, Supervision, And Continuing Education	0	0	1	0	0	1
Continuing Education Only	0	0	0	1	0	1
Fine Only	0	0	0	0	1	1

Source: LBA analysis of BMHP complaint data.

A 2004 article published in *Professional Psychology: Research and Practice* entitled, "Psychology Licensing Board Disciplinary Actions: The Realities," reported on a survey of American and Canadian psychology licensing agencies' complaints, investigations, and disciplinary actions.¹ Thirty-seven agencies responded to the survey with up to six years worth of data (1996-2001). It found that:

[t]he actual number of complaints received, though not necessarily opened for investigation, was approximately 2% of licensed psychologists for every year data were collected.... [F]ormal disciplinary actions reported to the [Association Of State And Provincial Psychology Boards'] Disciplinary Data System involved less than 0.13% of psychologists' licenses.

We compiled similar data from the BMHP for SFYs 2000-2004. Because of limitations of the board's data, we are only able to provide percentages for SFY 2004 data; however, we know of nothing that makes this year atypical. For 2004, we estimate that 2.1 percent of New Hampshire's 562 licensed psychologists had a complaint filed against them. And similar to other licensing agencies, one-half of one percent of licensed psychologists (three out of 562) were disciplined. We note the number of disciplined psychologists ranged from zero to three from SFYs 2000-2004. Unlike the result of other licensing agencies, the BMHP investigates 82 percent of complaints against psychologists verses the study's high of 20 percent of complaints.

The BMHP does not appear to be a rogue agency when the number of disciplinary actions are considered. The number of investigations and disciplinary actions the BMHP has taken against psychologists are proportional when compared to results of this study. We note this is a simple quantitative comparison and does not address the quality of the decisions made by the BMHP or other governmental licensing agencies.

¹ We did not find similar data for the other four mental health professions.

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

COMPLAINT RESOLUTION

A major function of the Board of Mental Health Practice (BMHP) is investigating complaints and, when warranted, disciplining licensees. State law gives the BMHP discretion on how to conduct investigations and by all accounts the board has been handling complaints and investigations by a standard, albeit undocumented, process. We found the rules to be inadequate in establishing the process, publicizing it, and handling conflicts of interests. We also found the board needs to carefully review complaints against board members, set standards for documenting investigations, and better define the supervisor's role in statute.

Observation No. 1

Promulgate Administrative Rules For Investigations

The BMHP has failed to comply with State law regarding administrative rules relative to conducting investigations. The board's current administrative rules do not adequately regulate its investigation process. RSA 330-A:28, III gives the BMHP the authority to undertake investigations in a form reserved to the board's discretion; while RSA 330-A:10, XVI requires the board to adopt rules relative to conducting investigations. The current rules simply describe the difference between formal and informal investigations, in that the board must order a formal investigation to subpoena individuals. We documented the process for resolving a complaint from filing through an adjudicative hearing. Interviews with knowledgeable participants and our review of investigative files indicate this process has been consistently in place during most of the audit period and has been described, to some extent, in the board's minutes.

There is little information readily available for licensees and complainants explaining the investigation process. When professional conduct investigators (PCI) meet with licensees under investigation, PCIs reportedly discuss the process, but even this is not standardized. By the board's inaction on promulgating rules for the investigation process, it has essentially let one board member (the board investigator) manage investigations, while some other board members admit not being as familiar with the details of the investigation process. Below are a number of potentially negative consequences of having non-codified investigation procedures that are not well known to those outside the process.

- Licensees may believe the board is conducting "witch hunts."
- Licensees may not be made fully aware of the procedures they may have to participate in.
- Potential complainants may not be made fully aware of the procedures they may have to participate in – especially the possibility of public disclosure of their mental health records and the facts surrounding a licensee's alleged misconduct if the complaint goes to an adjudicative hearing.
- The investigative process could change without the board's knowledge or approval.
- Investigators' authority is unclear and could be questioned.
- The board and its investigators do not have a clear standard for assessing the quality of investigations.

Some professionals involved in the investigatory process question the necessity of developing rules for how investigations should be conducted. They reported the uniqueness of alleged misconduct makes it impossible to develop investigative rules for all cases. In addition, if an investigation falls outside of the codified procedure it could be considered invalid. While attempts to micromanage investigations could be futile, the board should set general procedures and expectations for this work. The board has such rules in place for adjudicative proceedings, which provide a clear process for conducting hearings. Written rules should describe how the board investigates complaints and decides cases by clarifying the responsibilities and authority of PCIs, administrative prosecutions unit (APU) investigators, APU attorneys, the board investigator (BI), and board members.

Recommendation:

The BMHP should comply with State law and develop administrative rules for conducting investigations. The board is ultimately responsible for all actions taken in its name by investigators and it should exercise control over this important function to ensure investigations are conducted in a consistent and fair manner, within a clearly defined process.

Auditee Response:

CONCUR. Within one year of the date of the final audit report, the Board will submit draft rules and begin the rulemaking process, using the LBA flowchart as the starting point. These rules will explain the general process for conducting investigations, including detailing the responsibilities of the PCIs the APU staff, and the Board members, while still reserving the Board's discretion under RSA 330-A:28.

Observation No. 2

Publicize The Process For Resolving Complaints As Required By Statute

RSA 330-A:10, XVI requires the BMHP to adopt rules relative to publicizing the complaint process. The board does have an undocumented process by which it handles complaints and investigations. During our audit, we documented the process for resolving complaints from filing the complaint through final disposition. This included how investigations are initiated, assigned, conducted, reviewed, and reported back to the board. The board reportedly has used this process throughout the audit period, yet those outside of the investigative process, including some board members, do not clearly understand it. Five practitioners who were investigated during the audit period have expressed concern over the lack of information regarding the complaint process. They reported not receiving sufficient information regarding how complaints against them would be handled.

The BMHP published a clarification of the BI's and the PCIs' roles in its February 28, 2003 board meeting minutes. The general public would not know where to access this information unless it knew the meeting date when the board issued the clarification. The board also placed

this clarification on the “News from the Board” page of its website; however, the excerpt is found under a link titled “Reciprocity Agreement.”

As a result of complaints filed against them, practitioners may have their licenses to practice suspended or revoked. Not clearly publicizing the complaint resolution process may result in practitioners feeling anxious and confused about how the process operates, thereby subjecting the BMHP to accusations of operating in secret, and creating distrust of the board and PCI members. States such as Vermont, California, Colorado, Ohio, Wyoming, Mississippi, Michigan, Alabama, and Maine have published on the Internet their procedures for filing complaints against psychologists and other mental health professionals, as well as the complaint resolution process.

Recommendation:

The BMHP should comply with State law and write rules addressing how its complaint procedure will be publicized. At a minimum, the process should be better documented in the board’s administrative rules. The board should consider clearly identifying and summarizing the process for resolving complaints and conducting investigations on its website. In addition, the board may wish to provide licensees under investigation and complainants a description of the process.

Auditee Response:

CONCUR. Within one year of the date of the final report, the Board will submit draft rules and begin the rulemaking process addressing how its complaint procedure will be publicized in accordance with RSA 330-A:10 XVI. The Board has created a link on its website entitled “Explanation of Complaint Process” which includes the minutes of its February 2003 meeting explaining the complaint process. The Board has decided to distribute to licensees under investigation and complainants a description of the complaint process. The Board will also include the flowchart done by LBA on its website. The Board feels a year is necessary because as of November 2004, the Board will have four new members; it takes a considerable amount of time for new Board members to acquaint themselves with the workings of the Board. Also, the Board is planning to provide the LBA audit report to its Advisory Committees and work with those committees in redrafting its rules. The Board is striving for more participation from the five professional guilds in its rulemaking.

Observation No. 3

Amend Statute And Promulgate Rules For Complaints Against Board-Associated Licensees

The BMHP does not have rules for handling complaints against board-associated mental health licensees including board members, PCIs, and advisory committee members. Without clear and consistent rules for handling such complaints and investigations, the board risks the appearance of making biased decisions in those cases. Currently, the board decides on an ad hoc basis how it will handle complaints against board-associated licensees. We found that board members and PCIs are aware of the need to remain objective and maintain a fair system for dealing with complaints, investigations, and discipline. We observed meetings and found evidence in minutes

of non-public meetings that board-associated officials commonly recused themselves. However, we identified seven board actions that have the appearance of a conflict of interest from our review of the board's handling of complaints and investigations active from State Fiscal Years (SFY) 2000-2004.

Board-associated officials should ensure the integrity of their pursuits by taking steps to avoid not only a clear conflict of interest, but even the appearance of a conflict of interest. Certain personal, financial, and board related situations may have the appearance of compromising board decisions. Without clear guidance, the board risks losing public confidence and damaging its reputation. Because public confidence is important, the BMHP should take steps to avoid even the appearance of impropriety. Additionally, by making ad hoc decisions, the board risks inconsistently handling similar questionable situations.

Board Members

We found one instance where a board member voted on whether to refer a complaint for investigation against a former board member, even though they had served together. We believe this represents, at a minimum, an appearance of a conflict of interest, and the board member should have been recused from voting on the complaint.

Professional Conduct Investigators (PCI)

We identified three instances where the BI voted on whether a complaint against a PCI should be investigated. The BI holds monthly meetings with PCIs to discuss on-going investigations; we believe there is an appearance of a conflict of interest in the BI voting on whether to send a complaint against a PCI for investigation.

We found two instances of PCIs investigating complaints against other PCIs with whom they served. Since PCIs attend monthly meetings to discuss each other's investigations, we believe a PCI should not investigate another PCI. We note the board has used the APU and licensees not associated with the board to conduct investigations that may have had the appearance of a conflict of interest.

Advisory Committees

We identified one instance where the board member serving as the chairperson of an advisory committee participated in the vote on the final resolution of the complaint against another member of the committee. Board members act as the chairperson for their respective profession's advisory committee. Therefore, voting on a complaint against an advisory committee member could have the appearance of a conflict of interest for the committee's chairperson. Since other board members have little to no direct working relationship with another profession's advisory committee members, their participation may not present an appearance of conflict of interest.

Recommendation:

The BMHP should seek statutory amendment addressing conflict of interest. Such amendment could include providing a mechanism to appoint substitute board members for conflict of interest situations as addressed in Observation No. 15. Additionally, the board should develop rules for handling complaints made against current and former board-associated licensees to mitigate the appearance of a conflict of interest. Rules would provide transparency to how complaints, investigations, and discipline of current and former board-associated licensees would be handled.

Auditee Response:

CONCUR IN PART. While the Board understands that the appearance of a conflict of interest could cause concerns with the public and licensees, which the Board wants to avoid, the use of specific ethical standards as criteria for submission for further investigation creates an objective basis for decision making. The Board concurs that it should develop rules for investigating complaints made against current and former Board-associated licensees to eliminate actual conflicts and to limit the appearance of conflicts of interest. Within one year of the date of the final audit report, the Board will have draft rules completed to begin the rulemaking process. The Board is aware that the Attorney General's office is working on draft legislation to allow for a process to appoint substitute Board members for limited conflict situations.

Observation No. 4

Consider All Ethical Complaints Against Board Members

On two separate occasions, the BMHP has referred to RSA 330-A:27, IV in dismissing complaints against board members on the basis that it grants them immunity when acting in good faith while serving on the board. RSA 330-A:27, IV states, “no *civil action* shall be maintained against the board or any member of the board or its agents or employees with regard to any action or activity taken in the performance of any duty or authority established by this chapter” (emphasis added). According to the BMHP’s legal counsel, RSA 330-A:27, IV protects board members from civil liability when acting in good faith on behalf of the board; however, it does not exempt them from an ethical complaint.

Recommendation:

The BMHP should discontinue the practice of dismissing complaints based on the premise that RSA 330-A:27, IV grants board members immunity while acting in a board-related capacity.

Auditee Response:

CONCUR. The Board concurs that no ethical complaints against a current or former Board member based on treatments issues should be dismissed based on the immunity provided to Board members under RSA 330-A:27, IV. With respect to the two examples that LBA uses, the most recent

example is clearly a complaint against a former Board member, who is also a licensee, based solely on the Board member's actions on the Board. In accordance with advice from our legal counsel, and the policy established by the Legislature in RSA 330-A:27, IV, as long as Board members were acting reasonably and in good faith, while performing their Board duties, they are immune from action – either civil or administrative action. As advised by our counsel, the remedy for challenging a Board member's actions in a disciplinary hearing are through either an appeal of the decision to the Supreme Court or a petition in equity to the Superior Court either requesting removal of the Board member from the case or an injunction against the Board member preventing him/her from acting. It is not appropriate to request that the Board review decisions made by a former Board – which were either not appealed or which appeals were denied- and reconsider those decisions.

With respect to the older of the two complaints, the bulk of that complaint is also based on the former Board member's actions when that person was serving in a Board capacity. However, on closer review of that complaint, there does appear to be an allegation that the former Board member acted unethically in private practice. At this time, the current Board is unsure, based on the former Board's minutes, as to how extensive the review was of that allegation in the complaint. The current Board will review this specific allegation in the complaint and make an independent determination as to whether that specific allegation should be investigated.

Observation No. 5

Develop Written Guidance For Documenting Investigations

The BMHP does not have written guidance for documenting investigations. Some practitioners who have conducted investigations for the board and board members reported the need for additional guidance on how to conduct investigations. The board reportedly has undocumented investigation practices. PCIs reported they were trained by mentoring with other PCIs and participate in the monthly PCI meeting to discuss their investigations. The APU provides an independent quality control on board investigations by attending all PCI meetings and providing input on the direction of investigations, investigation reports, recommendations, and settlement agreement provisions. In some cases, the APU investigator conducts part or all of the investigation for the BMHP. An APU attorney also drafts the settlement agreement and prosecutes misconduct at board hearings. The New Hampshire Office of the Attorney General (OAG) has sponsored training for investigators in the past; however, not all PCIs or BIs have attended this training.

While reports of investigation (ROIs) are generally similar in appearance and content, we found investigation documentation maintained at the BMHP and APU offices to be different. In general, board investigation files contained the ROI and sometimes hand written notes of interviews. Many of the investigation files produced by the PCIs and held at the board did not have memorandums of interview; however, PCIs incorporate interview information directly into the ROI. In rare instances, the board files contained memorandums of interview and other investigation documentation such as the purpose, procedures, and conclusions of an inspection of a licensee's patient files. In contrast, the APU investigation files were well-organized and usually contained the ROI, as well as typed memorandums of interview (written by APU officials), written notes from meetings, correspondence, and "case run sheets" documenting all contact

related to the investigation. While we found the APU's files conformed to the advice provide in the OAG training, we were told that even the APU did not have written investigation standards; instead, they rely on the professionalism of the APU investigator and attorney.

Fully documenting the investigation is very important. According to APU personnel, if it is not on paper, it does not exist. During our review of APU files, we found a memo from an APU attorney to a PCI on how written interviews could be used:

I ask that you memorialize in writing the substance of your interview of [the licensee].... In doing so, I ask that you keep in mind that this report of interview will be available to [the licensee] if the Board commences disciplinary proceedings against [the licensee] and that you may be questioned about and/or cross-examined on any statement contained therein.

Without written guidance the board has inadequate controls over obtaining and maintaining sufficient, competent, and relevant evidence in its investigation files. Investigators and practitioners would be better served if the board's expectations on how to document an investigation were written. The OAG's training on how to conduct an administrative investigation could be used as the basis for written guidance for investigators. The following excerpts are examples of advice contained in OAG training material potentially useful for PCIs.

- [There is an o]bligation to collect evidence consistent with innocence, as well as guilt.
- Make a contemporaneous written report of every interview or contact you have with any source of information.
- Map out how the violation is subject to discipline. Logically connect from statute to rules to code of ethics.
- Document, document, document!
- If you speak to someone, create a report.
- If you receive original documents:
 - a. DO NOT write on them or change them in any way
 - b. Preserve for evidentiary reasons
 - c. Make copies to work from
 - d. Document the taking of records in your report
- The report of investigation is a summary of your investigation, and as such, it should be comprehensive and detailed enough to prove, or demonstrate the inability to prove, the alleged violation(s). The report of investigation provides notice to the licensee of the charges against him/her and outlines the supporting evidence which will be introduced at the disciplinary hearing.
- Do not give opinion [in the ROI] until appropriate to do so (i.e., analysis or recommendation sections).

- Be complete [in the ROI] – Give both inculpatory and exculpatory information on all issues.

The OAG training material also provides example of the various types of memorandums of interviews and ROIs.

Recommendation:

The BMHP should develop written guidance regarding how PCI investigations should be documented. The BMHP could use the OAG’s *Administrative Investigations Lesson Plan* as a guide. Additionally, the BMHP should require all new PCIs and board members be trained on how to conduct an administrative investigation. Such training could include written guidance, mentoring, or formal classroom instruction.

Auditee Response:

CONCUR. The Board will work with its counsel in adapting the Attorney General’s training materials and internal investigative standards into a written guide for Professional Conduct Investigators (PCIs). All current and future PCIs and Board members will be trained on how to conduct an administrative investigation upon completion of the guidelines. This task can be completed within 6 months of the date of the final audit report.

Observation No. 6

Establish Supervisor’s Role In Statute

The BMHP may appoint supervisors to oversee potentially high-risk licensees as part of a disciplinary action. However, supervisors may not be provided all the necessary information to appropriately supervise licensees, and may not have the civil liability protection granted to other board agents. This could negatively affect the number of professionals willing to take on this responsibility. According to RSA 330-A:27, III(d), the board may require a licensee to participate in supervision in the area(s) in which there is an identified deficiency. There are no statutes, administrative rules, or policies describing the role, responsibility, and authority of supervisors, except for what is written in the board’s disciplinary actions (i.e., settlement agreement, consent decree, or decision and order). The board provides supervisors with the written disciplinary action identifying practice area(s) where the licensee is deficient. Supervisors must submit monthly reports, attend bi-monthly meetings with a board member, and produce a final assessment of the fitness of the licensee to continue practicing.

Supervisors we spoke with commented about the general lack of information on their role and responsibilities. Supervisors mentioned their lack of access to the ROI, which details the disciplined licensee’s misconduct(s). The board considers the ROI to be a confidential document and giving it to a supervisor could allow it to be discoverable. As a result, supervisors may not have a complete or accurate understanding of the misconduct they are supposed to address with the disciplined licensee.

There is nothing in State law that provides any liability protection for supervisors overseeing board-disciplined licensees. According to RSA 330-A:27, IV:

No civil action shall be maintained against the board or any member of the board or its agents or employees with regard to any action or activity taken in the performance of any duty or authority established by this chapter. No civil action shall be maintained against any organization or its members or against any other person for or by reason of any good faith statement, report, communication, or testimony to the board or determination by the board in relation to proceedings under this chapter.

The supervisor's role is not directly addressed in State law, thereby making it unclear if they would be considered agents of the board. A board member liaison to the supervisors stated that the board sees supervisors as working for the board first, the disciplined licensee second. Even though the licensee is responsible for seeking out qualified mental health practitioners who would agree to act as the licensee's supervisor, the board makes the final approval regarding who will be the supervisor.

Recommendation:

The BMHP should seek to establish the authority and responsibilities of supervisors overseeing the rehabilitation of disciplined licensees in State law. By clearly making supervisors agents of the board, they would be provided the same liability protection as other agents conducting board-related business. The board may also consider seeking statutory amendments allowing supervisors access to the ROI in order to provide sufficient information to better rehabilitate the disciplined licensee.

Auditee Response:

CONCUR IN PART. The Board supports statutory change, which would specifically name supervisors as "agents" of the Board, thereby protecting supervisors from civil liability while carrying out their responsibilities for overseeing the rehabilitation of disciplined licensees. However, the Board's legal counsel disagrees with LBA's legal interpretation of RSA 330-A:27, IV and :27, III (d). The Board is allowed to require supervision as part of its discipline and the protection from civil action applies to the Board's "agents" – a supervisor approved by the Board is an "agent" of the Board.

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

COMPLAINT MANAGEMENT

Reliable and timely caseload information is an important management tool in assessing the past and current systems of conducting investigations and determining the Board of Mental Health Practice's (BMHP) future resource needs. We found the board does not have a method to systematically track complaint data, evaluate the timeliness of board actions, or ensure complainants have adequate opportunity to comment on potential disciplinary actions.

Observation No. 7

Track Complaints With An Electronic Database

The BMHP does not have an efficient system for tracking complaint information or promptly producing complaint and investigation statistics. The board was unable to readily produce caseload information, such as the number of complaints filed, or investigations initiated and completed each year.

While the BMHP has an electronic database for its licensing operations, it manually tracks complaints. The BMHP uses a database to manage licensing information for all five professions. This database contains the licensee's profession, license number, date of licensure, license status, and other relevant data. Currently, the board can only obtain complaint and investigation information by compiling data from several sources. The board administrator maintains and tracks complaints on individual index cards, which contain relevant case information such as filing date, date of board decisions, and disposition date. The administrator also tracks the status of complaints on the monthly agenda of the professional conduct investigators' (PCI) meetings, and in the board's non-public minutes. All complaints alleging licensee misconduct are kept on file at the board for reference in the event a new complaint is filed against the same licensee.

Our review of 171 complaints active from State Fiscal Years (SFY) 2000-2004 found two instances where index cards were missing for two separate licensees and one instance where the actual case file was missing from the cabinet where complaints are kept. Additionally, we found one complaint was filed under a different person's name based on the nature of the complaint. Regardless, we were ultimately successful in tracking all the complaints. With the board administrator, we identified complaints and their dispositions from the varied sources to create a database in order to produce some basic performance statistics.

The board administrator is the only person with intimate knowledge of the individual cases and can reference the index cards or the case file to see if a prior complaint exists for a specific licensee. The administrator is able to recall a significant amount of historic complaint information by memory. However, the board should not rely solely on one person's institutional memory and manual tracking system. The board risks being unable to easily track complaints or access prior complaints in the administrator's absence.

Recommendation:

The BMHP should develop an efficient system to track complaints. One option the board may choose is to expand its existing licensing database to include a complaint module with new reports and query functions. With such a system, complaints could be directly linked to existing licensee information, thereby centralizing data, avoiding duplication, and allowing for analysis of licensee and complaint information. As part of this process, the board should determine what performance information it should track to improve its oversight of the complaint process and ensure that information will be captured by a new module. The board should determine what resources are available for programming and, if needed, budget for it.

Auditee Response:

CONCUR. The Board has requested \$10,000 for FY '06 and FY'07 in Class 027 to have either a State OIT person or a consultant expand its existing licensing database/and or install the state licensing system to include a complaint module with new reports and query functions, thereby centralizing data, avoiding duplication, and allowing for analysis of licensed and complaint information. Within one month of the Governor approving the FY'06 and FY'07 budget request for class 027, the Board will contact OIT for assistance in drafting a Request for Proposals to bid out the creation of a database once the budget is adopted.

Observation No. 8

Evaluate The Timeliness Of Complaint Resolution

The BMHP does not systematically track the amount of time PCIs and administrative prosecutions unit (APU) personnel spend working on investigations or the board takes resolving complaints. The board is using an inexpensive method whereby mental health professionals conduct investigations, but is accepting relatively long periods of time to resolve complaints. The board has not periodically questioned whether another system of conducting investigations, while potentially more expensive, might reduce the amount of time the board takes in resolving complaints. Without data on the amount of time it takes to resolve complaints, the board cannot meaningfully assess whether the current system adequately fulfills the board's needs, the public's needs, or licensees' needs.

Some BMHP members and PCIs reported investigations take a long time to complete. PCIs indicated some investigations take a few months to complete, while others can take over a year, depending on complexity. Our analysis of 114 complaints investigated and resolved from SFYs 2000-2004 revealed the board resolved 73 (64 percent) complaints within 12 months, and 101 (89 percent) complaints within two years. The shortest resolution took approximately one month, while the longest took over three years.

Investigations reportedly take a long time to complete because the PCIs are volunteers. PCIs we spoke to stated serving as a PCI is time consuming; balancing the time spent in their role as PCIs and their role as clinicians has become increasingly difficult. One experienced PCI reported

spending approximately 20 hours per month, excluding the monthly PCI meeting, working on investigations. Another investigator reported spending approximately 40 hours over the course of eight months on one investigation.

Some practitioners we interviewed who have been investigated by the board, board members, and PCIs expressed the need for speedier complaint resolution. PCIs, practitioners, and attorneys familiar with the process reported the length of time it takes to resolve a complaint unfairly draws out the process, has a negative impact on the practitioner's livelihood, and is a disservice to the public.

If the BMHP determines the current system does not adequately balance its costs and the needs of the board, public, and licensees, it may wish to consider a different system for conducting investigations. For instance, other states such as Wyoming and Ohio have a full-time investigator who performs the investigation and presents the information to the board member or a panel of members representing the practitioner's discipline. Similarly, the New Hampshire boards of medicine and pharmacy also have full-time investigators who perform investigations and present the information to a sub-committee or the full board. Other states such as Vermont, Colorado, Michigan, California, and Maine have a central investigation office for boards. In some states, the investigator is paired up with a board member or other designee from the practitioner's profession, while in other states the investigator presents the information to a panel made up of members of the practitioner's profession. We note that beyond costs and timeliness of investigations, any decision to change the way the board investigates complaints would also have to consider many other factors, such as the knowledge, skills, and abilities of potential investigators.

Recommendation:

The BMHP should continuously track the time it takes to resolve complaints and conduct investigations. The electronic database recommended in Observation No. 7 should have the capability of tracking the timeliness of the complaint resolution process. The board should use this information to determine if it has adequate resources and a system for conducting investigations in an efficient and effective manner.

Auditee Response:

CONCUR. Assuming the Board receives budgetary approval and OIT implementation, the new database should allow the Board to evaluate the timeliness of the complaint resolution process and make informed decisions on whether the current system adequately balances its costs and the needs of the Board, public and licensees.

Observation No. 9

Ensure Complainants Have Adequate Opportunity To Comment On Proposed Settlement Agreements

The BMHP does not always ensure complainants receive sufficient opportunity to comment on proposed settlement agreements. When complaints result in a settlement agreement, RSA 330-A:28, VIII requires the BMHP to provide the complainant an opportunity to comment on the terms of the proposed settlement. An APU attorney drafts and negotiates all proposed settlement agreements for the BMHP. Once the licensee and the APU attorney have reached a proposed settlement agreement, the APU attorney usually sends a letter to the complainant regarding the terms of the agreement and offering them an opportunity to comment prior to the board taking final action. Our file review of 26 settlement agreements negotiated from SFYs 2000-2004 found five (19 percent) cases where there was no indication the complainant was given an opportunity to comment on the proposed settlement agreement. We found an additional three (12 percent) cases where the complainant was given less than a week to comment on the proposed agreement. In one of these cases, the APU attorney sent the letter to the complainant three days before the comments were due.

While we found evidence the complainant was given the opportunity to comment in 21 of the 26 (81 percent) settlement agreements we reviewed at the APU, we only found evidence in six (23 percent) of the BMHP's 26 files. In not ensuring every complainant is given adequate opportunity to respond to the terms of the proposed settlement agreement, the BMHP may not be fulfilling its statutory obligation to mental health consumers.

Recommendation:

The BMHP should institute procedures to 1) provide a minimum amount of time for complainants to comment on settlement agreements and 2) request documentation from the APU that complainants were notified in a timely manner.

Auditee Response:

CONCUR. The Board has instituted procedures to ensure complainants have adequate opportunity to comment on proposed settlement agreements by requiring two weeks notice to complainants prior to Board action on settlement agreements. In addition, the APU shall copy the Board on its notification to the complainant allowing him/her to comment within fourteen days as the method of proof of compliance with this procedure.

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

OFFICE OPERATIONS

During the audit period, the Board of Mental Health Practice (BMHP) collected over \$500,000 each biennium. We found the BMHP had not made timely deposits, properly segregated revenue-processing duties among the two board staff, or periodically reassessed its fees. Additionally, the board lacked a procedures manual documenting unique office operations.

Observation No. 10

Ensure Prompt Payment To Treasury

RSA 6:11 requires State departments or institutions possessing more than \$100 to deposit these funds into the State Treasury or the department's bank account daily. BMHP staff did not make daily deposits of funds collected from fines and licensing fees into the State Treasury. Nor does the board maintain a separate bank account. Additionally, in June of each odd-numbered year, when the majority of practitioners renew their licenses, the board holds money it collects until the beginning of the next fiscal year before depositing it into the State Treasury.

Board staff lacked situational awareness regarding how the board is funded and the importance of depositing and recognizing revenue in a timely manner. They were under the mistaken impression that board operations were directly funded by board revenue held in a separate account at the State Treasury and any surplus would lapse into the State's general fund at the end of the fiscal year. The board did have its own account until 1981 when the Legislature changed the BMHP's funding method by requiring all amounts collected be reported as unrestricted general fund revenue, thereby making the board a general fund-appropriated institution.

RSA 330-A:33 requires the BMHP to issue a license to all mental health providers certified prior to July 1, 1998. When Chapter 234, Laws of 1998 was enacted, the BMHP changed the renewal dates for all previously certified practitioners to July 1 regardless of their original renewal date. However, licenses issued after the new statute was effective expire two years from the date of original licensure. Licensed mental health practitioners pay a \$270 renewal fee every two years. Board staff reported it is challenging to process so many renewals, handle increased phone calls from licensees asking about their renewal, and get checks ready for deposit during June. While board staff send practitioners a reminder in early April, many practitioners reportedly wait until the deadline to renew their licenses. In 2003, 1,302 of the BMHP's 1,898 active practitioners had to renew their license by July 1, with 886 practitioners submitting their renewals in June. Board staff held all the checks until the next fiscal year and made deposits totaling almost \$366,000 into the State Treasury. Another erroneous reason given for inappropriately holding checks was the actual renewal date for the 1,302 licenses was July 1, 2003 therefore the fees collected in State Fiscal Year (SFY) 2003 should be revenue earned in the following fiscal year so checks should not be deposited until that date.

Recommendation:

The BMHP should record and process all financial transactions as they occur according to State law. Recording and processing transactions should not be intentionally delayed thereby avoiding State controls including the proper safeguarding of assets, cash

management practices, and accurate financial reporting. The BMHP should also seek Legislative changes to its statute to distribute license renewal dates more evenly throughout the year.

Auditee Response:

CONCUR IN PART. The Board disagrees that any of its actions were done to “avoid state controls.” The Board’s actions were based on lack of situational awareness of how the board is funded and misinformation from the Treasurer’s Office. The Board now deposits checks on a weekly basis and will no longer hold checks from June to July 1. If any daily receipts total more than \$100, deposit will be made daily, thus complying with RSA 6:11. The Board disagrees with the recommendation to stagger license renewals because it would be too confusing for licensees.

Observation No. 11

Segregate Revenue Processing Duties

The BMHP has not properly segregated duties in its revenue collection process. Without proper segregation of duties the board risks fraud or errors occurring that are not detected and corrected in a timely manner. The BMHP office has two full-time staff responsible for daily operations including revenue collection. The BMHP collects most of its revenue from licensing and renewal fees; however, it also collects fines imposed for disciplinary actions and fees from various companies requesting lists of licensed practitioners. During SFY 2004, board staff processed approximately \$500,000 in revenue.

The *State of New Hampshire Internal Controls Tool Kit* (issued October, 1995), prepared by the Department of Administrative Services, states segregating incompatible duties is important to protect the integrity of the system by ensuring that no one employee has such exclusive control as to permit intentional or unintentional errors to remain undetected. The *Internal Controls Tool Kit* lists three incompatible functions in the revenue process that must be segregated for proper internal controls: 1) authorization, 2) custody of assets, and 3) recording or reporting of transactions. While both employees review re-licensing applications, one employee prints the licenses, handles cash receipts for those licenses, and records the transactions in the board’s licensing database. The same employee completes the cash receipt document (Form A-17) and deposits checks into the State Treasury with no documented review from other staff. The employee responsible for these functions reported the board’s other staff member occasionally reviews the cash receipts; however, our review of SFY 2004 cash receipts found the signature of the preparer but no signature to indicate the forms were reviewed.

According to the *Internal Controls Tool Kit*, employees handling cash receipts should not be involved in reconciling those documents to the accounting records. We found that both staff perform the monthly reconciliation between the cash receipt documents and the State accounting system, but neither staff reconciles the cash receipts to the information in the licensing database. In addition, the board does not track revenue from fines and miscellaneous fees. Board staff reported they deposit these checks into the State Treasury, commingled with licensing revenue.

By not tracking this other revenue, the board is hampering its ability to reconcile all of its revenue to cash receipts, the State accounting system, and its licensing database.

Recommendation:

The BMHP should segregate the duties related to receipt document preparation and check handling from the reconciliation function to strengthen its internal control structure. Specifically, the board should institute office procedures recording revenue generated from fines and fees other than licensing and renewals to facilitate reconciliations and to easily track the various sources of revenue. In addition, the board should institute office procedures ensuring the employee other than the one responsible for completing the cash receipt reviews it and reconciles it with the licensing database and other records of revenue prior to depositing checks into the State Treasury.

Auditee Response:

CONCUR. The Board will ensure that its staff works with the business people at Health and Human Services, as well as Treasury, to make sure that appropriate controls are instituted immediately.

Observation No. 12

Periodically Review Licensing And Examination Fees

The BMHP may be collecting revenue in excess of its budgetary guidelines. A footnote to the operating budget for boards administratively attached to the Department of Health and Human Services requires boards and commissions to establish fees for examination applicants, applicants for a license or registration, publications for which they sell, or other programs for which they are specifically authorized to charge a fee. These fees must recover the full cost of the program, including the cost of support and administrative services provided by other agencies, or 125 percent of the direct cost of the board or commission relating to the program, whichever is greater. During the audit period, the BMHP collected more than the requisite 125 percent in fees. During the 2000-2001 and 2002-2003 bienniums the board collected 154 and 161 percent of its operating cost, respectively. The board collected an excess of \$97,371 in the 2000-2001 biennium and \$123,667 in the 2002-2003 biennium. All revenue collected is remitted to the general fund as unrestricted.

In collecting revenue in excess of the requisite 125 percent, the board may be overcharging its licensees for the cost of administering the board. The BMHP collects most of its revenue from licensing fees. The board sets licensing and examination fees; however, it does not periodically review them to determine whether they should be changed. The board staff reported the last change in the fee structure was prior to 1994. Board staff reported the BMHP is reluctant to lower licensing fees because it cannot predict how many licensees will renew during the biennium. If a large number of licensees decide not to renew, the board may not collect enough money for that biennium. As noted in Observation No. 11, the board does not track fines and other fees, included in its revenue. Such revenue would affect how the board calculates its fees.

Recommendation:

The BMHP should periodically review and, if necessary, adjust its licensing and examination fees to ensure it is charging its licensees a fair amount to administer the board.

Auditee Response:

CONCUR. The Board agrees to review fees periodically.

Observation No. 13

Develop Procedures Manual

The BMHP does not have a written procedures manual for daily operations. While the supplemental job descriptions outline the categories of each employee's duties, they do not provide detailed information about how each duty is performed. BMHP staff reported on-the-job training is imperative and a new employee with no prior knowledge of how State boards operate would not be able to readily maintain daily operations. Both BMHP employees have been with the board for over 11 years and have much institutional knowledge about the board's procedures.

The BMHP uses an electronic database to track licensees and their licensing status. When the board approves a new practitioner, BMHP staff enter the practitioner's name and assign a license number. The system also tracks practitioners who are currently licensed, as well as those who are currently active. The system is not documented, nor does the board have a user manual for using the system. Board members reported the BMHP would not be able to function properly and would lose a lot of institutional knowledge if the board experienced turnover. Without a procedures manual, the BMHP risks interrupting the continuity of daily operations in the event of staff turnover.

Comprehensive and current procedures manuals provide assistance and guidance to employees by promoting consistency in processing transactions. Additionally, manuals can be especially helpful as a training tool in the event of staff turnover.

Recommendation:

The BMHP should develop a procedures manual for daily operations. This manual should be comprehensive and kept current so that it remains useful to employees during the normal course of performing their duties.

Auditee Response:

CONCUR. The Board agrees that a procedures manual would be helpful. Work has begun on this manual already with the Board's staff creating a document in which they record what they do when they accept complaints, licensing fees, telephone calls, etc.

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

MAINTAINING A QUORUM

It is important to ensure the Board of Mental Health Practice (BMHP) is operating with the maximum number of members allowed by statute. Our audit found the BMHP has not ensured members file required statements of financial interests before performing their duties. Additionally, the board does not have a statutory mechanism to conduct business when recused members cause it to function with less than a quorum. To further exacerbate the situation, we found the Governor had not appointed a second public member for at least 20 months.

Observation No. 14

File Statements Of Financial Interests

RSA 21-G:5-a, I requires every member of every regulatory or administrative executive branch board, commission, advisory committee, board of directors, or authority, to file a verified written statement of financial interests by July 1 of each year. This statute applies to all members, regardless of whether they receive compensation for performing their duties. As shown in Table 5, our review of statements of financial interests filed at the Secretary of State as of May 2004 found that board members had not submitted seven statements from 2001-2003. In addition, none of the board's 17 advisory committee members had filed a statement of financial interests for calendar year 2003.

Table 5

**Board Member Statements Of Financial Interests
2001-2003**

Statements as of July 1	2001	2002	2003	Totals
Filed Timely^a	6	6	2	14
Filed Late	0	0	1	1
Not Filed	1	1	5	7

Note: ^a Includes one statement filed by a new member after July 1.

Source: LBA analysis of statements filed with the Office of the Secretary of State.

According to a 1998 letter from the New Hampshire Office of the Attorney General (OAG) to the LBA, "the statute's language imposes a legal obligation on each member to file, and a duty on the chair of each body to ensure that each member files, the required statement." Filing these statements is important because RSA 21-G:5-a, II prevents board or committee members from entering into or continuing the member's duties, unless the member has filed a statement of financial interests with the Secretary of State. As a result, allowing members to serve without filing statements of financial interests has the potential to unnecessarily subject board decisions to challenges.

Recommendation:

The BMHP should develop internal policies and procedures to ensure board and committee members properly file their statements of financial interests. The chairperson should bar any member from performing duties after July 1 until a statement is filed with the Secretary of State.

Auditee Response:

CONCUR. No later than the April meeting of each year the agenda will include distribution of required forms to Board members, advisory committee members and investigators to comply with RSA 21-G:5. BMHP staff will monitor and ensure compliance. All current Board members', advisory committee members' and investigators' financial statements for 2004 are now on file.

Observation No. 15

Develop Mechanism For Proceeding When Operating With Less Than A Quorum

The BMHP does not have a mechanism for proceeding if the number of recused members makes it impossible for the board to obtain a quorum. RSA 330-A:9 defines a quorum for the BMHP as a majority of its seven members (i.e. four members). Under RSA 91-A:2, boards may not hold discussions or take any actions without a quorum. The board has no alternative method for conducting business under State law. Two board members and the board's OAG counsel cited this as a weakness.

Without any flexibility under the current law, the board has experienced some difficulties with trying to ensure a quorum. Under certain circumstances members must recuse themselves from voting on board action, which has resulted in delays. For instance, in one case a majority of the board initially recused itself from voting. According to legal counsel, the board determined each member's reason for recusing themselves to determine whether the circumstances truly constitute a conflict of interest. One member commented others have had to cut short vacations in order to ensure the board would have a quorum. Further exacerbating the situation, the board has been without one of its public members for over 20 months (see Observation No. 16).

Recommendation:

The BMHP should seek a statutory change to enable it to conduct board business when less than four members can act in a given situation. For example, the board could have a smaller quorum requirement when members properly recuse themselves, or be allowed to substitute recused members with former board members.

Auditee Response:

CONCUR. The Board will work with the Attorney General's Office to seek legislative change in order to substitute recused members with former Board members.

Observation No. 16

Governor Should Appoint A Public Member

The Governor appoints one practitioner from each mental health discipline and two public members to the BMHP. RSA 330-A:8 states, “any vacancy in the membership of the board occurring otherwise than by expiration of a member’s term shall be *promptly* filled for the unexpired term” (emphasis added). In October 2002, one of the board’s public members resigned, leaving vacant a term that will not expire until March 2005. As of June 2004, this position has been vacant for 20 months. According to the board, the lack of a public member has created difficulties for the board in obtaining a quorum, which has resulted in delays. The board has formally requested the Governor fill the vacant position in February 2003, March 2003, January 2004, and March 2004.

Recommendation:

The Governor should promptly appoint a public member to the BMHP, in accordance with State law.

Auditee Response:

CONCUR. The BMHP wrote the Governor requesting the appointment of a public member and expressing the importance of filling these positions on February 7, 2003, March 21, 2003 and January 22, 2004.

Governor Response:

We concur that the Governor should comply with State Law and promptly appoint a public member to the BMHP. The Governor will nominate a public member before the Executive Council as soon as possible on at either the September 22nd or October 6th Council meeting of 2004.

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

LICENSING

A major function of the Board of Mental Health Practice (BMHP) is licensing practitioners of five mental health professions. The board licensed 941 new practitioners during our six-year audit period. Based on our review of files and administrative rules, we identified one issue that affected applications of four mental health professions.

Observation No. 17

Clarify Whether All Applicants Must Be Asked Certain Questions

Based on our review of licensure application files, we did not find evidence the BMHP asks all applicants to demonstrate knowledge of certain subject matters as required by administrative rule. According to Mhp 301.03 (j) (4), the applicant is to demonstrate knowledge of:

- issues of cultural diversity affecting client assessment and treatment;
- procedures and mechanisms for interdisciplinary collaboration among mental health professionals; and
- how records will be managed in the event of impairment or death of the practitioner.

However, in its application forms, the board does not require all applicants to address these issues. The administrative assistant confirmed that the board does not ask all licensees these questions in the essay part of the applications. Only psychologists are asked to address these issues as part of their oral exam, which is specifically required by another administrative rule.

Recommendation:

The BMHP should clarify whether it intends Mhp 301.03 (j) (4) to apply to applicants for all five mental health professions. If the board wants all applicants to address these issues in their licensure applications, it should implement the requirement for the non-psychologists. If the board decides not all applicants need to comment on those issues, it should revise its administrative rules accordingly.

Auditee Response:

CONCUR. The Board has now changed its practice to include these questions in its essay exam requirements per MHP 301.03 j (4).

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

OTHER ISSUES AND CONCERNS

In this section, we present issues and concerns we encountered during our audit not developed into formal observations, yet we consider noteworthy. The Board of Mental Health Practice (BMHP) and the Legislature may consider these issues and concerns deserving of further study or action. The board offered a response to one issue and concern.

Attorney General Provided Inconsistent Legal Advice

The New Hampshire Office of the Attorney General (OAG) counsel to the BMHP and some board members have stated the OAG has not always provided consistent or accurate advice. This has likely contributed to some licensees' negative perception of the board. For example, the OAG mistakenly advised the BMHP that its old rules remained in effect after their expiration date, causing a delay in enacting new rules. The OAG also incorrectly advised the board to conduct public deliberation of an adjudicative proceeding. According to the OAG counsel, the OAG advised all State boards to conduct their deliberations in public, without specifically reviewing the BMHP's statute, which does not allow for public deliberation of disciplinary hearings. Lastly, a number of board members, the board administrator, and the OAG counsel, mentioned a significant difference in philosophy between the current and prior counsels. The former OAG counsel advised the board not to discuss board business with the public, whereas, the current counsel advises the board to increase communications with licensees to demystify the board's processes.

Professional Expectations

Practitioners expressed concern over the lack of information and guidance from the board regarding professional expectations. Some practitioners expressed concern the board holds practitioners accountable to an unwritten standard during the course of an investigation.

Board members and professional conduct investigators (PCI) reported the BMHP uses each guild's professional code of ethics and State law as the guideline for determining whether allegations would constitute an ethical violation. However, there may be ambiguity about the application of professional expectations. According to one board member and a PCI, there are also professional expectations (i.e., aspirational codes of ethics) to which licensees should aspire or be held accountable.

We did not test whether aspirational codes were used in determining disciplinary actions and issuing letters of concern, therefore, we cannot comment on their use. We suggest the BMHP address this issue with board members, PCIs, the administrative prosecutions unit (APU), and licensees to clarify its use of aspirational codes.

Auditee Response:

The board in existence during the time when this audit was being conducted vehemently denies the use of “unwritten standards” or “aspirational codes of ethics” in determining professional conduct complaints and believes that using such “standards” or “codes” to discipline licensees would be inappropriate. Further, the Board believes that if the auditors thought that such inappropriate actions occurred, they should have investigated these allegations to determine their accuracy rather than just raising them as a concern based on one unidentified board member and one unidentified PCI. The Board will issue clear directives to its members and to its PCIs that there are no “aspirational codes” or “unwritten standards” that should be used in investigating, reviewing, and deciding professional conduct complaints.

Alternative Providers

RSA 330-A:2, I and Mhp. 301.04 allow alternative providers to register with the BMHP. An alternative provider is defined by law as “a person who, for remuneration, engages in any aspect of mental health practice... but does not hold a license... to practice as a licensed psychologist, pastoral psychotherapist, clinical social worker, clinical mental health counselor, or marriage and family therapist...” As of April 2004, there were seven alternative providers registered with the BMHP providing:

- educational consultant/attention deficit disorder coaching,
- exposure/anxiety coaching,
- channeled energy/spiritual healing,
- synergy practitioner/holistic counseling,
- eastern methodology,
- life-skills counseling, and
- advanced clinical hypnotherapy.

The board has no oversight over these providers. We question the public good of allowing alternative providers to register with the BMHP when the board does not have jurisdiction to oversee them. The public may perceive legitimacy for the services because these providers are registered with the State. This concern is reflected in the BMHP’s alternative provider application, which requires the alternative provider to attest they will not mislead the public into believing they are certified, licensed, or otherwise approved by the board or advertise in a way which may cause the public to believe they fall under the regulation of the BMHP.

We note the BMHP is complying with State law in registering alternative providers. If the BMHP, its licensees, or the Legislature wishes to change this practice, State law must be amended.

Administrative Rules

Some attorneys we spoke to have expressed concern that the board's administrative rules are ambiguous and lack consistency. Some practitioners stated it is difficult to determine what they need to do to be compliant with the rules and some of the board's requirements are not written anywhere.

In addition to the changes in administrative rules we recommend in the observations, the BMHP should also consider seeking public input into clarifying other rules. We provide the following issues for the board's consideration in any future rule writing:

- Re-write Mhp. 210.04 (d) on conducting investigations on an ex parte basis to reflect board practice.
- Clarify the language in Mhp. 207.03 to define situations when it “would be more likely to promote the fair, accurate and efficient resolution of issues... than would adherence to a particular rule or procedure.”
- Clarify language used in the Mental Health Bill Of Rights by defining words such as “mental health services,” “full information,” “treatment provider,” and “effective treatment” somewhere in administrative rules.
- Better define scope of practice for each mental health discipline.
- Avoid using ambiguous words such as “reasonable,” “appropriate,” and “substantially.” According to the *NH Drafting and Procedure Manual*, ambiguous words make it unclear when the rule applies and imply a case-by-case determination of its meaning with unstated criteria.
- Ensure the appendix to the administrative rules references the correct statute. For instance, the appendix states that Mhp 403 Continuing Education implements RSA 330-A:10, XX, which addresses interdisciplinary collaboration. Mhp 403 should be implementing RSA 330-A:10, XIV, which addresses ensuring the professional competency of mental health providers through continuing education.
- Ensure references to other administrative rules are correct. For instance, Mhp 302.07 (f) requires the psychology oral examination committee to recommend to the board whether the applicant meets the requirements of Mhp. 302.06 (a). However, Mhp 302.06 (a) states, “the EPPP [Examination for the Professional Practice of Psychology] shall be administered via computer.”

In addition to seeking public input, the board may wish to consider hiring a consultant who specializes in rule writing to aid the board.

Due Process Under Administrative Law

A number of practitioners and board members we interviewed said the due process provided for in State law is unfair, especially when compared to criminal or civil law. Some practitioners see themselves at a disadvantage because:

- unlike criminal law, respondents are obligated to cooperate with investigations;
- reports of investigation (ROI) are not shared with the respondent during settlement negotiations; and
- the burden of proof in an adjudicative hearing is a preponderance of the evidence, which is a relatively low threshold of proof.

Cooperating With Investigations

State law requires licensees to meet their professions' ethical standard. According to each profession's ethical code, mental health providers must cooperate with misconduct investigations. If licensees do not cooperate, the board can consider it an ethical violation.

Reports Of Investigation

RSA 330-A:28, I exempts the investigation and information collected during an investigation from disclosure unless it results in a public hearing. This includes the ROI. Currently, respondents do not have access to the ROI prior to signing a settlement agreement. As a result, licensees settle complaints made against them without the benefit of knowing all of the board's evidence. Licensees can obtain the report during an adjudicative proceeding, which commences if the board issues a notice of hearing. Interestingly, after the board issues a notice of hearing, the practitioner, having access to the ROI, can still settle the case through a consent decree.

Practitioners we interviewed expressed concern that they do not have access to the board's ROI. Some board members have expressed they would like the practitioner to have a copy of the ROI. However, those prosecuting cases for the board may lose some leverage in settlement negotiations because respondents would have access to all the evidence. We note that other New Hampshire boards, such as the boards of medicine, pharmacy, and veterinary medicine do not give respondents access to the investigation report prior to settlement agreements.

Burden of Proof

While the burden of proof is relatively low, it reflects Legislative intent. In the *Petition of Grimm* (1993) 138 N.H. 42, 635 A.2d 456 (as annotated in RSA 330-A:27) the New Hampshire Supreme Court indicated that "insofar as majority of psychologist's time is spent with individual patients in a private office, and the only records created are the notes of the psychologist, a less stringent burden of proof in proceedings involving psychologist certificates is rational when assessing the difficulty of proof in disciplinary proceedings." We note other State boards also use the preponderance of evidence threshold.

The board is providing the due process protections afforded by State law. If the licensees or the board wish to change due process provided to licensees, they will have to work through the Legislature to change the appropriate statutes.

Confidentiality Of Complaints

According to RSA 330-A:13, I, “records compiled in connection with disciplinary investigations” are exempt from disclosure. Additionally, RSA 330-A:28, I states, “board investigations and the information gathered in such investigations shall be exempt from the public disclosure provisions of RSA 91-A [Access To Public Records And Meetings], except to the extent such information may later become the subject of a public disciplinary hearing.” The board considers the complaint as part of the investigation; therefore, the board maintains that complaints are confidential. In 2001, the board submitted proposed rules to the Joint Legislative Committee on Administrative Rules (JLCAR) stating a complaint is a confidential document subject to public disclosure only when it results in a disciplinary hearing or other provisions as specified in administrative rule. The JLCAR objected to the proposed rule on the grounds that complaints are not gathered as part of the investigation, but rather precede it. Therefore, JLCAR maintained complaints are subject to public disclosure. As a result, the board did not adopt the proposed rule exempting complaints from public disclosure.

In practice, the BMHP considers the complaint a confidential document unless it results in a disciplinary hearing. In April 2002, a lawsuit filed in Merrimack County Superior Court challenged the BMHP’s practice of keeping complaints confidential. The court ruled in the BMHP’s favor and the case was appealed to the New Hampshire Supreme Court. The Supreme Court declined to hear the case. In October 2003, another lawsuit was filed in Sullivan County Superior Court about similar issues. The court dismissed the suit citing the issue had already been decided in another court. The case was appealed to the Supreme Court and was accepted in April 2004. As of this report, the case is still pending before the Supreme Court.

Board Investigator

Currently, the board selects one of its members as the board investigator (BI) to supervise investigations and make disciplinary recommendations to the board. The BI is recused from discussing and voting on the recommendation or deliberating during a hearing, if the case proceeds to one. As a result, one profession may not be represented when the recommendation comes before the board. For instance, if the BI is a psychologist and a psychologist is under investigation, there is no psychologist representative to vote on the recommendation or to deliberate during a hearing, if the case proceeds to one.

The board has some flexibility in choosing an investigator. According to Mhp 210.03, “The board shall appoint a member of its staff, a member of the board, a member of any sub-committee of the board or an attorney to conduct a formal or informal investigation.” The BI is reportedly a board member because the board wants to retain its supervisory power and input over the direction of the investigation. However, because one member is automatically recused

from voting, if other members must recuse themselves, the board may have difficulty obtaining the quorum necessary to vote on the investigator's recommendation. We note other New Hampshire boards, such as the boards of medicine and pharmacy, have full-time investigators who coordinate the investigations. The board may wish to consider the strengths and weaknesses of appointing a non-board member to supervise investigations. For example, the APU attorney could be named to supervise investigations and still continue to use the PCIs as the primary investigators.

Attorney General Representation

Board members and the board administrator have expressed the need for greater access to the board's OAG representative. Some stated it would be helpful to have legal counsel present at board meetings to address legal issues encountered during the course of their work. According to the board administrator, it is sometimes difficult to reach legal counsel because of counsel's other commitments. This has occasionally impacted the board's work and has caused delay in board action.

While the BMHP does not pay for its legal counsel, the OAG does not provide unlimited free services because it represents all State agencies. If boards feel they need more representation, they can pay the OAG for more legal representation. The BMHP has inquired about this in the past and if the board feels it needs greater access to legal advice, it may want to re-consider paying the OAG for more time.

Administrative Law Judge

The BMHP conducted two disciplinary hearings during our audit period. An OAG representative has expressed concern that the State and the BMHP expects laypeople to act in a judicial capacity. Further, some attorneys familiar with the BMHP noted there is a problem with the BMHP acting as the prosecutor, judge, and jury. Some board members reported an administrative law judge would be helpful because the board conducts very few hearings. The administrative law judge could provide legal expertise and more formality to the hearing process. A representative from the OAG reported the office is attempting to obtain two administrative law judges to exclusively handle hearings for all State boards. These judges would decide the case, as well as determine appropriate disciplinary action, which would help bring consistency among all State boards.

Some attorneys caution that an administrative law judge would not be an expert in the field and may not understand all the issues pertaining to a particular matter. They preferred a system where the person serving as the judge was knowledgeable about the accused practitioner's profession. We note that states such as California, Michigan, and Alabama conduct hearings before an administrative law judge. The board may also want to consider the cost of an administrative law judge compared to the number of hearings the board conducts each year.

Board Stipend

By law, BMHP members are not paid for their services; they are only reimbursed mileage for commuting to monthly meetings. However, the board pays its PCIs \$100 for each monthly meeting they attend in addition to mileage reimbursement. According to an OAG official, most boards and commissions pay their members a monthly stipend. We found that members of the following State boards are paid a stipend ranging from \$25 to \$100 per month for their service:

- medicine;
- barbering, cosmetology, and esthetics;
- funeral directors and embalmers;
- dental examiners;
- pharmacy;
- veterinary medicine;
- professional engineers;
- licensure for architects;
- land surveyors; and
- speech-language pathologists.

We observed, and board meeting minutes reflect, that monthly meetings usually start at 9:00 A.M., go through lunch, and continue into the afternoon. Considering the amount of time members spend on board business, preparing for and participating at monthly meetings, and the prevalence of other New Hampshire board members being paid, the BMHP may wish to seek a change to its statute authorizing a monthly stipend for members' attendance at board meetings.

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

CONCLUSION

Our observations identified a number of concerns with the Board of Mental Health Practice's (BMHP) investigation process, financial and office operations, and licensing procedure. Some licensees commented the BMHP acts like a "star chamber," meaning it engages in secret, harsh, or arbitrary procedures. In our opinion, this concern is overstated but may be reflective of some of the problems we identified. The board could benefit from more transparency in its investigation process, as well as avoiding appearances of conflicts of interest. We found the board lacks adequate written rules governing the investigation process and guidance to its investigators. Additionally, the investigative process is not well publicized, making board actions appear secretive or arbitrary to licensees.

The absence of the investigation process in administrative rule does not necessarily mean the quality of investigations has been poor. However, by not establishing the investigation process in rules, the BMHP has failed to set standards for investigators to follow, including the level of documentation they are expected to provide for investigations. It is important to note involving the New Hampshire Office of the Attorney General's (OAG) administrative prosecutions unit (APU) provides some assurance investigations are adequately conducted; however, the level of APU involvement varied by investigation. We note, past and present board-associated licensees and OAG officials we interviewed commented on the thoughtful and serious manner in which the board, its investigators, and office staff take their responsibilities.

We found other negative perceptions of the BMHP may be based on inconsistent legal advice from the OAG. This sometimes conflicting advice may reinforce the impression some board actions are arbitrary. Many board-associated professionals commented on how the legal advice provided by the OAG has changed with different legal counsel. In the past, the board was advised not to publicly discuss or explain board proceedings; now it is advised to be more open.

Based on our review of BMHP operations, we recommend the board improve its:

- compliance with State law,
- administrative rules and guidance for investigations,
- controls over revenue,
- monitoring of complaints,
- documentation of office procedures,
- charge to supervisors,
- identification of potential conflict of interests, and
- ability to act without a quorum.

By addressing these issues and increasing communications with and receiving input from its licensees, the board could improve its reputation and relationship with them.

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**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

APPENDIX A

BMHP RESPONSE TO AUDIT



Judith Coleman, MA.
Chair
Ronald P. Dieter, D.Min.
Secretary
Michael Mortimer, Esq.
Public Member
Mary Ellen Nicholls MSW
Karen Jennings, Ph.D.
Jean Haley, MS

STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE

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Board of Mental Health Practice
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October 29, 2004

Catherine A. Provencher, CPA
Director of Audits
Audit Division
Office of Legislative Budget Assistant
State House, Room 102
107 North Main Street
Concord, NH 03301

Dear Ms. Provencher:

The Board of Mental Health Practice would like to thank the LBA Audit team for their efforts in evaluating the adequacy of the Board's rules and procedures. We found the auditors to be diligent, highly skilled professionals, who appreciated the difficult work a Board has to perform.

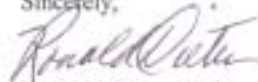
The auditor's observations include many recommendations the Board has already instituted. In response to the office operations, deposits are done on a daily basis, revenue processing duties show a segregation of revenue and a board manual has been started. Regarding the complaint management suggestions, monies have been requested in the Board's FY '06 budget for a new licensing system/or inclusion of the database developed by the auditors into the Board's current system. This would allow the Board to track complaints in a more efficient manner. The database developed by the auditors during this process will be very useful in tracking complaints as will the charts they developed outlining the process for resolving complaints.

The Board of Mental Health Practice will be proposing rules that address the investigative process and various issues mentioned in the complaint resolution section of this report. Written guidelines for investigators and investigator training is something the Board hopes to put into place within one year.

The audit process has been lengthy and time consuming for a small Board office and a volunteer Board. The Board will continue to review the auditor's recommendations and attempt to make many of the changes suggested. Of course, many recommendations depend on the additional resources the Board has requested in the budget for the next biennium.

Again, the Board would like to thank the audit team for their professionalism and their thoroughness in performing this audit.

Sincerely,

A handwritten signature in cursive script that reads "Ronald Dieter".

Ronald Dieter, D.Min.
Board Chair

**STATE OF NEW HAMPSHIRE
BOARD OF MENTAL HEALTH PRACTICE**

APPENDIX B

LOGIC MODEL

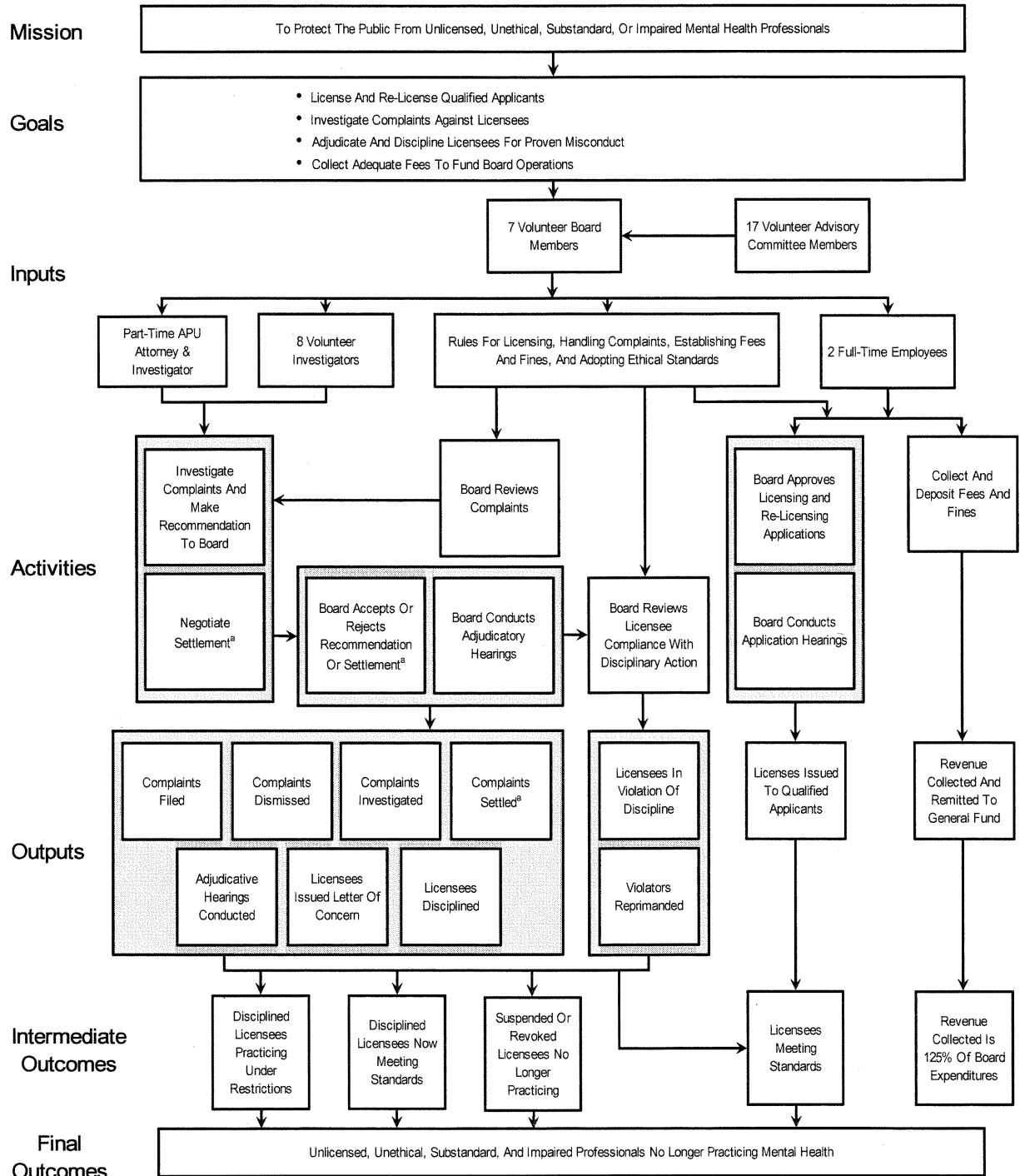
We developed the following logic model, Figure 6, to assist our understanding and analysis of the connections between the Board of Mental Health Practice's (BMHP) mission, activities, and the results of those activities (i.e., outcomes). The BMHP may wish to employ this logic model for identifying data to collect and analyze as part of its management oversight responsibilities.

When measuring the BMHP's performance one of the more difficult questions to answer is what contribution the board made to the outcomes. In fact, in most cases other factors influence outcomes in addition to the board's efforts. Determining the absolute extent to which the board contributes to a particular outcome is not usually possible. Instead, the aim of measuring the board's performance is to acquire insight and provide some evidence the board is actually having an impact.

A key tool for determining attribution is a logic model, which illustrates intended relationships. Logic models are presented as flow charts describing programs in a way that facilitates developing relevant measures by portraying intended causal relationships between activities, outputs, and outcomes. The flow chart thus illustrates how the board attempts to solve identified problems. The board's mission and goals are included at the top of the page as reference points to show the rationale of the board. Individual board activities, outputs, and outcomes are arranged in rows. Relationships between the various activities, outputs, and outcomes are arranged vertically on the page according to the sequential flow of program logic. The arrows linking the elements signify the intended flow. The activities describe what the board does to produce outputs. The outcomes are what the board hopes to change. Therefore, outcomes, or the intended impact of the board, should be linked to the goal and mission.

Figure 6

LBA Logic Model Of BMHP Operations



Note: ^a Includes settlement agreements and consent decrees.

Source: LBA analysis.