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ATTORNEY GENERAL OF TEXAS

June 14, 2021

Mr. Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
333 Guadalupe, Suite 3-900
Austin, Texas 78701

Opinion No. KP-0372

Re: Authority of the Behavioral Health Executive Council to adopt a rule prohibiting certain discriminatory conduct by licensed social workers (RQ-0391-KP)

Dear Mr. Spinks:

You ask about the authority of the Behavioral Health Executive Council (“the Council”) to adopt a rule prohibiting discriminatory actions relating to disability, sexual orientation, and gender identity and expression by licensed social workers regulated by the Council.¹

I. The Legislature directed the Council to take disciplinary action against license holders for only certain types of discriminatory conduct.

The Council oversees four separate entities related to the provision of psychology and counseling services: (1) the Texas State Board of Examiners of Marriage and Family Therapists; (2) the Texas State Board of Examiners of Professional Counselors; (3) the Texas State Board of Examiners of Psychologists; and (4) the Texas State Board of Social Worker Examiners. *See* TEX. OCC. CODE § 507.151(a) (requiring the Council to administer and enforce chapters related to each profession). The Legislature authorized the Council to “adopt and enforce rules” and to “establish standards of conduct and ethics for license holders” under its jurisdiction. *Id.* § 505.201(a)(1)–(2).

With regard to the practice of social work, the Legislature directed the Council to take disciplinary action against license holders who refuse “to perform an act or service within the scope of the license holder’s license solely because of the recipient’s age, sex, race, religion, national origin, color, or political affiliation.” *Id.* § 505.451(13). The Council adopted the following rule with respect to social workers:

¹Letter from Mr. Darrel D. Spinks, Exec. Dir., Tex. Behavioral Health Exec. Council, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 14, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0391KP.pdf> (“Request Letter”).

A social worker must observe and comply with the code of conduct and standards of practice set forth in this subchapter. Any violation of the code of conduct or standards of practice will constitute unethical conduct or conduct that discredits or tends to discredit the profession of social work and is grounds for disciplinary action.

- (1) A social worker shall not refuse to perform any act or service for which the person is licensed solely on the basis of a client's age; gender; race; color; religion; national origin; disability; sexual orientation; gender identity and expression; or political affiliation.

22 TEX. ADMIN. CODE § 781.301(1).

The Council's rule prohibiting social workers from discrimination changes the term "sex" to "gender" and adds three categories of discrimination not expressly included by the Legislature in subsection 505.451(13): discrimination based on disability, sexual orientation, and gender identity.² Compare *id.*, with TEX. OCC. CODE § 505.451(13). You ask whether the Council has statutory authority to adopt this rule in its regulation of social workers. Request Letter at 1.

II. The Council lacks authority to discipline licensees for discrimination beyond what the Legislature authorized it to address.

As a state administrative agency, the Council is a creature of the Legislature and has no inherent authority. See *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001). When the Legislature authorizes an agency to adopt rules, the agency "may adopt only such rules as are authorized by and consistent with its statutory authority." *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 452 (Tex. 2008). Important to your question, an agency rule may not impose "additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Tex. State Bd. of Exam'rs of Marriage & Fam. Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017). The Legislature "chooses a statute's language with care, including each word chosen for a purpose, while purposely omitting words not chosen." *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325–26 (Tex. 2017) (quotation marks omitted). State agencies must take the statutes as they find them and refrain from rewriting the Legislature's text. *Id.* at 326.

Subsection 505.451(13) identifies the obligation the Legislature placed on the Council to take disciplinary action for discrimination by social workers. TEX. OCC. CODE § 505.451(13). No provisions in either chapter 505 ("Social Workers") or chapter 507 ("Texas Behavioral Health Executive Council") address gender, disability, sexual orientation, or gender identity

²The common understanding of the term "sex" is "one of the two divisions of organic esp. human beings respectively designated male or female." WEBSTER'S THIRD NEW INT'L DICT. 2081 (2002). In contrast, the term "gender" is commonly defined as "any of two or more subclasses within a grammatical class of a language (such as noun, pronoun, adjective, verb) that are partly arbitrary but also partly based on distinguishable characteristics such as . . . sex (as masculine, feminine, or neuter) and that determine agreement with and selection of other words or grammatical forms." *Id.* at 944.

discrimination by a social worker. By contrast, in other circumstances, the Legislature expressly authorized regulatory agencies to take disciplinary action for disability discrimination. *See, e.g., id.* § 1101.652(b)(32) (authorizing the Real Estate Commission to discipline a real estate broker who “discriminates against an owner, potential buyer, landlord, or potential tenant on the basis of . . . disability”). “When the Legislature uses a word or phrase in one part of a statute but excludes it from another, the term should not be implied where it has been excluded.” *Cadena Comercial USA Corp.*, 518 S.W.3d at 329.

Thus, the Council’s attempt to rewrite the Legislature’s chosen language by changing the term “sex” to “gender” and to prohibit discrimination on the basis of disability, sexual orientation, or gender identity and expression by adopting a rule and authorizing itself to take disciplinary action for such conduct exceeds the authority granted to it by the Legislature and imposes additional restrictions in excess of the relevant statutory provisions. Because the Council exceeded its statutory authority in adopting the rule, a court would likely conclude the rule is invalid to the extent of that excess.

III. State law does not prohibit discrimination based on sexual orientation or gender identity.

Protected classes are created by statute or a constitutional provision. *See, e.g.,* TEX. CONST. art. I, § 3a (“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”); TEX. LABOR CODE § 21.051 (prohibiting employment discrimination on the basis of race, color, disability, religion, sex, national origin, or age); *Flores v. State*, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995) (explaining that race or national origin discrimination is prohibited by provisions in the U.S. and Texas constitutions).

No Texas statute prohibits discrimination based on sexual orientation or gender identity and expression. If the Legislature intends otherwise, it may expressly amend statutes to so provide. While the U.S. Supreme Court, in *Bostock v. Clayton County*, construed federal law to prohibit discrimination based on sexual orientation or gender identity in the employment context, the Court expressly limited its decision to the statutory language of Title VII. 140 S. Ct. 1731, 1753 (2020) (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”).³ The factual scenarios at issue in that case involved employers firing employees on the basis of their sexual orientation, as distinguished from the scenarios at issue here, where the Council seeks to compel its licensees to affirmatively provide services to individuals without consideration of sexual orientation or gender identity. Furthermore, the Court in *Bostock* expressly distinguished statutes that, like subsection 505.451(13), prohibit discrimination “solely” because of an individual’s sex. *Id.* at 1739, 1753. Thus, the rule in *Bostock* cannot be applied to extend the Council’s authority to take disciplinary action against license

³“The role of an Attorney General opinion is to assess how a court would likely rule on a legal question in light of prior court decisions.” Tex. Att’y Gen. Op. No. KP-0158 (2017) at 2; *see* Tex. Att’y Gen. Op. No. GA-1087 (2014) at 3. Nothing in this opinion should be construed as opining on the holding of the *Bostock* decision or its underlying analysis or persuasiveness.

holders. *Cf. Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (“[T]he rule in *Bostock* extends no further than Title VII and does not stretch to the ADEA.”).

IV. The sexual orientation and gender identity discrimination the Council seeks to prohibit through its rule may, in particular instances, be constitutionally protected under the Free Exercise Clause.

The First Amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I. The Free Exercise Clause has been applied to the States through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In addition, the Texas Constitution provides: “No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion. . . .” TEX. CONST. art. I, § 6. Some courts have opined that article I, section 6 of the Texas Constitution “provides greater protections for the free exercise of one’s religion than does the federal constitution.” *Ex parte Herrera*, No. 05-14-00598-CR, 2014 WL 4207153, at *4 (Tex. App.—Dallas Aug. 26, 2014, no pet.) (mem. op.) (citing *Howell v. State*, 723 S.W.2d 755, 758 (Tex. App.—Texarkana 1986, no writ)).

Both state and federal law protect religious organizations and persons as they seek to fulfill the principles central to their faiths. *See, e.g., Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 694–95 (2014). The U.S. Supreme Court has emphasized that “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018).

Consistent with these constitutional protections, the U.S. Supreme Court concluded in *Masterpiece Cakeshop* that “the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).⁴ The sexual orientation and gender identity discrimination the Council seeks to prohibit through its rule may, in particular instances, be a constitutionally protected exercise of religion. *See generally Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012) (reversing summary judgment against a student who declined to provide counseling to a gay client because affirming same-sex relationships contradicted her religious

⁴The defendant in *Masterpiece Cakeshop* also asserted a claim that the Colorado Civil Rights Commission infringed upon his freedom of speech when it ruled that he violated the Colorado Anti-Discrimination Act by refusing to bake a wedding cake for a gay couple. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723. The Court decided the case on free exercise grounds and left for another day the free speech concerns surrounding the issue. *See id.* (“Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.”). However, a social worker disciplined for voicing controversial viewpoints regarding sexual orientation or gender identity may also have a claim under the First Amendment right to free speech as well. *See Meriwether v. Hartop*, 992 F.3d 492, 511–12 (6th Cir. 2021) (holding that a university violated a professor’s right to free speech when it disciplined the professor for refusing to identify a student using the student’s preferred pronouns).

beliefs). A rule prohibiting that exercise of religion conflicts with the longstanding constitutional protection for an individual's most deeply held religious beliefs.

V. While a social worker may not discriminate based on disability in contravention of state and federal law, the Council lacks statutory authority to discipline a licensee for discrimination based on disability.

The Legislature has promulgated laws to prohibit discrimination against the disabled. Texas law provides that “[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state.” TEX. HUM. RES. CODE § 121.003(a). “No person with a disability may be denied admittance to any public facility in the state because of the person’s disability.” *Id.* § 121.003(c). Persons who discriminate against an individual based on a disability in violation of section 121.003 may incur both criminal and civil penalties. *Id.* § 121.004.⁵

However, the Legislature did not give the Council authority to discipline social workers for disability discrimination. If the Legislature intends otherwise, it may expressly amend the statute to so provide. The Council’s power to adopt rules is limited to what is authorized by and consistent with its statutory authority. *Pruett*, 249 S.W.3d at 452. Thus, while a social worker may not discriminate based on disability in contravention of state and federal law, the Council lacks statutory authority to discipline a licensee for discrimination based on disability.

⁵The federal Americans with Disabilities Act (“ADA”) also prohibits discrimination on the basis of disability in certain circumstances:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The ADA establishes a civil action for injunctive relief for a person subject to discrimination on the basis of disability in violation of that Act. *Id.* §§ 12188(a), 2000a-3. Whether a legal claim exists for disability discrimination under either state or federal law will depend on the particular facts of each case. But the law generally prohibits disability discrimination and provides actions to enjoin the discriminatory conduct.

S U M M A R Y

The Legislature authorized the Behavioral Health Executive Council to take disciplinary action against social workers who refuse to perform an act or service within the scope of their licenses solely because of the recipient's age, sex, race, religion, national origin, color, or political affiliation. The Council adopted a rule changing the word "sex" to "gender" and authorizing disciplinary action for refusal of service based on disability, sexual orientation, and gender identity and expression. In doing so, the Council exceeded the authority granted to it by the Legislature by rewriting the language chosen by the Legislature and imposing additional restrictions in excess of the relevant statutory provisions. A court would likely conclude that the rule is invalid to the extent that it is inconsistent with and exceeds the Council's statutory authority.

No Texas statute prohibits discrimination based on sexual orientation or gender identity or expression, and the U.S. Supreme Court has emphasized that religious and philosophical objections to categories of sexual orientation are protected views and in some instances protected forms of expression under the First Amendment. If the Legislature intends otherwise, it may expressly amend the statute to so provide. A Council rule prohibiting that expression conflicts with the longstanding constitutional protection for an individual's free exercise of religion.

While a social worker may not discriminate based on disability in contravention of state and federal law, the Council lacks statutory authority to discipline a licensee for discrimination based on disability.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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