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OPINION COMMITTEE



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TEXAS HEALTH AND HUMAN SERVICES COMMISSION

THOMAS M. SUEHS  
EXECUTIVE COMMISSIONER

July 27, 2010

*Via Hand Delivery*

The Honorable Greg Abbott  
Texas Attorney General  
Opinion Committee  
209 West 14<sup>th</sup> Street  
Austin, Texas 78701

Dear General Abbott:

On behalf of the Health and Human Services Commission (HHSC), I respectfully ask for your opinion concerning HHSC's authority to adopt a specific definition of the term "affiliate" for purposes of section 32.0248, Human Resources Code.<sup>1</sup>

Section 32.0248 requires HHSC to establish a five-year demonstration project under title XIX of the federal Social Security Act (42 U.S.C. ch. 7, tit. XIX) "to expand access to preventive health and family planning services for women."<sup>2</sup> This demonstration project is referred to as the "Women's Health Program" (WHP).

Subsection (h) of the statute expressly forbids HHSC from contracting for purposes of the WHP with any entity that is an "affiliate" of another entity that performs or promotes elective abortions:

(h) The department<sup>3</sup> shall ensure the money spent under the demonstration project, regardless of the funding source, is not used to perform or promote elective abortions. The department, for the purpose of the demonstration project, may not contract with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions.<sup>4</sup>

<sup>1</sup> Tex. Gov't Code § 402.042(a), (b)(2).

<sup>2</sup> Tex. Hum. Res. Code § 32.0248(a).

<sup>3</sup> "Department" means the Health and Human Services Commission or an agency operating part of the medical assistance program, as appropriate." *Id.* § 32.003(3).

<sup>4</sup> *Id.* § 32.0248(h).

Subsection (a)(7) limits physicians' authority to refer women who receive WHP services to health care providers for medical services that are not provided through WHP:

A woman eligible under Subsection (b) to participate in the demonstration project may receive appropriate preventive health and family planning services, including:

.....  
(7) referral of medical problems *to appropriate providers that are entities or organizations that do not perform or promote elective abortions or contract or affiliate with entities that perform or promote elective abortions.*<sup>5</sup>

I have been questioned about HHSC's implementation of subsection (h) with respect to contracts with entities that may be affiliates of other entities that perform or promote elective abortions. Section 32.0248 does not define the term "affiliate," but in other contexts, the distribution of funds to affiliates of elective abortion providers has been the subject of litigation in Texas and elsewhere. This litigation led my predecessor to conclude that there may be constitutional issues concerning the enforcement of the plain language of subsection (h). This conclusion was articulated in a letter written to Senator Robert F. Deuell dated February 4, 2009 (copy attached).

HHSC wishes to effectuate the Legislature's intent for this statute. To do so, we believe administrative rules are necessary to properly notify providers of which statutory limitations HHSC is authorized and required to enforce. HHSC is considering proposing administrative rules that define the term "affiliate" and enforcing the statute using that definition. However, before we do so, we ask your opinion whether, consistently with federal and state law, HHSC may adopt and enforce administrative rules that define the term "affiliate" for purposes of section 32.0248 to mean "any individual or organization that has a formal or an informal business or professional relationship with another entity that performs or promotes elective abortions, except a hospital licensed under chapter 241 of the Health and Safety Code." For purposes of section 32.0248(a)(7), which uses the term "affiliate" as a verb, the rules would define the term as the existence of such a business relationship.

For purposes of this proposed definition, HHSC would define the term "formal relationship" to be a business or professional relationship that is governed by some type of written documentation, e.g., a contract or hospital transfer agreement. By contrast, HHSC would define the term "informal relationship" as a business or professional relationship that is not created by any written document, but by an unwritten agreement, such as one to refer patients to another practitioner for certain health conditions that are not available through WHP, e.g., dermatological care.

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<sup>5</sup> *Id.* § 32.0248(a)(7) (emphasis added).

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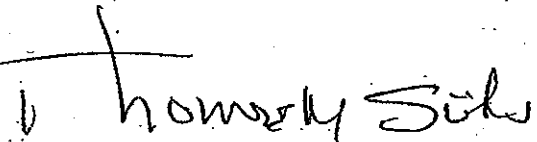
In the context of section 32.0248, we believe this definition would prohibit HHSC from contracting for WHP services with a health care provider that has a business or professional relationship with an individual or organization that performs or promotes elective abortions, except a licensed hospital. Similarly, this definition would prohibit a WHP provider from referring a WHP patient to a health care provider that has a business or professional relationship with an individual or organization that performs or promotes elective abortions, except a hospital.

The brief attached to this request provides additional information, including a list of cases that may be pertinent to your review of our question.

Steve Aragón, Chief Counsel, serves as the lead staff on this matter and can be reached at (512) 424-6578 or by e-mail at [steve.aragon@hhsc.state.tx.us](mailto:steve.aragon@hhsc.state.tx.us).

Thank you for considering this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Suehs". The signature is written in a cursive style with a horizontal line above the first few letters.

Thomas M. Suehs

Attachment