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December 14, 2020

VIA EMAIL TO [OPINION.COMMITTEE@OAG.TEXAS.GOV](mailto:OPINION.COMMITTEE@OAG.TEXAS.GOV)

The Honorable Ken Paxton  
Attorney General of Texas  
Attn: Opinions Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Dear Mr. Paxton:

The Texas Behavioral Health Executive Council (hereinafter referred to as “the Council”) respectfully requests a Texas Attorney General Opinion regarding the statutory authority to adopt 22 Tex. Admin. Code Sec. 781.301(1), and any other similar rules prohibiting discriminatory misconduct by other licensees regulated by the Council. Put another way, why does the Council not have the statutory authority to adopt a code of conduct rule prohibiting discrimination by social workers, as well as other similar ethical rules prohibiting discriminatory practices by psychologists, professional counselors, or marriage and family therapists?

Although the discrimination prohibition for social workers found in 22 Tex. Admin. Code Sec. 781.301(1) has existed in a rule in some shape or form since January of 2011, it was previously in 22 Tex. Admin. Code Sec. 781.201(a)(1); it has been suggested that this rule exceeds the Council’s statutory authority. While the Council believes this rule is within its authority to adopt, the Council seeks the Office of the Attorney General’s assistance to clarify any potential misunderstanding regarding the matter.

The relevant portions of the rule and statutes involved are set out below.

**Copy of the Rule in Question**

22 Tex. Admin. Code Sec. 781.301. CODE OF CONDUCT. 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.

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*The Texas Behavioral Health Executive Council is an equal opportunity employer and does not discriminate on the basis of race, color, religion, national origin, age, sex, disability or sexual orientation.*

(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.

#### **Relevant Statutes Pertaining to Council Rulemaking Authority**

Tex. Occ. Code Sec. 507.152. GENERAL RULEMAKING AUTHORITY. The executive council shall adopt rules as necessary to perform its duties and implement this chapter.

Tex. Occ. Code Sec. 507.153. LIMITATION REGARDING CERTAIN RULES. (a) Unless the rule has been proposed by the applicable board for the profession, the executive council may not adopt under this chapter or Chapter 501, 502, 503, or 505:

- (1) a rule regarding:
  - (B) the scope of practice of and standards of care and ethical practice for the profession[.]

#### **Relevant Statutes Pertaining to the Practice of Social Work**

Tex. Occ. Code Sec. 505.004. NONDISCRIMINATORY ACTIONS AND DECISIONS. An action taken or a decision made under this chapter, including an action or a decision relating to a license application, examination, regulation, or disciplinary proceeding, shall be taken or made without regard to sex, race, religion, national origin, color, or political affiliation.

Tex. Occ. Code Sec. 505.201. GENERAL RULEMAKING AND ENFORCEMENT AUTHORITY OF EXECUTIVE COUNCIL. (a) The executive council may:

- (1) adopt and enforce rules necessary to perform the executive council's duties under this chapter;
  - (2) establish standards of conduct and ethics for license holders; and
  - (3) ensure strict compliance with and enforcement of this chapter.
- (b) The executive council by rule may define a term not defined under Section 505.002 if a definition is necessary to administer or enforce this chapter.

Tex. Occ. Code Sec. 505.2015. BOARD DUTIES. The board shall propose to the executive council:

- (1) rules regarding:
  - (B) the scope of practice of and standards of care and ethical practice for social work[.]

Tex. Occ. Code Sec. 505.451. GROUNDS FOR DISCIPLINARY ACTION. The executive council shall take disciplinary action under Subchapter G, Chapter 507, against a person for:

- (13) refusing 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[.]

#### **Relevant Statutes Pertaining to the Practice of Psychology**

Tex. Occ. Code Sec. 501.151. GENERAL POWERS AND DUTIES OF EXECUTIVE COUNCIL.

- (c) The executive council shall adopt and publish a code of ethics under this chapter.

Tex. Occ. Code Sec. 501.1515. BOARD DUTIES. The board shall propose to the executive council:

(1) rules regarding:

(B) the scope of practice of and standards of care and ethical practice for psychology[.]

### **Relevant Statutes Pertaining to the Practice of Marriage and Family Therapy**

Tex. Occ. Code Sec. 502.151. GENERAL POWERS AND DUTIES OF EXECUTIVE COUNCIL. The executive council shall:

(2) adopt a code of professional ethics for license holders.

Tex. Occ. Code Sec. 502.1515. BOARD DUTIES. The board shall propose to the executive council:

(1) rules regarding:

(B) the scope of practice of and standards of care and ethical practice for marriage and family therapy[.]

### **Relevant Statutes Pertaining to the Practice of Professional Counseling**

Tex. Occ. Code Sec. 503.201. GENERAL POWERS AND DUTIES OF EXECUTIVE COUNCIL. (a) The executive council shall:

(3) adopt and publish a code of ethics[.]

Tex. Occ. Code Sec. 503.2015. BOARD DUTIES. The board shall propose to the executive council:

(1) rules regarding:

(B) the scope of practice of and standards of care and ethical practice for professional counseling[.]

### **Background**

H.B. 3155, 76<sup>th</sup> Leg., R.S. (1999) codified Sec. 505.451(13); and, except for the role of the Texas State Board of Social Worker Examiners (“Social Worker Board”) being substituted for the Council in 2019 by H.B. 1501, it substantively remains the same to this day. From the plain language of this statute it is clear the Legislature intended to prohibit discriminatory practices by social workers: the statute states that the Council shall take disciplinary action against a person for “refusing 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[.]” Former Sec. 505.201 allowed the Social Worker Board to adopt rules as well as establish standards of conduct and ethics for license holders.

Effective January 27, 2011, the Social Worker Board amended 22 Tex. Admin. Code Sec. 781.201(a)(1) to prohibit a social worker from refusing to provide services based solely on the recipient's age, gender, race, color, religion, national origin, disability, sexual orientation, or political affiliation, see 36 Tex. Reg. 242 (January 21, 2011). Effective March 28, 2013, the Social Worker Board further amended 22 Tex. Admin. Code Sec. 781.201(a)(1) to also include gender identity and expression to the list of prohibited discrimination, see 38 Tex. Reg. 1980 (March 22, 2013).

H.B. 1501, 86<sup>th</sup> Leg., R.S. (2019) created the Texas Behavioral Health Executive Council and authorized the Council to regulate, administer, and adopt rules for the practice of marriage and family therapy, professional counseling, psychology, and social work. Certain rules, such as the scope of practice of and standards of care and ethical practice for a profession, must first be proposed to the Council by the underlying professional board.

22 Tex. Admin. Code Sec. 781.201(a)(1) has recently been readopted as 22 Tex. Admin. Code Sec. 781.301(1) by the Council, to conform with the new regulatory structure created by H.B. 1501. The issue that has been raised to the Council is that the rule should match the statute, otherwise the rule exceeds the agency's rulemaking authority. Those that question the Council's rulemaking authority believe that Sec. 505.451(13) provides an exhaustive list, and if the Legislature intended to include other categories of prohibited discrimination, then it would have included them in the statute.

### Discussion

A state administrative agency has only those powers that the Legislature expressly confers upon it or that are implied to carry out the express functions or duties given or imposed by statute. *Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 652 (Tex. 2004); *Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315-16 (Tex. 2001). In construing a statute, a state administrative agency or court's objective is to determine and give effect to the Legislature's intent first by looking to the statute's plain and common meaning. *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999).

Texas courts recognize that the Legislature "intends an agency created to centralize expertise in a certain regulatory area be given a large degree of latitude in the methods it uses to accomplish its regulation function." *City of Garland v. Public Util. Comm'n of Tex.*, 165 S.W.3d 814, 819 (Tex. App.—Austin 2005, pet. denied). When conferring a power upon an agency, the Legislature also "impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties, and the Legislature is not required to include every specific detail or anticipate all unforeseen circumstances when enacting an agency's authorizing statute." *Texas Orthopaedic Ass'n v. Texas State Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714, 719 (Tex. App.—Austin 2008, pet. denied).

The plain language of the Occupations Code sections listed above states that the Council, in conjunction with each underlying board, shall adopt a code of ethics. Therefore, the Legislature delegated the authority to develop and adopt rules concerning the ethical practice of social workers, and other licensees regulated by the Council. The Legislature clearly intended to prohibit social workers from discriminating against a recipient of social work services on the basis of age, sex, race, religion, national origin, color, or political affiliation. The Council asserts that including disability, sexual orientation, and gender identity and expression to this list comports with the Legislature's intent.

National associations often develop and publish model rules or codes of ethics. While such model rules do not create a legal basis for a Texas state agency to promulgate and adopt rules, they are often instructive for regulatory agency rulemaking. To that end, the National Association of Social Workers has issued a code of ethics as a guide to the everyday professional conduct of social workers. Section 4.02 of those model rules, regarding discrimination, states: "[s]ocial workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical ability." The Social Worker Board is not the only agency to use model rules as a guide for rulemaking. The Texas State Bar has based rules on American Bar Association Model Rules of

Professional Conduct; see Ethics Opinion No. 653, January 2016, which discusses Rule 4.02(a) being based on Model Rule 4.2. It is worth noting that other national associations for psychologists, counselors, and marriage and family therapists have also promulgated similar model codes of ethics that prohibits discrimination.<sup>1</sup>

Social workers are utilized in various settings throughout the State of Texas. One such setting is in hospitals; social workers are often employed by hospitals as case managers to ensure patients continue to receive the necessary care, services, equipment, or the like during a hospital stay and when discharged. It is not uncommon for disabled persons to be admitted and discharged from hospitals. The legislative intent of Sec. 505.451(13) is clearly focused on prohibiting and preventing discriminatory conduct. It would be counterproductive and counterintuitive to not prohibit social workers from discriminating against disabled persons since disabled Texans may not receive necessary care or services provided by social workers. Therefore including "disability" in 22 Tex. Admin. Code Sec. 781.301(1) would not only appear logical, but also comport with the legislative intent of Sec. 505.451(13).

The contrary viewpoint would assert that Sec. 505.451(13) lists age, sex, race, religion, national origin, color, or political affiliation; but does not list disability. Those that question the underlying authority of the rule assert that when the Legislature provides a list it is intended to be exclusive, not inclusive, so additional categories should not be added in rulemaking. While it can be true that the Legislature can and does sometimes provide an exclusive list in statutes, the Council does not believe that is the case here. For example, Sec. 505.004 prohibits an action or decision made under Chapter 505, such as one relating to a license application, examination, regulation, or disciplinary proceeding, from being taken or made on the basis of sex, race, religion, national origin, color, or political affiliation. While this statute appears very similar to Sec. 505.451(13) noticeably absent from this list, which is in the later statute, is "age." The Council does not interpret the omission of the term "age" from Sec. 505.004 to then authorize the agency to use age as a basis for making a decision or taking an action in a licensing application, disciplinary proceeding, or the like. Instead, the Council interprets the legislative intent of Sec. 505.004 to require actions or decisions in licensing applications or disciplinary proceedings to be based on facts and law rather than on the basis of irrelevant or potentially discriminatory factors such as sex, religion, race, or any other such category - which could include age. The overarching principle in Sec. 505.004, that the agency should not conduct discriminatory practices, is the same found in Sec. 505.451(13), that licensees should not discriminate against clients.

Additionally, the plain language of Sec. 505.451(13) does not appear to restrict or limit the categories of prohibited discrimination since the language does not include any limiting statements, such as "limited to." Conversely, the statute does not include language that broadens these enumerated categories, such as

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<sup>1</sup> American Psychological Association code of ethics, section 3.01, states: "[i]n their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis proscribed by law." American Counseling Association code of ethics, section C.5., states: "Counselors do not condone or engage in discrimination against prospective or current clients, students, employees, supervisees, or research participants based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital/ partnership status, language preference, socioeconomic status, immigration status, or any basis proscribed by law." American Association for Marriage and Family Therapy code of ethics, section 1.1, states: "[m]arriage and family therapists provide professional assistance to persons without discrimination on the basis of race, age, ethnicity, socioeconomic status, disability, gender, health status, religion, national origin, sexual orientation, gender identity or relationship status."

“including, but not limited to.” The statute plainly states the prohibited discrimination categories and is ambiguous as to whether the Legislature intended this to be an exclusive list or a starting point. The Council believes the resolution to any such ambiguity in the statutory language requires the Council to look to the statute’s intent and that any categories logically related to the statute’s intent were intended for inclusion by the Legislature.

Turning to the inclusion of the terms “sexual orientation” and “gender identity and expression” in the rule, the term “sex” that is included in Sec. 505.451(13) can be and has been interpreted to mean more than just a synonym for gender. In an employment law context, the U.S. Supreme Court has interpreted the term “sex” to include not only male and female gender, but to also include gay or transgender. See *Bostock v. Clayton County, Georgia*, No. 17-1618 (S. Ct. June 15, 2020). The court held an employer who fires an individual merely for being gay or transgender violates Title VII. Title VII makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. §2000e–2(a)(1). Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. Because of caselaw precedent, the Council reasonably believes the term “sex” in Sec. 505.451(13) is intended to include the categories listed in 22 Tex. Admin. Code Sec. 781.301(1) of gender, sexual orientation, and gender identity and expression.

Even if one believes the term “sex” is not intended to include gender, sexual orientation, and gender identity and expression, why would including sexual orientation and gender identity and expression not accord with the intent of the Legislature or be permissible within the scope of the Legislature’s delegation of powers for the Council to adopt a code of ethics? As discussed above regarding the inclusion of disability, the general objective of the statute is to prohibit discrimination so that Texans may have access to the necessary services social workers provided, and the inclusion of sexual orientation and gender identity and expression works towards this objective. If the Office of the Attorney General states that the reason a category cannot be added to the rule is because the statute does not explicitly state or include it, then would the other Boards for counseling, psychology, and marriage and family therapy be within their statutory authority to adopt a similar rule with these same categories since Chapters 501, 502, and 503 of the Occupations Code do not contain such a list?

The Council does not believe the prohibited discrimination enumerated by Sec. 505.451(13) is without limitation. S.B. 138, 76<sup>th</sup> Leg., R.S. (1999), codified Chapter 110 of the Civil Practices and Remedies Code which pertains to government restrictions on the free exercise of religion. This legislation was enacted during the same legislative session that Sec. 505.451(13) was first codified. The Code Construction Act would presume that the Legislature intended the entirety of both statutes to be effective. Specifically, Sec. 110.002(c) states, “[t]his chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.” Chapter 505 was not made exempt, so Chapter 110 applies. Sec. 110.003(a) states, “[s]ubject to Subsection (b), a government agency may not substantially burden a person’s free exercise of religion.” Sec. 505.451(13), and the rule, does not conflict with Chapter 110 because subsection (b) of Sec. 110.003 may apply but, more importantly, because both the statute and rule contain the following limiting language “solely because of” and “solely on the basis of” respectively. A licensee may not discriminate based solely on one of the enumerated categories, but a person may freely exercise religion; so if a licensee denies services based upon a sincerely held religious belief then the licensee would not be denying services based solely on one of the enumerated categories but

based upon a licensee's free exercise of religion. Therefore Sec. 505.451(13), and the rule, does not conflict with Chapter 110 of the Civil Practices and Remedies Code.

The Council recognizes that the Office of the Attorney General has filed an amicus brief in a case currently pending before the U.S. Supreme Court that may be related to this matter, *Fulton v. City of Philadelphia*, No. 19-123, and a decision in that case may impact this request for an opinion. In summary, the brief discusses the delicate balance that must be struck in the law between the protection of religious freedoms and protections against discrimination. The Council believes a related question is posed here, and believes it has achieved a thoughtful and informed delicate balance between Sec. 505.451(13) and Chapter 110.

It is the Council's understanding that to establish a rule's facial invalidity, one must show that the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the underlying Act; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. See *Texas Bd. of Chiropractic Exam'rs v. Texas Med. Ass'n*, 375 S.W.3d 464, 474 (Tex. App.—Austin 2012, pet. denied); *City of Garland v. Public Util. Comm'n of Tex.*, 165 S.W.3d 814, 819 (Tex. App.—Austin 2005, pet. denied).

As discussed, the rule does not conflict with any specific statutory language and the rule is the agency's effort to comply with the general objects of Chapter 505; thus, the Council does not believe it is facially invalid under either of these first two factors. While the rule does impose additional burdens, conditions, or restrictions on licensees than those stated in the statute, they are consistent with legislative objectives and intent of Chapter 505, as well as Sec. 505.451(13). Therefore the rule cannot be facially invalid, and the Council respectfully requests an opinion confirming or clarifying its statutory authority to adopt the current rule.

#### **Affected or Interested Groups or Parties**

Lastly, the Council has identified the following persons or groups likely to be interested in the opinion.

National Association of Social Workers Texas  
810 W. 11<sup>th</sup> Street  
Austin, Texas 78701

Texas Counseling Association  
1210 San Antonio St., Ste. 200  
Austin, Texas 78701

Texas Psychological Association  
1464 E. Whitestone Blvd., Ste. 401  
Cedar Park, Texas 78613

Texas Association of Psychological Associates  
P.O. Box 601374  
Dallas, Texas 75360

Texas Association of School Psychologists  
P.O. Box 141023  
Austin, Texas 78714

Sen. José Menéndez  
P.O. Box 12068  
Austin, Texas 78711

Texas House LGBTQ Caucus  
Rep. Mary González, Chair  
P.O. Box 2910  
Austin, Texas 76768

Texas Association for Marriage and Family  
Therapy  
3305 Steck Ave., Ste. 200  
Austin, Texas 78757

Rep. Jessica Gonzáles  
P.O. Box 2910  
Austin, Texas 76768

Texas Values  
900 Congress, Ste. L115  
Austin, Texas 78701

The Council appreciates your review of this matter and looks forward to your opinion. If additional information is required, please contact Patrick Hyde, the Council's General Counsel, at (512) 305-7700.

Respectfully,

A handwritten signature in blue ink that reads "Darrel D. Spinks". The signature is written in a cursive, flowing style.

Darrel D. Spinks  
Executive Director  
Texas Behavioral Health Executive Council