



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1996

David R. Smith, M.D.
Commissioner
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

Letter Opinion No. 96-077

Re: Whether the Texas Board of Health is authorized to adopt certain rules under the Medical Radiologic Technologist Certification Act, V.T.C.S. art. 4512m, and related questions (RQ-867)

Dear Commissioner Smith:

On behalf of the Texas Department of Health (the "department"), you ask whether the Texas Board of Health (the "board") is authorized to adopt certain rules under the Medical Radiologic Technologist Certification Act, V.T.C.S. art. 4512m, (the "act") as amended by House Bill 1200, Act of May 24, 1995, 74th Leg., R.S., ch. 613, 1995 Tex. Gen. Laws 3463, 3463.

You ask eleven questions about the act. First, you ask several questions about the registry and mandatory training requirements set forth in House Bill 1200. Section 2.05(a)(4) of the act as amended requires the board to adopt rules establishing "a registry of persons who are required to comply with Subsection (f) of this section." Subsection (f) of section 2.05 provides as follows:

The minimum standards of the Texas Board of Health for approval of curricula and education programs under Subsection (a) of this section shall include mandatory training guidelines for a person, other than a practitioner or medical radiologic technologist, who intentionally administers radiation to another person for medical purposes, including a person who does not hold a certificate issued under this Act who is performing a radiologic procedure at a hospital or under the direction of a practitioner, other than a dentist. The training program approved by the Texas Board of Health must contain an appropriate number of hours of education that must be completed before the person may perform a radiologic procedure.

V.T.C.S. art. 4512m, § 2.05(f). A practitioner is defined as a "doctor of medicine, osteopathy, podiatry, dentistry, or chiropractic who is licensed under the laws of this state and who prescribes radiologic procedures for other persons." *Id.* § 2.03(6). A medical radiologic technologist is a "person certified under this Act, other than a practitioner, who,

under the direction of a practitioner, intentionally administers radiation to other persons for medical purposes." *Id.* § 2.03(7).

You ask if the department is authorized to register persons who have not completed the mandatory training program but who have been employed to perform radiologic procedures and have passed a proficiency examination. Section 2.03(16) of the act defines a "registrant" as "an individual, other than a practitioner or medical radiologic technologist, who meets the requirements of Section 2.05(f) of this Act." In effect, you ask whether the department may approve practical experience and proficiency testing as mandatory training under section 2.05(f). Section 2.05(f) clearly limits the registry to persons who have completed a department-approved mandatory training program. *See id.* § 2.05(f). The reference to "hours of education" in subsection (f) suggests the legislature intended mandatory training to consist of formal training. In addition, the mandatory training program is an "education program." The act defines the term "education program" to mean clinical training or any other program offered by an organization approved by the board that has a specified objective, includes planned activities, and uses an approved method for measuring the progress of the participants. *Id.* § 2.03(14). Practical experience followed by proficiency testing, without more, would not satisfy these criteria. We believe, however, that the board is authorized to approve mandatory training programs in employment settings provided that the training programs satisfy these criteria. We also note that persons who are required to complete mandatory training as a result of House Bill 1200 have until January 1, 1998, to do so and may continue to perform radiologic procedures under prior law until that date, *see discussion infra* pp. 8-9, and that hardship exemptions are available for practitioners and entities that are unable to employ persons who are certified or who have completed mandatory training, *see discussion infra* pp. 10-11.

You ask whether a person who is required to complete mandatory training must be on the registry, or whether registration is voluntary. Again, section 2.03(16) of the act defines a "registrant" as an individual who meets the requirements of section 2.05(f). Section 2.05(a)(4) requires the board to establish a registry of persons "who are required to comply with Subsection (f)." Subsection (f) delineates those who must satisfy mandatory training requirements; it does not require that they register.

We have not been able to identify any other provision in the act that requires a person who must complete mandatory training to register. Section 2.07 of the act provides that a person must hold a certificate under the act to perform a radiologic procedure, with several exceptions. Subsection (c) of section 2.07 provides, for example, that a person need not be certified if the person performs the procedures under the instruction or direction of a practitioner according to rules adopted under section 2.08, which gives the licensing boards regulating practitioners certain rulemaking authority. *See id.* § 2.08. Section 2.08(c) provides that rules adopted by licensing boards require "an authorized person . . . to register with the agency that licenses the practitioner under whom the person performs radiologic procedures." *Id.* § 2.08(c)(1). An authorized

person is defined as “a person who meets or exceeds the minimum educational standards of the Texas Board of Health under Section 2.05(f) of this Act.” *Id.* § 2.03(15). This definition does not require registration with the department. Thus, while a person who is excepted from certification under section 2.07(c) must register with the applicable licensing board, there is no requirement that he or she register with the department under section 2.05(a)(4), (f).

We do not believe that a person who is excepted from certification under section 2.07 must be registered with the department in order to perform radiologic procedures. Nowhere is this requirement stated in sections 2.07 and 2.08, the provisions setting forth the circumstances under which these persons can perform procedures without certification. Nor is this requirement found in subsections (a)(4) and (f) of section 2.05. By contrast, persons performing radiologic procedures under section 2.07(c) are expressly required to register with the appropriate licensing board under section 2.08(c)(1). Had the legislature intended to make the section 2.05(a)(4) registry mandatory, it would have done so. Furthermore, “it is well settled that an agency rule may not impose additional burdens, conditions, or restrictions in excess of . . . the relevant statutory provisions.” *Railroad Comm’n v. Arco Oil & Gas Co.*, 876 S.W.2d 473, 481 (Tex. App.—Austin 1994, writ denied). Therefore, we conclude that a person who is required to complete mandatory training under section 2.05(f) is not required to register with the department.

You ask whether the department may require registrants to satisfy continuing education requirements on a periodic basis. The act does not expressly authorize the department to do so, nor do we believe that such authority may be implied. Subsection (f) of section 2.05 requires the board to adopt mandatory training guidelines for

a person, other than a practitioner or a medical radiologic technologist, who intentionally administers radiation to another person for medical purposes The training program . . . must contain an appropriate number of hours of education that must be completed before the person may perform a radiologic procedure.

While subsection (f) speaks to the training a person must have in order to qualify to perform radiologic procedures, it is silent with respect to continuing education. By contrast, subsection (d) of section 2.05 expressly authorizes the board to establish requirements for continuing education for certified medical radiologic technologists.¹ Had the legislature intended to authorize the board to require registrants to satisfy continuing education requirements, it would have done so expressly.

You also ask whether “registrants” who are not certified under the act are subject to disciplinary action by the department. We believe that the act both authorizes the

¹A medical radiologic technologist is certified under the act, and is not required to register. See V.T.C.S. art. 4512m, § 2.03(7), (16).

department to take action against persons who are not certified and proscribes conduct on the part of persons who are not certified.

First, section 2.11(a) of the act, which authorizes the department to take certain disciplinary actions, includes subsections providing for the following: (1) suspension, revocation, or nonrenewal of a certificate; (2) rescission of curriculum, training program, or instructor approval; (3) denial of an application for certification or approval; (4) assessment of a civil penalty for a violation of the act; (5) issuance of a reprimand; and (6) placement of the offender's certification on probation. The majority of these powers clearly apply only to certificate holders, training programs, and instructors. Subsections (4) and (5), however, could apply to persons who are not certified and would authorize the department to reprimand them and to assess civil penalties against them. In addition, the department's authority to deny an application for certification, as provided in subsection (3), would apply to a person who seeks certification.

Second, subsection (c) of section 2.11 sets forth the grounds for disciplinary action. In certain circumstances, the following subsections could apply to the conduct of a person who is not certified but who is subject to the act:

(1) obtaining or *attempting to obtain* a certificate issued under this Act by bribery or fraud;

...

(3) intentionally or negligently failing to file a report or record required by law;

(4) intentionally obstructing or inducing another to intentionally obstruct the filing of a report or record required by law;

(5) *engaging in unprofessional conduct*, including the violation of the standards of practice of radiologic technology established by the Texas Board of Health;

(6) developing an incapacity that prevents the practice of radiologic technology with reasonable skill, competence, and safety

(7) failing to report to the department the violation of this Act by another person;

(8) employing, for the purpose of applying ionizing radiation to a person, a person who is not certified under or *in compliance* with this Act;

(9) violating a provision of this Act, a rule adopted under this Act, an order of the department previously entered in a disciplinary

proceeding, or an order to comply with a subpoena issued by the department;

(11) being convicted of or pleading nolo contendere to a crime directly related to the practice of radiologic technology. [Emphasis added.]

In addition, we note that section 2.14 of the act authorizes the department to bring a civil action to obtain an injunction and/or civil penalties against a person who has violated, is violating, or threatens to violate the act. This authority is not limited to actions against certificate holders.²

You ask if persons on the registry are subject to Family Code chapter 232 and Education Code section 57.491. Chapter 232 of the Family Code provides for the suspension of a license for failure to pay child support. Section 232.001(1) defines the term "license" as "a license, certificate, registration, permit, or other authorization that" meets certain criteria, including the criterion that a person must obtain it to "practice or engage in a particular business, occupation, or profession." Fam. Code § 232.001(1)(C)(i). Section 57.491 of the Education Code prohibits certain licensing agencies from renewing the license of a licensee who is in default on a loan guaranteed by the Texas Guaranteed Student Loan Corporation. It defines a license as "a certificate or similar form of permission issued or renewed by a licensing agency and required by law to engage in a profession or occupation." Educ. Code § 57.491(a)(1). Because a registrant need not register in order to perform radiologic procedures, *see supra* pp. 2-3, registration does not constitute a license under either of these provisions.³

Next, you ask a number of questions about the department's authority with respect to students. First, you ask whether the department may take disciplinary action against a student performing radiologic procedures. We assume that the students you ask about are not certified. Section 2.07(e) provides that a person is not required to be certified in order to perform radiologic procedures "if the person is a student enrolled in a program which meets the minimum standards adopted under Section 2.05 of this Act and if the person is

²Although the department does not appear to have the authority to prevent a person who is not required to hold a certificate from performing radiologic procedures through an administrative disciplinary proceeding, it may be able to do so by filing a civil action for injunctive relief.

³You also ask whether the department may charge registrants a fee. As this office noted in Attorney General Opinion DM-219, which you cite, "A long line of opinions from this office has held . . . that a state licensing agency may not prescribe any fee which is not specifically authorized by statute." Attorney General Opinion DM-219 (1993) at 2 (citing *Nueces County v. Currington*, 162 S.W.2d 687 (Tex. 1942)); *see also* Attorney General Opinions H-897 (1976), H-669 (1975), H-443 (1974). You state that the department has not identified any statutory authority for the fee. Your conclusion that the department may not require a fee in order to place a person on the registry or to continue a person on the registry is correct.

performing radiologic procedures in an academic or clinical setting as part of the program.”⁴ Students who are not certified who perform radiologic procedures in an academic setting as part of an approved training program under this exception to certification are not subject to those disciplinary provisions applicable only to certificate holders. They are, however, subject to those provisions applicable to persons who do not hold certificates, as discussed above. *See supra* pp. 3-5. In addition, subsection (f) of section 2.11 provides that the department may take disciplinary action “against a student for intentionally practicing radiologic technology without direct supervision.” We discuss this provision below.

You ask several questions about the effect of the direct supervision provisions. The term “direct supervision” is defined by section 2.03(13) as follows:

supervision and control by a medical radiologic technologist or a practitioner who assumes legal liability for a student employed to perform a radiologic procedure and enrolled in a program that meets the requirements adopted by rule under Section 2.05 of this Act, and who is physically present during the conduct of a radiologic procedure to provide consultation or direct the action of the student.

The term is used in two places in the act. First, as discussed above, subsection (f) of section 2.11 provides that the department may take disciplinary action “against a student for intentionally practicing radiologic technology without direct supervision.” Second, section 2.13(a)(4) provides that a person who is required to hold a certificate commits a class B misdemeanor if the person “knowingly allows a student enrolled in an education program to perform a radiologic procedure without direct supervision.” The act does not affirmatively state when direct supervision is required.

Under the department’s interpretation, the term “direct supervision” does not apply to a student performing procedures in an academic or clinical setting as part of an education program under the section 2.07, subsection (e) exception to certification.⁵ The

⁴We believe that the term “program” in section 2.07(e), which predates the 1995 amendments adding the mandatory training requirement, refers to a course of study for certification, not to a mandatory training program. Persons enrolled in mandatory training programs who have not completed the requisite hours may not administer radiation to other persons. *See* V.T.C.S. art. 4512m, § 2.05(f). Thus, students who perform radiologic procedures under the section 2.07(e) exception to certification must have completed the requisite hours of mandatory training under section 2.05(f) before administering radiation to another person.

⁵Again, section 2.07(e) provides as follows:

A person is not required to hold a certificate issued under this Act or to comply with the registration requirements adopted under Section 2.08 of this Act if the person is a student enrolled in a program which meets the minimum

department interprets the direct supervision provisions to apply to students, who have completed mandatory training as required by section 2.05(f), who perform radiologic procedures as employees in nonacademic settings under other section 2.07 exceptions to certification, primarily subsection (c), which provides an exception for a person who performs procedures under the instruction or direction of a practitioner, and subsection (d), which provides an exception for a person who performs radiologic procedures at a hospital.⁶ As the department points out, however, this construction would require greater supervision of persons who have completed mandatory training and are employed to perform radiologic procedures in nonacademic settings under these exceptions solely as a result of their student status. Their workplace colleagues working under the same exceptions to certification who have also completed mandatory training but who are not enrolled in education programs would not be subject to greater supervision. It is unlikely the legislature intended this illogical result.⁷

There are several other possible constructions of these provisions. For example, the direct supervision provisions could be construed to apply to a student performing radiologic procedures as part of his or her education program under section 2.07(e) when the student does so as an employee, *i.e.*, for pay or some other form of compensation. We understand from your staff, however, that in fact students do not receive compensation for performing radiologic procedures as part of their education programs. Therefore, this interpretation would render the direct supervision provisions a nullity as a practical matter. The direct supervision provisions could also be construed to create an additional implied exception to the mandatory training and certification requirements, that is to permit students with absolutely no training to perform radiologic procedures if they do so with "direct supervision." This construction is also unlikely to reflect legislative intent. The legislature expressly provided for several exceptions to these requirements in the act. *See* V.T.C.S. art. 4512m, §§ 2.05(f) (excepting persons performing procedures under the direction of a dentist from mandatory training), (i) (providing hardship exemptions for practitioners and certain entities permitting them to employ persons who have not completed mandatory training or obtained certification), 2.07(b) - (g) (exceptions to certification). The existence of a particular exception indicates that the legislature intends no other exceptions. 67 TEX. JUR. 3D, *Statutes* § 120 (1989).

(footnote continued)

standards adopted under Section 2.05 of this Act and if the person is performing radiologic procedures in an academic or clinical setting as part of the program.

⁶The hospital must participate in the federal Medicare program or be accredited by the Joint Commission on Accreditation of Hospitals. *See* V.T.C.S. art. 4512m, § 2.07(d).

⁷The department concludes that students who work under the section 2.07(c) and (d) exceptions should not be subject to heightened supervision. It notes, however, that under this construction the direct supervision provisions would be meaningless because students cannot perform radiologic procedures without certification in a nonacademic setting except pursuant to section 2.07 exceptions.

As demonstrated above, the meaning of the direct supervision provisions is ambiguous. We are unable to discern the legislature's intent in enacting these provisions from the definition of "direct supervision" itself or from the act as a whole. Nor have we located legislative history that sheds any light on the legislature's intent. Again, the act lacks any affirmative statement regarding when direct supervision is required. The term "direct supervision" would come into play only in the context of an administrative proceeding to discipline a student under section 2.11(f) or a criminal proceeding against a certified medical radiologic technologist under section 2.13(a)(4). A statute or regulation violates the due process clause of the federal constitution if it requires a course of conduct so vague that people of common intelligence must guess at its meaning and differ as to its interpretation.⁸ We believe that the act's definition and use of the term "direct supervision" are so vague that a court would probably conclude that an administrative sanction under section 2.11(f) or a criminal conviction under section 2.13(a)(4) violates due process under this standard. Unless the board promulgates an interpretive rule that is both consistent with the legislative intent and gives adequate notice of the required course of conduct, *see infra* note 9, we believe that a court would also probably conclude that agency rules based on the term suffer from the same constitutional defect.

You ask about the effective date of the direct supervision provisions.⁹ These provisions were added to the act by House Bill 1200. Section 8 of House Bill 1200 provides as follows:

(a) The Texas Board of Health shall adopt rules relating to the education of persons performing a radiologic procedure not later than January 1, 1996.

(b) A person subject to the requirement of the Texas Board of Health that the person *receive the appropriate number of hours of education requirements before performing a radiologic procedure* must complete the education requirements approved by the Texas Board of Health on or before January 1, 1998, but may until that date continue to perform radiologic procedures authorized by the Medical Radiologic Technologist Certification Act . . . and the former law is continued in effect for that purpose. [Emphasis added; citation omitted].

⁸See *National Ass'n of Indep. Insurers v. Texas Dep't of Ins.*, 888 S.W.2d 198, 210-11 (Tex. App.—Austin, 1994, writ granted); *Raitano v. Texas Dep't of Pub. Safety*, 860 S.W.2d 549, 551 (Tex. App.—Houston [1st Dist.] 1993, writ granted).

⁹We address this query despite our conclusion that a court would probably find that the direct supervision provisions are unconstitutionally vague, because that conclusion is not intended to preclude the department from promulgating an interpretive rule construing these provisions if it develops or is presented with a plausible construction that gives adequate notice.

The language in section 8(b) emphasized above appears to refer to the mandatory training requirement in section 2.05(f), which includes a reference to "an appropriate number of hours of education that must be completed before the person may perform a radiologic procedure," and was also added to the act in House Bill 1200. Thus, one could construe section 8(b) to affect only the mandatory training requirement set forth in section 2.05(f) of the act. At the very most, section 8(b) applies only to new education requirements for persons performing radiologic procedures promulgated by the board pursuant to House Bill 1200. It is clear, however, that section 8(b) does not delay the effective date of any non-education requirements adopted by the board pursuant to House Bill 1200 or any other requirements resulting from House Bill 1200. The direct supervision provisions do not impose education requirements. Rather, they purport to require greater supervision of certain persons by practitioners and certified medical radiologic technicians. Section 8(b) of House Bill 1200 is inapplicable to these provisions.

Next you ask about section 2.05(g) of the act, which requires the board, with the assistance of other state agencies, to "identify radiologic procedures that are dangerous or hazardous and that may only be performed by a practitioner or a medical radiologic technologist certified under this Act." Section 2.05(h) excepts certain dental radiologic procedures from section 2.05(g). In addition, section 2.05(k) provides that, in adopting rules under section 2.05(g), the board "may consider whether the radiologic procedure will be performed by a registered nurse or a licensed physician assistant." This provision authorizes, but does not require, the board to permit a registered nurse or physician assistant who is not certified to perform a dangerous or hazardous procedure.

You ask whether a person who is excepted from certification under section 2.07 (and who is not a practitioner) may perform a dangerous or hazardous procedure. Sections 2.05(h) and 2.05(k) provide the only express exceptions to section 2.05(g). Again, the existence of a particular exception indicates that the legislature intends no other exceptions. 67 TEX. JUR. 3D, *Statutes* § 120 (1989). Therefore, we conclude that a person who is excepted from certification under section 2.07 (and who is not a practitioner) may not perform a dangerous or hazardous procedure, except under section 2.05(h) or as permitted by the board under section 2.05(k).

You ask if section 8(b) of House Bill 1200 permits a person to perform a dangerous or hazardous procedure under prior law until January 1, 1998. As discussed above, section 8(b) is limited to education requirements adopted by the board pursuant to amendments to the act set forth in House Bill 1200. This grandfather provision does not delay the effective date of other requirements imposed by House Bill 1200. The requirement that only a practitioner or certified person conduct a dangerous or hazardous procedure is not an education requirement. Therefore, we believe rules adopted by the board regarding dangerous or hazardous procedures will be effective prior to 1998.

Next you ask about section 2.05, subsections (i) and (j). Subsection (i) requires the department to exempt hospitals, certain health centers, and practitioners from

the requirements of Subsection (f) of this section in employing a person certified under this Act or trained as required by Subsection (f) of this section if the applicant shows a hardship in employing a person certified under this Act or trained as required by Subsection (f) of this section.

The grounds for hardship are set forth in subsection (j). The department must exempt a hospital, health center, or practitioner from employing a person who is certified or who has completed mandatory training if the applicant demonstrates a hardship under one of the grounds set forth in subsection (j).

We agree with your conclusion that an exemption under section 2.05(i) does not permit a person who is not a practitioner or certified medical radiologic technologist to perform a dangerous or hazardous procedure identified by the board under section 2.05(g). As noted above, sections 2.05(h) and 2.05(k) provide the sole exceptions to the section 2.05(g) requirement that only a practitioner or certified person conduct a dangerous or hazardous procedure. Even a person or entity with a hardship exemption may not employ a person who is not a practitioner or certified medical radiologic technologist to perform a dangerous or hazardous procedure.

Finally, you ask about the department's authority with respect to the hardship grounds. Subsection (j) of section 2.05 provides as follows:

The following conditions are considered to be hardships for purposes of Subsection (i) of this section:

- (1) that the [applicant] reports an inability to attract and retain medical radiologic technologists;
- (2) that the [applicant] is located at a great distance from a school of medical radiologic technology;
- (3) that there is a list of qualified applicants to a school of medical radiologic technology whose admissions are pending because of a lack of faculty or space;
- (4) that the school of medical radiologic technology produces an insufficient number of graduates in medical radiologic technology to meet the needs of the [applicant]; or
- (5) any other criteria determined by department rule.

The department would like to limit hardship exemptions to applicants in rural areas. It is not authorized to do so. Subsection (i) requires the department to exempt an

applicant who shows "a hardship" in the singular. Subsection (j) begins as follows: "The following conditions are considered to be hardships." The legislature's use of the plural "hardships" in the introduction and the term "or" (rather than "and") preceding subpart (5) indicates that the legislature intended each subpart to provide a separate basis for an exemption. The hardship grounds in subparts (1) through (4) are not limited to applicants in rural areas. Subpart (5) authorizes the department to promulgate additional grounds for hardship exemptions. Subpart (5) does not authorize the department to restrict subparts (1) through (4). You argue that the legislative history indicates that the legislature intended to limit hardship exemptions to applicants in rural areas. Given the plain, unambiguous meaning of the statute, however, it is not appropriate for this office to refer to the legislative history as an aid to statutory construction. *See Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983) (it is inappropriate to use extrinsic aids to construe clear and unambiguous statute); *Boykin v. State*, 818 S.W.2d 782, 785-86 & n.4 (Tex. Crim. App. 1991) (same).¹⁰

S U M M A R Y

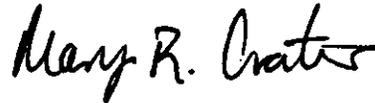
The Texas Board of Health (the "board") is authorized to approve mandatory training programs in employment settings provided that they satisfy the criteria for "education programs" in section 2.03(14) of the Medical Radiologic Certification Act, V.T.C.S. art. 4512m (the "act"). A person who is required to complete mandatory training is not required to register with the Texas Department of Health (the "department"), nor is the board authorized to require such a person to satisfy continuing education requirements. Registrants, and others who are not certified under the act, are subject to certain disciplinary action by the department. Registration does not constitute a license for purposes of Family Code chapter 232 or Education Code section 57.491.

The meaning of the term "direct supervision" is ambiguous. We are unable to discern the legislature's intent in enacting these provisions from the definition of "direct supervision" or from the act as a whole. Nor have we located legislative history that sheds any light on the legislature's intent. The act's definition and use of the term "direct supervision" are so vague that a court would probably conclude that an administrative sanction under section 2.11(f) or a criminal conviction under section 2.13(a)(4) violates due process.

¹⁰You state that the department would like to charge a fee for hardship exemption applications, while noting that there is no statutory basis for such a fee. For the reasons explained above, *see supra* note 3, the department may not do so.

Under section 2.05(g) of the act, a person, who is not a practitioner or a certified medical radiologic technologist, and who is excepted from certification under section 2.07, may not perform a dangerous or hazardous procedure. The department must exempt practitioners and entities that demonstrate a hardship from certain requirements of the act. The department is not authorized to limit hardship exemptions to applicants in rural areas.

Yours very truly,

A handwritten signature in cursive script that reads "Mary R. Crouter".

Mary R. Crouter
Assistant Attorney General
Opinion Committee