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December 14, 1995

RECEIVED
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Opinion Committee

RQ867

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Attn: Opinion Committee

Re: House Bill 1200

Dear General Morales:

The Texas Department of Health ("TDH") administers the Medical Radiologic Technologist Certification Act, Vernon's Texas Civil Statutes, Article 4512m. The Act was substantially amended by Acts 1995, 74th Legislature, Chapter 613 (House Bill 1200). This is a request for an opinion on several issues which have arisen as the TDH adopts rules and interprets HB 1200.

Question No. 1:

May the TDH require a fee for a person to be placed on the registry or to continue on the registry established pursuant to §2.05 (a)(4) of the Act?

Discussion:

Section 2.05 (a)(2) states that the Board of Health shall adopt rules establishing minimum standards for the approval of curricula and education programs to train individuals. Under §2.05(f) education programs "shall include 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, including a person who does not hold a certificate issued under (the) Act who is performing a radiologic procedure at a hospital or under the direction of

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a practitioner, other than a dentist." Under §2.05 (a)(4) the TDH is required to adopt rules establishing a registry of persons who are required to comply with §2.05 (f). The TDH has interpreted this provision as requiring a registry of persons who have completed the mandatory training requirements. To interpret it to cover persons who are required in the future to comply with the mandatory training requirements would be ludicrous because the list would then include everybody in the State of Texas who might at some time in their lifetime administer radiation to another person for medical purposes, other than under the direction of a dentist. The TDH would have no way to identify all of those future persons.

Although the TDH would like to require a fee in order to place a person on the registry or to continue on the registry, the TDH has not identified any authority for adopting such a fee. The well-established law in Texas is that "unless a fee is provided by law for an official service required to be performed in the amount thereof fixed by law, none (no fee) can lawfully be charged therefore." Nueces County vs. Currington, 162 S.W. 2d 687, 688 (Tex. 1942). See also Attorney General Opinions H-443 (1974) and DM-219 (1993). Only Section 2.09 mentions the setting of fees by the TDH. This section speaks to fees relating to an application for certification, approval of curricula and programs, examination, certificate issue, and certificate renewal. This section does not authorize a fee for a person to be placed on the registry or to continue on the registry. There is no other section of the Act or other law which allows the establishment of such a fee.

Question No. 2:

May the TDH require that registrants obtain continuing education on a periodic basis?

Discussion:

The TDH believes that it has no statutory authority to require continuing education for registrants. Section 2.05 (d) gives the Board of Health authority to adopt requirements "for continuing education for medical radiologic technologists." Medical radiologic technologists are persons who are certified by the TDH (see §2.03 (7) and does not include a person who is a registrant (see §2.03 (16)). There is no other statutory basis for establishing continuing education requirements.

Pursuant to §2.08, other agencies arguably have authority to establish continuing education requirements. Persons who complete the mandatory training and are placed on the TDH registry may also work in a situation in which the person is registered with their supervising practitioner's board pursuant to §2.08 and §2.07 (c). Section 2.08 (c)(4) allows the practitioner licensing boards to "establish standards, in addition to those required by this Act, for the training and supervision of the operators of the equipment." This language would give authority to the practitioner licensing boards to establish continuing education standards for registrants.

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Question No. 3:

Must a person be on the TDH registry in order to administer radiation to another person for medical purposes, other than under the direction of a dentist?

Discussion:

Section 2.05 (f) clearly requires that such persons have the mandatory training established by the Board of Health. However, there is no statutory provision which requires that a person also be placed on the registry, in addition to having the mandatory training, in order to perform radiologic procedures. The legislative intent behind the registry was to have a centralized information system of persons performing radiologic procedures. While requiring placement on the registry would promote such legislative intent, there does not appear to be express or implicit authority to require placement on the registry. The only authority is to require the mandatory training. Requiring placement on the registry would in fact be requiring a type of "license" as that term is defined in the Administrative Procedure Act. The TDH believes that type of requirement requires clear legislative intent which is not present in this case. Therefore, a person must have the mandatory training but is not required to be listed on the registry in order to perform radiologic procedures. Of course the TDH would register any qualified person who applies to be placed on the registry.

Question No. 4:

Will persons on the registry be subject to the laws concerning suspension of license for failure to pay child support or concerning non-renewal of a license after failure to repay a guaranteed student loan?

Discussion:

The TDH believes that persons on the registry will not be subject to either of these laws. The law relating to suspension of a license for failure to pay child support is found in the Family Code, Chapter 232, effective September 1, 1995. Section 232.001 of the Family Code defines a "license" to mean authorization that a person "must obtain to practice or engage in a particular business, occupation, or profession or to engage in any other regulated activity" and that is subject to "suspension, revocation, forfeiture, or termination" by the TDH. Section 2.05(f) of the Act requires a person to have the mandatory training program and §2.05(a)(4) and §2.03(16) allow such a person to be placed on the registry; however, placement on the registry is not required in order to perform a radiologic procedure. In other words, the training is required to perform a procedure but placement on the registry is not. Placement on the registry is voluntary. In addition, persons on the registry are not subject to suspension, revocation, forfeiture, or termination of that placement as a means of disciplinary action (see question 5 for further explanation). Therefore, placement on the registry is not a "license" under the Family Code, Chapter 232 and not subject to suspension under that law.

The Education Code, §57.491 relates to denial or renewal of a "license" for failure to repay a guaranteed student loan. That section defines a license to include any form of permission issued by an agency and "required by law to engage in a profession or occupation." As stated earlier, placement on the registry is not required by law to perform a radiologic procedure; only the training is actually required in order to perform procedures. Therefore, this section of the Education Code does not apply to persons on the registry.

Question No. 5:

Will persons on the registry be subject to disciplinary action by the TDH?

Discussion:

Persons on the registry will be subject to some of the disciplinary actions authorized under §2.11 of the Act. A review of the legislative history of HB 1200, in particular testimony by the bill's sponsor, Representative Rodriguez on April 19, 1995 in the House Public Health Committee, indicates that §2.11 and §2.14 were intended to give the TDH certain authority over anyone performing radiologic procedures, including persons on the registry.

Section 2.14 addresses injunctive actions and civil penalties. It allows the TDH to seek injunctive relief if a person has violated, is violating, or is threatening to violate the Act or a rule adopted under the Act. It also allows a civil penalty in an amount that may not exceed \$1,000 for each day of violation against a person who violates the Act or a rule adopted under the Act.

Section 2.11 addresses disciplinary action for a violation of the Act or any rule adopted under the Act. Subsection (a)(1) would only apply to a certificate holder. Subsection (a)(2) would only apply to an education program or instructor. Subsection (a)(3) would only apply to an applicant for a certificate or for program or instructor approval. Subsection (a)(6) would only apply to a certificate holder. Only the language in subsections (a)(4) and (5) could be applied to a person on the registry. The grounds for taking disciplinary action are stated in subsection (c). While some of the paragraphs are particular to a certificate holder, most of the paragraphs could also apply to a person on the registry who is performing radiologic procedures, particularly paragraph (5) relating to engaging in unprofessional conduct.

The committee substitute for HB 1200 which was first considered by the House Public Health Committee on March 14, 1995 expressly stated in §2.11(c) that the TDH could take disciplinary action "against a person subject to this Act, other than a registrant." When the bill was considered on the floor of the House on April 19, 1995, Representative Rodriguez presented an amendment to strike the words "other than a registrant" and said that the inclusion of this language had been "a mistake." This history indicates that §2.11 was intended to cover registrants as well as other persons subject to the Act, such as certified medical radiologic technologists.

In addition, persons on the registry could be subject to the criminal penalties under §2.13.

Question No. 6:

May the TDH take disciplinary action against a student performing radiologic procedures?

Discussion:

Section 2.11(f) specifically authorizes the TDH to take disciplinary action against a student for intentionally practicing radiologic technology without direct supervision. The definition of direct supervision is found in §2.03(13). The disciplinary action which the TDH is authorized to take is that stated in §2.11(a). For a student, disciplinary action could include the action described in Subsection (a)(3), (4), (5), or (6). Such a student could also be subject to action under §2.13 or §2.14.

Question No. 7:

Did the direct supervision requirement for employed students in §2.03 (13) become effective September 1, 1995? Does it apply to employed students performing radiologic procedures in all settings, including hospitals which are Medicare certified or Joint Commission on Accreditation of Hospitals (JCAHO) accredited?

Discussion:

The requirements relating to direct supervision technically became effective September 1, 1995, for all settings, but HB 1200, §8(b) allows persons to continue (until January 1, 1998) to perform radiologic procedures under the Act as it was effective before September 1, 1995.

The term "direct supervision" is defined in §2.03 (13). The definition standing alone has no meaning and should only be read in the context of the use of the term "direct supervision." The term is used in §2.11(f) which allows the department to take disciplinary action against a student for intentionally practicing radiologic technology without direct supervision. In trying to insert the definition into that language, one concludes that the TDH can take disciplinary action against the student if the student was employed to perform radiologic procedures and enrolled in an education program and did not have supervision and control by a medical radiologic technologist or practitioner who was physically present during the conduct of the radiologic procedure to provide consultation or direct the student.

Section 2.13(a)(4) is the other section which uses the term "direct supervision." That section creates a criminal offense if a person knowingly allows a student enrolled in an education program to perform a radiologic procedure without direct supervision. Because of the wording of the definition, it appears to apply only to the employment situation of a student, not to the clinical

portion of a student's education program. This section creates a criminal penalty only for a person who is required to be certified under the Act, not for the employing facility or practitioner or the student. However, §2.14 could be used to take injunctive action against the employed student or a medical radiologic technologist.

Under §2.07(e) a student who is performing procedures in an academic or clinical setting as part of an approved education program is not required to be certified. This exemption from certification does not apply to the employment situation of a student; it only applies to the academic or clinical portion of the education program. In order for a student to be employed and performing radiologic procedures, the student would have to have the training per §2.05(f) and meet one of the subsections in §2.07 to be exempted from certification. The student could be registered with a licensing agency under §2.07(c) or could be working in a Medicare or JCAHO hospital under §2.07(d). However, because of the language in §8(b) of HB 1200, any person (an employed student or otherwise) may perform radiologic procedures under the Act as it was effective prior to September 1, 1995. This exception continues until January 1, 1998. Therefore, until that time an employed student could perform procedures under §2.07(c) or (d) as it was effective before September 1, 1995, without meeting the new additional requirement of direct supervision.

Question No. 8:

If a person completed the mandatory training program required by §2.05(f) and the person is employed to do radiologic procedures but the person is continuing his or her education by completing all of an education program leading to limited or general certification as a medical radiologic technologist, must that person have direct supervision in the employment setting?

Discussion:

Section 2.05(f) requires the TDH to establish mandatory training guidelines. Section 2.05(a)(2) states that the board shall adopt rules establishing minimum standards for the approval of curricula and education programs. This language encompasses the mandatory training guidelines. One of the approved mandatory training programs could be the first year of a two year general certificate program or some portion of a limited certificate program

The definition of direct supervision in §2.03(13) along with the language in §2.11(f) could appear to require direct supervision (after completion of the mandatory training guidelines) during the second year of a student's two year general certification program or after completion of the designated portion of the limited certificate program for the situation in which the student is employed, not the situation in which the student is performing procedures as part of his or her education program. This would require more supervision of these students than is required of other persons who have completed only a training program and are working under §2.07(c) or (d). This would appear to be unreasonable and impractical to require a person who had more training

to have more supervision. The better reading is that an employed student who would be exempt from certification by one of the subsections in §2.07 would be treated the same as any other person working under the same subsection. For example, an employed student working under §2.07(c) would meet the same requirements as any other registered person and would not have to have direct supervision in addition to meeting §2.07(c).

If the above is correct, the TDH would like to know how to apply the definition of "direct supervision." A person, whether a student or not, cannot be employed to perform a radiologic procedure unless the person has completed the mandatory training. A person who has completed the mandatory training can work without being certified by fitting within one of the exceptions stated in §2.07. Therefore, there appears to be no instance where the definition of direct supervision would be applicable.

Question No. 9:

May a person who has completed a training program approved by the TDH perform a radiologic procedure which has been identified as dangerous or hazardous? In any setting, including hospitals that are Medicare certified or JCAHO accredited?

Discussion:

It is the TDH's position that no person may perform a dangerous or hazardous procedure unless the person is a practitioner or certified by the TDH. Section 2.05 (g) states that the board by rule shall identify radiologic procedures that are dangerous or hazardous and that may only be performed by a practitioner or medical radiologic technologist certified under the Act. This language does not allow registrants to perform a procedure that is identified as dangerous or hazardous. However, subsection (k) requires that in adopting rules, the board may consider whether the radiologic procedures will be performed by a registered nurse or a licensed physician assistant. In order to give meaning to subsection (k), it appears that there may be a "middle tier" of radiologic procedures which may be performed by a registered nurse or a licensed physician assistant as well as by a practitioner or certified medical radiologic technologist. In other words, the procedure may be dangerous or hazardous when done by a person who is only a registrant but is not necessarily dangerous or hazardous when done by a registered nurse or physician assistant. Assuming that the person who has completed the training program is not a registered nurse or a licensed physician assistant who could be allowed to do certain dangerous or hazardous procedures under the board rules, such a person is neither a practitioner nor a person certified under the Act and therefore, may not perform a procedure identified as dangerous or hazardous.

Section 2.07(d) allows a person who has completed only the mandatory training program to work in a Medicare or JCAHO hospital to perform radiologic procedures without a certificate; however, this section does not exempt such a person from the prohibition against doing dangerous or hazardous procedures. In §2.05(h), the legislature did write such an exception for persons doing

dental radiologic procedures. In that case, subsection (h) does not allow the board to identify dangerous or hazardous procedures relating to dental radiologic procedures. Clearly the legislature knew how to write an exemption from subsection (g) because they wrote one in subsection (h) for dental procedures. There is no such exemption for any other setting. While a person who performs procedures under the authority of §2.07(d) may be exempt from certification, that person is not exempt from the rules established by the board under Section 2.05(g) relating to dangerous or hazardous procedures.

A person who is not a practitioner or not certified under the Act but who is performing dangerous or hazardous procedures is committing a criminal offense under §2.13(a)(1) since the performance of dangerous or hazardous procedures requires certification under §2.05(g). The TDH could also take court action under §2.14 relating to injunctive relief and civil penalties or disciplinary action under §2.11(a)(4) or (5) and (c)(9).

If a person has not completed a mandatory training program and is working in a hospital, federally qualified health center, or practitioner's office for which the TDH has granted a hardship exemption under §2.05 (i), the person may not perform a procedure which has been identified as dangerous or hazardous. Section 2.05(i) and (j) establish a mechanism for a hospital, federally qualified health center or practitioner to request an exemption from the requirements of §2.05(f) in employing a person certified under the Act or trained as required by Subsection (f). In the same manner as described in the previous discussion, while there is an exemption from the rules on dangerous or hazardous procedures for dental radiologic procedures, there is no exemption for any other setting.

The TDH anticipates that it will adopt final rules identifying dangerous or hazardous radiologic procedures during the summer of 1996. Because §8(b) of HB 1200 allows individuals to perform procedures under the previous version of the Act until January 1, 1998, the TDH is not clear as to whether it may actually enforce its rules on dangerous or hazardous procedures before January 1, 1998.

Question No. 10:

May the TDH establish a fee for hardship applications filed under §2.05(i)? May the TDH establish as one of the conditions for a hardship exemption that the hospital, federally qualified health center, or practitioner be located in a rural area?

Discussion:

Section 2.05(i) establishes a mechanism by which a hospital, federally qualified health center, or practitioner may be granted an exemption by the TDH from the mandatory training requirements in employing a person certified under the Act or trained as required by §2.05 (f). Subsection (j) establishes certain hardship conditions.

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Although the TDH would like to adopt a fee for hardship exemption applications, the TDH has not located any statutory authority to require such a fee. The discussion under Question 1 relating to fees for placement on the registry applies to this issue of hardship exemption application fees.

The TDH believes that it has authority to allow hardship exemptions under §2.05 (j)(1) through (4) only if the hospital, federally qualified health center or practitioner is in a rural area. Such authority is granted in (j)(5) which allows the TDH to establish "any other criteria determined by department rule." Although no version of the HB 1200 as it was proceeding through the 74th Legislature specifically stated that the hardship exemption was only for those in rural settings, the legislative history indicates that was the intent of this subsection. See the House Public Health Committee hearing on March 14, 1995 in testimony from the sponsor, Representative Rodriguez and Carolyn Nicholas and the Senate Health and Human Services Committee hearing on May 10, 1995 in testimony by Senator Galloway and Frank Collazo. Based on the language in §2.05(j)(5) along with the legislative history, the TDH believes it has the authority to apply the hardship exemption only to hospitals, federally qualified health centers or practitioners in rural areas.

If you have any questions or require further information, please feel free to contact Linda Wiegman, an attorney with the TDH, at (512) 458-7236. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "David R. Smith".

David R. Smith, M.D.
Commissioner of Health