KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 15, 2017

Tim F. Branaman, Ph.D.
Chair, Texas State Board of Examiners of Psychologists
333 Guadalupe, Suite 2-450
Austin, Texas 78701

Via E-Mail

Re: Whether a licensed psychologist may submit a bill to a third-party payer under the licensed psychologist's name without indicating that the psychological services rendered were provided by a supervisee (RQ-0193-KP)

Dear Dr. Branaman:

We received your request for an attorney general opinion and have designated it as Request No. 0193-KP. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received, unless before that date the Attorney General notifies the requesting person in writing that the opinion will be delayed. TEX. GOV'T CODE § 402.042(c)(2). We received your request on November 13, 2017, setting a due date for your opinion of May 14, 2018.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefing on your questions if they have a special interest or expertise in the subject matter. If you are aware of other interested parties, please forward this request for briefing to them or let us know, so that we may notify them as soon as possible. We ask that the briefs be submitted by December 15, 2017, to ensure that this office will have adequate time to review and consider arguments relevant to the request from all interested parties. Briefs may be submitted by e-mail to opinion.committee@oag.texas.gov. Please note that briefs and other correspondence are subject to the Public Information Act.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Virginia K. Hoelscher

Virginia K. Hoelscher
Chair, Opinion Committee

VKH/mma

Attachment: Request No. 0193-KP

cc: Ms. Norma Garcia, General Counsel, Texas Department of Insurance
Mr. Albert Betts, Jr., Executive Director, Insurance Council of Texas
Robert F. Mehl, III, Ph.D.
Ms. Amanda Real, President, Texas Association of School Psychologists
Mr. David White, Executive Director, Texas Psychological Association
Texas Association of Psychological Associates
Ms. Johanna Hopkins, General Counsel Division, Office of the Governor

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FILE # ML-48243-17
I.D. # 48243
RQ-0193-KP

November 9, 2017

VIA EMAIL TO 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 State Board of Examiners of Psychologists (hereinafter referred to as "the Board") is seeking an Attorney General Opinion regarding the interplay between Section 501.351(b) of the Occupations Code, 22 Tex. Admin. Code Sec. 465.15(a)(4), and Chapter 35 of the Texas Penal Code. More specifically, the Board seeks an opinion as to whether a licensed psychologist may submit a bill or invoice to a third-party payer pursuant to Section 501.351(b) under the licensed psychologist's own name, without indicating that the psychological services rendered were provided by a supervisee of the licensed psychologist.

The Board is aware that some of its licensees[1] interpret Section 501.351(b) to allow a licensed psychologist to delegate a test or service to a supervisee and then, for the purposes of reimbursement, submit a bill to an insurance company on which they claim that they performed the test or service. The Board is concerned that such a practice may constitute a violation of Chapter 35 of the Penal Code and be viewed as a fraudulent or criminal in nature.

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

Sec. 501.351. GENERAL AUTHORITY TO DELEGATE. (b) The delegating psychologist remains responsible for the psychological test or service performed by the person to whom the test or service is delegated, and the test or service is considered to be delivered by the delegating psychologist for billing purposes, including bills submitted to third-party payors. The person must inform each patient on whom the test or service is performed that the person is being supervised by a licensed psychologist.

22 Tex. Admin. Code §465.15(a)(4). In reporting their services to third-party payers, licensees accurately state the nature, date and fees for the services provided, and the identity of the person(s) who actually provided the services.

[1] See enclosed letter from Robert F. Mehl, III, Ph.D., dated April 22, 2015

333 Guadalupe, Suite 2-450, Austin, Texas 78701
(Administration) 512-305-7700 (Enforcement) 512-305-7709 (TDD) 1-800-735-2989
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The Texas State Board of Examiners of Psychologists is an equal opportunity employer and does not discriminate on the basis of race, color, religion, national origin, age, sex, disability, or sexual orientation.

Sec. 35.02. INSURANCE FRAUD. (a) A person commits an offense if, with intent to defraud or deceive an insurer, the person, in support of a claim for payment under an insurance policy:

(1) prepares or causes to be prepared a statement that:

(A) the person knows contains false or misleading material information; and

(B) is presented to an insurer; or

(2) presents or causes to be presented to an insurer a statement that the person knows contains false or misleading material information.

Background and Discussion

Section 501.351 of the Psychologists' Licensing Act was signed into law on June 14, 2013 by then Governor Rick Perry, and became effective on September 1, 2013. See Tex. H.B. 808, 83rd Leg., R.S. (2013). Section 501.351 grants licensed psychologists the general authority to delegate any psychological test or service that a reasonable and prudent psychologist could delegate within the scope of sound psychological judgment, if certain criteria are met. The authority to delegate extends only to those individuals set forth in Section 501.351(a). Section 501.351(b) goes on to provide that any test or service provided by a delegate is considered to be delivered by the delegating psychologist for billing purposes, including bills submitted to third-party payers.

While the Board certainly understands that Section 501.351 grants licensed psychologists the authority to delegate as set forth in that section and submit bills or invoices for services rendered by their delegates, the Board seeks guidance as to whether a licensed psychologists must reveal the identity of the actual service provider when submitting bills to third-party payers. The attribution of services to a supervising psychologist found in Section 501.351(b) does not seem to, on its face at least, negate the purpose behind Board rule 465.15(a)(4) or Chapter 35 of the Penal Code. For example, some insurance companies require bills to include certain modifiers to indicate the licensure status of the individual who provided the service being billed. The reason for this is insurance companies routinely reimburse psychological services at a lower rate if they are performed by an individual with less training and education than a licensed psychologist. Provisionally licensed psychologists and licensed psychological associates for example are reimbursed at seventy percent of what a licensed psychologist would receive for the same service under Medicaid rules. If Section 501.351(b) is to be interpreted to allow a psychologist to claim he or she is accurately describing that he or she performed a service on a bill when it was actually delegated to a supervisee, then insurance companies will most likely pay more on those claims than they otherwise would have if the identity of the actual provider had been disclosed. Such a scenario seems to run contrary to the very purpose behind Ch. 35 of the Penal Code.

Without an Attorney General opinion, the Board is hesitant to agree that a licensed psychologist may submit bills to third-party payers without indicating the services rendered were provided by a delegate, rather than the billing psychologist directly. The focus of Section 501.351 appears to be more in line with ensuring psychologists have express authority to delegate a test or service - something greatly restricted following the issuance of Letter Opinion No. 96-147 by then Attorney General Dan Morales – rather than increasing reimbursement amounts to supervising psychologists. Given the fact that many third-party payers condition reimbursement upon licensure or provide for scaled (i.e. reduced) reimbursement depending upon licensure status, a licensee's failure to divulge this information could be viewed as false or misleading. By and through this request, the Board hopes to provide its licensees and the public with sound guidance on how third-party billing should be conducted when delegated tasks are involved. The

Board also hopes to provide its licensees with information sufficient to help them avoid prosecutions similar to those brought by federal authorities in recent years involving this very issue within the Medicaid system[2]. Lastly, the Board hopes to determine whether any changes are necessary to its rule, 465.15(a)(4), which requires psychologists to disclose the identity of their supervisees when billing third-party payers.

The Board is not however, seeking or asking the Attorney General for any opinion regarding federal law or the Texas Medicaid program. According to the Texas Medicaid Provider Procedures Manual, October 2017, Volume 2, Subsection 4.2.3 regarding Delegated Services, bills are required to list a modifier to indicate if a service was provided by a psychologist, an intern or post-doctoral fellow, a licensed psychological associate, or a provisionally licensed psychologist. The Board believes the Medicaid Provider Procedure Manual provides reasonable guidance on third-party billing under that program, and thus does not ask for any clarification regarding this issue under Medicaid rules.

Lastly, the Board has identified the following persons or groups likely to be affected by this request and subsequent opinion.

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

Texas Association of School Psychologists
P.O. Box 141023
Austin, Texas 78714-1023

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

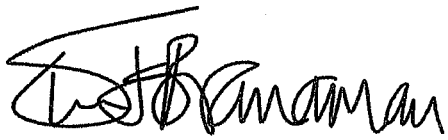
[redacted]

Texas Dept. of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

Insurance Council of Texas
P.O. Box 15
Austin, Texas 78767-0015

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

Sincerely,



Digitally signed by: Tim F. Branaman
DN: CN = Tim F. Branaman C = US O = Texas
State Board of Examiners of Psychologist
Date: 2017.11.10 17:58:19 -05'00'

Tim F. Branaman, Ph.D.
Chair, Texas State Board of Examiners of Psychologists

[2] See enclosed July 13, 2017 press release from the U.S. Attorney's Office, Western District of Texas