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OPINION COMMITTEE CERTIFIED MAIL, RETURN RECEIPT REQUESTED

May 20, 2014

The Honorable Greg Abbott
Attn. Chair, Opinion Committee
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-47581-14
I.D. # 47581

RQ-1202-GA

RE: Request for Opinion

Dear Attorney General Abbott:

This is to request that the Attorney General of Texas issue an opinion pursuant to article IV, section 22, of the Texas Constitution and pursuant to section 402.042 of the Texas Government Code.

SUMMARY OF REQUEST

It has been brought to my attention that a managed care organization (MCO) participating in the Texas Medicaid program has been retrospectively "recouping" 30% of previously paid reimbursement for behavioral health services. Apparently, it is basing this recoupment on a state agency rule, 22 TAC §355.8091. Rule 355.8091 provides that licensed clinical social workers (LCSWs), licensed marriage and family therapists (LMFTs), and licensed professional counselors (LPCs) in the Texas Medicaid program "are reimbursed at 70% of the existing fee for similar services provided by psychiatrists and psychologists." This is to request your opinion to three issues related to this rule.

First, assuming that the services provided are in fact "similar services" (or the same services) provided by psychologists and psychiatrists, whether Rule 355.8091 is invalid on the basis that it is in conflict with Texas Insurance Code section 1451.104, which provides that insurance carriers cannot discriminate in the amount paid for services simply because the services are rendered by different health care providers, so long as the services are within the scope of the respective providers' practices.

Second, assuming that Rule 355.8091 is invalid, if the MCOs' contracts with providers incorporate by reference the rule, are such contract provisions subject to challenge as void as against public policy?

Third, in the alternative, assuming that Rule 355.8091 is *not* invalid, if the MCOs' contracts with providers incorporate by reference a fee schedule that fails to apply the rule, which governs -- the fee schedule or the rule? Must the parties follow the manner in which the State has interpreted and applied that fee schedule? Or do general private contract law principles govern and require that the parties follow the language referenced in the contract?

MEMORANDUM BRIEF IN SUPPORT OF REQUEST

I. 22 TAC §355.8091

A. Agency Rules Generally

Rule 22 TAC §355.8091 was promulgated by the Texas Health and Human Services Commission (THHSC). Like most state agencies, the THHSC is a creature of the Legislature and has no inherent authority. *Texas Dept. of Human Services v. Christian Care Centers, Inc.*, 826 S.W.2d 715, 719 (Tex. App.—Austin 1992, writ denied); see *Public Util. Comm'n v. GTE-SW Corp.*, 901 S.W.2d 401, 407 (Tex. 1995); see also *El Paso Hosp. Dist. v. Texas Health and Human Services Comm'n*, 247 S.W.3d 709 (Tex. 2008). A state agency has “only those powers that the Legislature expressly confers upon it” and “any implied powers that are necessary to carry out the express responsibilities given to it by the Legislature.” See *Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001); *Christian Care*, 826 S.W.2d at 719. Agency rules that exceed the authority delegated to the agency are void. *Texas Orthopaedic Ass'n v. Texas State Board of Podiatric Medical Examiners*, 254 S.W.3d 714, 722 (Tex. App.—Austin 2008, pet. denied); see *Perry Homes v. Strayhorn*, 108 S.W.3d 444, 448 (Tex. App.—Austin 2003, no pet.); see, e.g., *El Paso Hosp. Dist. v. Texas Health and Human Services Commission*, 247 S.W.3d 709; *Christian Care*, 826 S.W.2d 715.

B. THHSC Authority – Discriminatory Rules are not Reasonable Rules

The THHSC is vested with the authority to administer the Texas Medicaid Program. Texas Human Resources Code Ann. § 32.012 (Vernon 2013) (authority to administer Program); Tex. Gov't Code Ann. § 531.021(a) (Vernon 2012) (authority to administer funds). Specifically, the THHSC has the authority to “adopt reasonable rules and standards governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code....” Tex. Gov't Code Ann. § 531.021(b)(2)(emphasis added). Under Chapter 32, the THHSC is charged with the responsibility to “adopt *reasonable* rules and standards governing the determination of fees, charges, and rates for medical assistance payments. Texas Human Resources Code Ann. §32.028(a) (emphasis added) (Vernon 2013); cf. *Southwest Pharmacy Solutions, Inc. v. Texas Health and Human Services Comm'n*, --- S.W.3d ---, 2013 WL 3724038 (Tex. App.-Austin, Jul 12, 2013, pet. filed) (NO. 03-12-00293-CV) (such authority does not extend to setting fees paid by MCOs in the Medicaid managed care program).

The THHSC's fee for service reimbursement rates are located in Part 15, Chapter 355 of the Texas Administrative Code. 22 TAC §355.8091. Rule 355.8091 provides:

Counseling services provided by a licensed professional counselor, a licensed master social worker-advanced clinical practitioner, or a licensed marriage and family therapist in compliance with applicable professional licensing laws and under 25 TAC §29.3001 (relating to Benefits and Limitations) and §29.3002 (relating to Conditions for Participation) are reimbursed *at 70% of the existing fee for similar services provided by psychiatrists and psychologists* as described in §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology (TMRM)).

22 TAC §355.8091 (emphasis added).

As indicated, the Texas Legislature directed that the THHSC adopt *reasonable* reimbursement rates. The Texas Legislature did not authorize the THHSC to implement rules which differentiate among providers delivering Medicaid services based solely on their licensure. The 30% "reduction" is not statutorily authorized because discriminatory rules are, as a matter of law, not reasonable. Failure to pay all providers the same rate for delivering the same service is a denial of the equal protection guaranteed in the Texas Constitution. Tex. Const. art. I, § 3.

C. Agency Rules Must be Consistent with State Law

In addition, a state agency's rules must be consistent with the laws of this state. *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex.1992); *Gerst v. Oak Cliff Savings & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex.1968); *see, e.g., Riess v. Williamson County Appraisal Dist.*, 735 S.W.2d 633, 637–38 (Tex. App.—Austin 1987, writ denied) (State Property Tax Board rule held invalid when inconsistent with Tax Code Section 23.51). That means not just the particular agency's enabling statute, but also *other* applicable state laws.

D. Rule 355.8091 Conflicts with Texas Insurance Code Chapter 1451

Rule 355.8091 is in direct conflict with Texas Insurance Code section 1451.104, which provides that insurance carriers cannot discriminate in the amount paid for services simply because they are rendered by different health care providers, so long as the services are within the scope of the respective providers' practices. LCSWs, LMFTs, and LPCs are among those providers the Texas Legislature intended section 1451.104 to protect. *See* Tex. Ins. Code §1451.001(9), (10), and (11); §1451.113 (Selection of Licensed Clinical Social Worker); §1451.114 (Selection of Licensed Professional Counselor); §1451.116 (Selection of a Licensed Marriage and Family Therapist). Section 1451.103 of the Insurance Code provides that provisions of health insurance policies that conflict with Chapter 1451 are void to the extent of the conflict. Texas Insurance Code §1451.103(a).

When the Texas Legislature has intended that the prohibition on discriminatory reimbursement should *not* apply to the Medicaid program, it has stated so expressly. For example, section 1451.109 contains a provision prohibiting discrimination against Chiropractors, but expressly states that section 1451.109 does not apply to the Medicaid managed care program. Texas Insurance Code §1451.109(d). Had the Texas Legislature intended to exempt the Texas Medicaid program with respect to other providers it could have done so. It did not.

II. Contracts incorporating state agency rules

A. Contracts provisions incorporating invalid state agency rules are unenforceable

As indicated, we understand that at least one of the Medicaid MCO's contracts with providers incorporate by reference Rule 355.8091. It would appear that, if the rule is invalid, then such contract provisions would also be subject to challenge as void as against public policy. As a general rule, contracts that are inconsistent with state law are void as against public policy. *See generally Robert H. Osburn, P.C. v. Realty Engineering, Inc.*, 2010 WL 3059450, *2 (Tex. App.-Austin Aug 06, 2010, no pet. hist.) (not reported in S.W.3d); *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 726 (Tex. App.-Dallas, 2004, no pet.); *Ranger Ins. Co. v. Ward*, 107 S.W.3d 820, 827 (Tex. App.-Texarkana 2003, pet. denied); *see also South Texas College of Law v. Texas Higher Educ. Coordinating Bd.*, 40 S.W.3d 130, 135 (Tex. App.-Austin Nov 30, 2000) review denied (2 pets.) (Nov 15, 2001), rehearing of petition for review denied (2 pets.) (Mar 21, 2002). Obviously, we are not asking that you declare such provisions invalid, which would be beyond the scope of the law authorizing attorney general opinions, only that you indicate whether our understanding of the law is correct, assuming the rule is invalid.

B. Whether agency applications and interpretations of rules govern contracts incorporating state agency rules

Finally, in the alternative, assuming that Rule 355.8091 is *not* invalid, if the MCOs' contracts with providers incorporate by reference a fee schedule, officially promulgated by the State and/or the State's fiscal agent, that *fails* to apply the rule, which governs -- the fee schedule or the rule?

As indicated, certain MCO contracts apparently incorporate the Texas Medicaid Behavioral Fee Schedule. The State, however, has not historically or consistently applied 22 TAC §355.8091 in that fee schedule or in Medicaid Bulletins. In specific, the fee schedule does not regularly or consistently provide for the 30% reduction in the reimbursement of LCSWs, LMFTs, and LPCs.

For example, a review of the Outpatient Behavioral Health portion of the Medicaid Fee Schedules from 2010 through 2012 reveals that between January 2010 and December 2012, thirteen (13) fee schedules – roughly 4 per year. In ten (10) of those fee schedules, consecutively published from October 2010 to October 2012, the reimbursement rates for LCSWs and psychologists were *equal* for procedure codes 90804, 90806, 90808, 90847, and 90853 (the only codes common between the two), despite Rule 355.8091. In only three (3) fee schedules - those published in January, April and July 2010 – were the reimbursement rates not consistently equal. For example, in the January and April 2010 fee schedules, the reimbursement rates for procedure codes 90806, 90847, and 90853 were 30% higher for psychologists. However, the reimbursement rate for code 90808 was equal between psychologists and LCSWs (code 90804 did not appear on the psychologists' fee schedules). In the July 2010 fee schedule, the reimbursement rate for procedure code 90847 was approximately (within a few cents) 30% higher for psychologists but the reimbursement rates for procedure codes 90804, 90806, 90808, and 90853 were equal between LCSWs and psychologists.

In addition, in many editions, there was no “note code indicator” directing that payments for LCSW’s should be reduced by 30%. In the fee schedules from January 2010 through September 2011, note code indicator E1 directed only that “Fees for procedures performed by a *Licensed Psychological Associate* are reduced by 30%.” There was no mention of LCSWs or LMFTs or LPCs. Only with the October 2011 fee schedule, and continuing through the October 2012 fee schedule, was there a note code indicator, E1, which stated that “The Texas Medicaid rate for LPA, LCSW, LMFT, and LPC is 70% of the rate paid to a psychiatrist and psychologist.”

In the recent decision of the Third Court of Appeals in *Southwest Pharmacy Solutions, Inc. v. Texas Health and Human Services Comm'n*, --- S.W.3d ----, 2013 WL 3724038, the court of appeals suggests that the State’s authority to regulate does not extend to setting fees paid by MCOs to providers in the Medicaid managed care program. That would constitute unauthorized “state intervention into private contracts.” *Southwest Pharmacy Solutions, Inc. v. Texas Health and Human Services Comm'n*, --- S.W.3d ----, 2013 WL 3724038, *9. For that reason, it appears that simple contract law principles should apply after the advent of managed care in March 2012, and that the language of the fee schedule, if referenced in the contracts, should apply prior to March 2012.

C. Applying Contract Principles

1. No contract language

Since the MCOs consider such contracts to be confidential and prohibit their release by providers. It appears that there could be a number of scenarios, all depending on the language, or lack thereof, of the contract. Whether particular contract language can be given a certain or definite meaning, deciding that meaning is a question of law. *DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex.1999); *Markert v. Williams*,

874 S.W.2d 353, 354 (Tex. App.-Houston [1st Dist.] 1994, writ denied). As a result, it would be an appropriate topic for an opinion from your office.

To be valid, a contract must contain all essential terms and be sufficiently certain to define the parties' legal obligations. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex.1992); *Nickerson v. E.I.L. Instruments, Inc.*, 874 S.W.2d 936, 939 (Tex. App.-Houston [1st Dist.] 1994, writ denied). An essential term is "one that the parties would have reasonably regarded, at the time of contracting, as a vitally important ingredient in their bargain." See *Nelly v. Bankers Trust Co. of Texas*, 757 F.2d 621, 628 (5th Cir.1985). The amount to be paid for services under a contract for services would be such a term. See *Williams v. L.M.S.C., Inc.*, 2005 WL 2469876, *8 (Tex. App.-Houston (1st Dist.) Oct 06, 2005, pet. denied) (NO. 01-03-00924-CV) (not reported in S.W.3d). If the MCO contract with the providers failed to incorporate a schedule of reimbursement, however, only then it would appear that there would be no enforceable contract and the MCO and provider would be bound by principles of *quantum meruit*. See *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex.2000); *Atlantic Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 227 (Tex. App.-Houston [1st Dist.] 2004, pet. denied) (op. on reh'g).

Under this equitable principle, it would appear that providers would be entitled to the fair market value of their services. But the question remains of what measure? Prior to March 2012, would the market value take into consideration other government programs, such as workers compensation and Medicare? After March 2012, since it would be a matter of private contract, would the amount be measured by general commercial policies for the same or similar services in the particular health profession?

2. Contract expressly incorporating "Rule 355.8091"

Again, it would appear that a contract expressly and clearly incorporating an invalid rule would not be enforceable. In addition, it would appear that MCOs are directly subject to section 1451.104 of the Insurance Code. Assuming, however, that disparate rates are not prohibited, either before or after March 2012, we have additional questions.

Assuming that the rule is *not* invalid and section 1451.104 of the Insurance Code does not apply to MCOs, if the MCO contract with the provider specifies that Rule 355.8091 controls, then does it (i.e. regardless of any inconsistent provision in the Texas Medicaid Behavioral Health Fee Schedule)? In other words, if an MCO contract clearly specifies that Rule 355.8091 applies, then has the provider effectively agreed to accept 30% less than a psychologist or psychiatrist? Does it make a difference for services rendered prior to or outside of the Medicaid managed care program?

For example, if an MCO contract with a provider specifies that Rule 355.8091 applies for services rendered prior to March 2012, since reimbursement was directly regulated under the prior fee for services system, would the official publication of the reimbursement rates apply (i.e. the Texas Medicaid Behavioral Health Fee Schedule?) It would seem that when the THHSC regulates payments, then the MCOs are not free to depart from the

The Honorable Greg Abbott

May 20, 2014

Page 7 of 8

THHSC's interpretation and application of the fee schedule, even when the fee schedule appears to be inconsistent with the actual language of the rule.

3. Contract expressly incorporating the Texas Medicaid Behavioral Health Fee Schedule

If the MCO contract with the provider specifies that the Texas Medicaid Behavioral Health Fee Schedule applies, then does it (assuming that the contract provision is not void as against public policy because it is in conflict with section 1451.109 of the Insurance Code), regardless of any inconsistency in the fee schedule with Rule 355.8091? Does it make a difference whether the services are rendered before or after March 2012?

Under this final possible scenario, based on the decision in *Southwest Pharmacy Solutions, Inc. v. Texas Health and Human Services Comm'n*, --- S.W.3d ----, 2013 WL 3724038, if an MCO contract adopts the Texas Medicaid Behavioral Health Fee Schedule by reference, then the fee schedule, as written, controls. Neither the State nor the MCO could attempt to interfere with the private contract to "regulate" by applying Rule 355.8091. For services rendered prior to March 2012 or otherwise outside of the managed care system, it would appear that the answer would be the same, the fee schedule, as written, controls.

CONCLUSION

Although I recognize that not all behavioral health care providers work in the same way and that they do not all provide the same kinds of treatment, when the basic service is the same, health care providers should be reimbursed at the same rate for the same services. By copy of this letter, I am inviting comment from the Texas Health and Human Services Commission, the Texas Department of Insurance, the Texas Medical Board, the Texas State Board of Examiners of Psychologists, as well as the other boards that regulate behavioral health specialists.

Your attention to this request is greatly appreciated. Please let me know if you need additional information.

Sincerely,



Richard Peña Raymond

cc: Texas Health and Human Services Commission
Texas Department of Insurance
Texas Medical Board
Texas State Board of Examiners of Psychologists
Texas State Board of Examiners of Marriage and Family Therapists

The Honorable Greg Abbott

May 20, 2014

Page 8 of 8

Texas State Board of Examiners of Professional Counselors
Texas State Board of Social Worker Examiners