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April 28, 2016

ATTORNEY GENERAL OPINION NO. 2016- 7

The Honorable Laura Kelly
State Senator, 18th District
State Capitol, 125-E
300 S.W. 10th Avenue
Topeka, Kansas 66612

The Honorable Marci Francisco
State Senator, 2nd District
State Capitol, 134-E
300 S.W. 10th Avenue
Topeka, Kansas 66612

The Honorable Terry Bruce
State Senator, 34th District
State Capitol, 330-E
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Public Health—Home Health Agencies—Home Health Agencies Required
To Be Licensed

Public Health—Miscellaneous Provisions—Individuals In Need Of In-
Home Care; Definitions

Synopsis: A private or public agency or organization that provides only attendant care services may provide such services without being licensed as a home health agency under K.S.A. 65-5101, *et seq.* The conclusions regarding whether an attendant must be licensed stated in Attorney General Opinion No. 2002-49 are affirmed. Cited herein: K.S.A. 2015 Supp. 65-5101; K.S.A. 65-5102; K.S.A. 2015 Supp. 65-5112; K.S.A. 65-5115, 65-6201.

Dear Senators Kelly, Francisco, and Bruce:

As the Senators for the Eighteenth, Second, and Thirty-fourth District, respectively, you request our opinion on whether the Kansas Department of Health and Environment (KDHE) may require providers of attendant care services to obtain a home health agency license. For the reasons further discussed below, we believe that it may not.

Attendant Care Services

Your question uses the example of businesses that “provide [only] attendant care services.” We assume in every instance those services are limited to “those basic and ancillary services which enable an individual in need of in-home care to live in the individual’s home and community rather than in an institution and to carry out functions of daily living, self-care and mobility.”¹

“Basic services” include, but are not limited to, such things as getting in and out of bed, bathing and personal hygiene, dressing and grooming, and feeding.² “Ancillary services” include assisting with housework and chores, providing transportation, and helping with finances and decision-making.³

In your letter, you indicate that in November 2015, KDHE sent cease and desist letters to providers of attendant care services warning them that “providing home health services and representing [themselves] as a home health agency” constitutes a Class B misdemeanor.⁴ KDHE instructed the providers to demonstrate they had not provided home health services in the past or that they had ceased providing home health services.⁵ In a follow-up letter, KDHE confirmed that it was concerned with “hands on” services such as bathing, dressing, feeding, grooming, incontinence care, medication reminders, and help with mobility.⁶ Essentially, KDHE announced that only “companion or chore services” could be performed without a license unless performed by someone meeting one or more of the statutory exceptions located at K.S.A. 2015 Supp. 65-5112.

Home Health Agencies

A “home health agency” is defined as “a public or private agency or organization . . . that provides for a fee one or more home health services at the residence of a patient.”⁷ “Home health services” are “[n]ursing, physical therapy, speech therapy, nutritional or dietetic consulting, occupational therapy, respiratory therapy, home health aid,

¹ K.S.A. 65-6201(a).

² K.S.A. 65-6201(b).

³ K.S.A. 65-6201(c).

⁴ Letter to Beverly Blassingame, Blassingame Home Care Owner from Joyce Smith, Health Facilities Program Director, November 18, 2015.

⁵ *Id.*

⁶ Letter to Beverly Blassingame, Blassingame Home Care Owner from Joyce Smith, Health Facilities Program Director, December 8, 2015.

⁷ K.S.A. 2015 Supp. 65-5101(b).

attendant care services [and] medical social service”⁸ whenever those services are provided within the patient’s residence. In this context, “attendant care services” has the same definition provided above.⁹

Home health agencies are required to be licensed prior to providing home health services, other than attendant care services, or holding themselves out as providing home health services, other than attendant care services.¹⁰

Analysis

Although there is overlap between the definitions set out above, we can find no support for the assertion that attendant care service providers must be licensed if they provide “hands-on” services, such as assisting with bathing and personal hygiene. That interpretation omits the plain language of K.S.A. 65-5102 excepting attendant care services from the licensing requirements.¹¹ We also observe that interpretation explicitly conflicts with statutes defining attendant care services as those which include such “hands-on” activities as bathing and personal hygiene,¹² as well as performing wound care and administering suppositories.¹³

Attorney General Opinion No. 2002-49 answered a similar question regarding whether an attendant care service provider was required to complete the instruction and examination requirements¹⁴ applicable to a home health aide:

Although it is clear from the definition of [home health services] that an attendant performs some of the duties that are performed by a home health aide, there is no requirement that an attendant who provides only attendant care services pursuant to K.S.A 65-6201 . . . be similarly trained and certified. Moreover, home health agencies that provide only attendant care services pursuant to K.S.A. 65-6201 are not required to be licensed.¹⁵

⁸ K.S.A. 2015 Supp. 65-5101(c).

⁹ The term “attendant care services” shall have the meaning ascribed to such term under K.S.A. 65-6201, and amendments thereto.” K.S.A. 2015 Supp. 65-5101(j).

¹⁰ K.S.A. 65-5102.

¹¹ “No home health agency . . . shall provide one or more of the home health services specified in subsection (c) of K.S.A. 65-5101 and amendments thereto, *other than attendant care services*, or shall hold itself out as providing one or more of such home health services, *other than attendant care services*, or as a home health agency unless it is licensed in accordance with the provisions of this act.” (Emphasis added.)

¹² K.S.A. 65-6201(b).

¹³ K.S.A. 65-6201(d).

¹⁴ K.S.A. 65-5115.

¹⁵ Attorney General Opinion No. 2002-49 (citing K.S.A. 65-5102 and K.S.A. 65-5112).

We can find no court cases or statutory amendments which would make us question affirming the analysis or the conclusion made in Attorney General Opinion No. 2002-49.

Because we affirm that portion of Attorney General Opinion No. 2002-49, we conclude the answer to your question is “no”—KDHE may not require a business that provides only attendant care services to be licensed as a home health agency pursuant to K.S.A. 65-5101, *et seq.*

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Craig Paschang

Craig Paschang
Assistant Attorney General

DS:AA:CP:sb