

**OPINION NO. 86-078**

**Syllabus:**

The Bureau of Disability Determination may adopt and implement policy guidelines addressing the utilization of the services of unlicensed supervisees in the administration of psychological tests to disability claimants by licensed psychologists from whom the Bureau purchases consultative and diagnostic

services. The Bureau of Disability Determination may require that certain batteries of such psychological tests shall be administered and interpreted by a licensed psychologist, without the assistance of a supervisee, and the adoption and implementation of such a policy by the Bureau does not constitute regulation of the practice of psychology.

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To: Robert N. Wendt, President, State Board of Psychology, Columbus, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, November 13, 1986

One of your predecessors has requested my opinion whether the Ohio Bureau of Disability Determination (BDD) may adopt and implement a policy addressing the utilization of the services of unlicensed supervisees in the administration of psychological tests to disability claimants in federal Social Security benefit programs by licensed psychologists with whom the Bureau maintains provider contracts. Before I answer your specific question, it is necessary for me to examine briefly those provisions of federal and state law that govern the powers and responsibilities of BDD with respect to disability determinations.

42 U.S.C. §§423-425 and §§1381-1383c, and the regulations promulgated thereunder, see 20 C.F.R. §§404.1-.325 and §§404.1501-.1825; 20 C.F.R. §§416.101-.2227 (1986), govern respectively the federal disability insurance benefit (DIB) and supplemental security income benefit (SSI) programs administered by the Social Security Administration. In order to be eligible for disability insurance or supplemental security income benefits, an individual must satisfy a number of statutory requirements, including a requirement that the individual be disabled. See 42 U.S.C. §§423 and 1382. For purposes of the various provisions governing both the DIB and SSI programs, the term "disability" means the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§423(d)(1)(A) and 1382c(a)(3)(A). Thus, in order to be eligible for disability insurance or supplemental security income benefits, an individual must suffer from a medically determinable physical or mental impairment which is severe enough to result in an inability to engage in any substantial gainful activity.

42 U.S.C. §§421(a)(1) and 1383b(a) further provide that a state agency shall perform the disability determination function in any state that has agreed to assume responsibility for the performance thereof and that has complied with the federal statutory requirements pertaining thereto. For purposes of the various provisions governing determinations of disability in both the DIB and SSI programs, the term "disability determination function" means "making determinations as to disability or blindness and carrying out related administrative and other responsibilities." 20 C.F.R. §§404.1602 and 416.1002, and "state agency" is defined as "that agency of a State which has been designated by the State to carry out the disability determination function," 20 C.F.R. §§404.1502; 404.1602; and 416.1002.

The Bureau of Disability Determination has been established within the Rehabilitation Services Commission (RSC), see R.C.

3304.12; R.C. 3304.15, as the state agency responsible for performing disability determinations pursuant to the federal statutory scheme described above. See generally 1983 Op. Att'y Gen. No. 83-013. As the state agency designated to perform such disability determinations, it is clear that BDD must have the authority necessary to comply with those federal statutes and regulations that impose requirements with respect to those determinations on the state agencies so designated. See, e.g., 20 C.F.R. §§404.1615(a); 416.1015(a)(requiring that, when making a disability determination, the designated state agency will adhere to the federal regulations pertaining thereto). See also 20 C.F.R. §§404.1633(b) and 416.1033(b)(requiring that the designated state agency will "comply with the written guidelines in the Disability Insurance section of the Program Operations Manual System [POMS]").<sup>1</sup> It is my understanding that BDD regularly retains the services of physicians, psychiatrists, psychologists, and other medical professionals on a contractual basis whereby such medical professionals perform various consultative and diagnostic services for BDD as a part of the disability determination process. See Op. No. 83-013 at 2-56. The services these medical professionals provide in this regard assist BDD in determining whether an individual actually suffers from a particular claimed disability.

The question posed by the State Board of Psychology is addressed to those provider contracts that BDD currently maintains with licensed psychologists. Specifically, the Board wishes to know whether BDD may adopt and implement a policy addressing the utilization of the services of unlicensed supervisees in the administration of certain psychological tests to disability claimants by the licensed psychologists. In this regard, BDD requires that certain batteries of psychological tests be administered, and the results thereof be interpreted, by a licensed psychologist, without the assistance of any unlicensed supervisee who may be in the psychologist's employ. Certain other tests of intelligence and personality may be administered by unlicensed supervisees.<sup>2</sup> In addition, BDD requires the consulting psychologist to maintain clear, readily available records of which tests were administered by

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<sup>1</sup> The Program Operations Manual System is a compilation of written guidelines formulated by the Department of Health and Human Services that address various aspects of disability determinations.

<sup>2</sup> According to BDD's policy guidelines, a copy of which accompanies the Board's opinion request, the Wechsler Adult Intelligence Scale Test (WAIS) and the paragraph comprehension section of the Nelson Reading test, which comprise Battery D, shall always be administered by the consulting psychologist "without supervisee assistance," and "[i]f only one test is requested, regardless of type, then that test must be administered by the consultant [psychologist]." On all other test batteries, BDD's guidelines state that the consulting psychologist is expected to "administer all projective tests, all neuropsychological batteries, to conduct the clinical interview covering mental status, to interpret all tests, and to write the report of results." Supervisees may, however, consistent with their competency, "administer intelligence tests, achievement tests, tests of adaptive behavior, personality inventories, dexterity measures, and brief neuropsychological tests."

the supervisee and the extent of supervisee contact with the disability claimant.

Thus, BDD's policy guidelines address the participation and role of supervisees in the administration of various psychological tests, the results of which are used by BDD in making disability determinations. On a recent occasion, I stated that, where there is no definitive interpretation on a matter of federal law, I may advise only whether an agency's adoption of a particular interpretation appears to be consistent with the agency's duty to carry out its responsibilities under the laws of this state. 1985 Op. Att'y Gen. No. 85-007 at 2-25. In the instant situation, I believe that the above policy guidelines have been adopted by BDD consistent with its duties and responsibilities as a state agency to comply with the various federal requirements pertaining to disability determinations, and that such guidelines do not appear to be inconsistent with any existing federal law, regulations, or directives. See, e.g., 20 C.F.R. §416.913 (need for medical evidence); 20 C.F.R. §§404.1513(d) and 416.913(d)(medical evidence must be complete and detailed enough for a proper disability determination); POMS §DI 00401.080A(sources of medical evidence that may be consulted in determining the existence or severity of an impairment); POMS §DI 00401.110 (purchase of consultative examinations and qualifications of a consultant); POMS §DI 00401.115 (content of report of psychiatric or psychological consultative examinations). Accordingly, I conclude that BDD, pursuant to its authority to make disability determinations, and consistent with its responsibility to comply with federal requirements pertaining thereto, may adopt and implement policy guidelines addressing the utilization of the services of unlicensed supervisees in the administration of psychological tests to disability claimants by licensed psychologists with whom BDD maintains provider contracts.

The State Board of Psychology has expressed its concern, however, that BDD's adoption and implementation of the foregoing policy guidelines constitute regulation of the practice of psychology, which is a responsibility conferred upon the Board by R.C. Chapter 4732. In this regard, R.C. 4732.21(A) prohibits a person who is not licensed as a psychologist from rendering or offering services as a psychologist or otherwise engaging in the practice of psychology for compensation or other personal gain. R.C. 4732.02 and R.C. 4732.03 provide for the appointment and organization of the State Board of Psychology as the entity responsible for licensing individuals who wish to engage in the practice of psychology. The Board is responsible for establishing the qualifications for admission to the examination for a license to practice psychology, see R.C. 4732.10, and such examination shall be conducted under rules prescribed by the Board, see R.C. 4732.11. Each applicant shall be examined for knowledge in whatever theoretical or applied fields of psychology the Board considers appropriate. Id. An applicant who passes the examination is entitled to receive a license to practice psychology from the Board. R.C. 4732.12. See 7 Ohio Admin. Code 4732-9-01 to 4732-9-03 (rules promulgated by the State Board of Psychology addressing requirements for admission to licensure examinations for psychologists and school psychologists); 7 Ohio Admin. Code 4732-11-01 to 4732-11-08 (regulations pertaining to licensure examinations for psychologists and school psychologists). See also R.C. 4732.01(B)(defining the practice of psychology as

used in R.C. 4732.01-.25); R.C. 4732.17 (grounds for denial, suspension, or revocation of a license to practice psychology).

R.C. 4732.22 does, however, exempt certain persons from the licensing requirements of R.C. Chapter 4732 if such persons work under the supervision of a licensed psychologist. See R.C. 4732.22(C)("[a]ny person employed by a licensed psychologist...while carrying out specific tasks, under the licensee's supervision, as an extension of the licensee's legal and ethical authority"); R.C. 4732.22(D)("[u]nlicensed persons holding a master's degree or doctoral degree in psychology from a program approved by the board while working under the supervision of a licensed psychologist"). See also R.C. 4732.22(E)("[a]ny student in an accredited educational institution, while carrying out activities that are part of his prescribed course of study, provided such activities are supervised by a professional person who is qualified to perform such activities and is licensed under this chapter" or is otherwise exempt from licensure). The Psychology Board has promulgated rules governing the supervisory relationship pursuant to R.C. 4732.22(D). 7 Ohio Admin. Code Chapter 4732.13. See R.C. 4732.17(G); 7 Ohio Admin. Code 4732-17-01(D). See also 7 Ohio Admin. Code Chapter 4732-15 (titles that may be used by persons employed by a licensed psychologist pursuant to R.C. 4732.22(C)).

I conclude that BDD's adoption and implementation of policy guidelines pertaining to the utilization of the services of supervisees by licensed psychologists with whom BDD maintains provider contracts does not constitute regulation of the practice of psychology. As I have already noted, BDD regularly enters into contracts with licensed psychologists for a variety of professional consultative and diagnostic services that assist BDD in carrying out its disability determination functions. Such services may include the administration and interpretation of psychological tests designed to assess a disability claimant's intellectual development, learning ability, personality profile, or emotional condition. As a purchaser of these particular services, I believe it is within BDD's prerogative to specify, as a matter of contract, which individuals shall furnish and perform those services. In this regard, parties to a contract for the performance of services may agree with respect to the manner in which those services are to be performed and the individual or individuals who shall perform those services. A party to a contract may further agree that the services he agrees to undertake shall not be performed by another person in his place. See, e.g., Restatement (Second) of Contracts §318(1)(1981)("[a]n obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise"). This is particularly true with respect to services of a professional nature, such as those rendered by a legal or medical professional. An individual may retain the services of a particular lawyer or physician precisely because the lawyer or physician in question possesses the expertise and knowledge required to competently address and handle that individual's particular problem. In such a situation, it is understandable that the client or patient should request, and expect, within reason, that his particular needs shall be attended to by the lawyer or physician himself. Further, such a request on the part of the client or patient clearly may not be characterized as regulation of the practice of law or medicine, since by simply acceding to such a request the lawyer or physician does not abdicate his responsibility to exercise his independent professional judgment and to make decisions

with respect to the management and resolution of the problem that is the focus of concern for that client or patient.

Similarly, BDD may require that certain batteries of psychological tests be administered, and the results thereof be interpreted, by the licensed psychologists from whom BDD purchases diagnostic and consultative services in fulfilling its disability determination functions. In this regard, BDD retains the services of licensed psychologists in order that it may obtain the most accurate and reliable independent assessment possible of a disability claimant's mental and emotional health. To that end, BDD has indicated that certain batteries of psychological tests shall be administered and interpreted exclusively by a licensed psychologist. In view of the objectives BDD hopes to achieve in this respect, I believe such a requirement is a logical and reasonable exercise of BDD's authority.

I further conclude that such a requirement on the part of BDD does not constitute regulation of the practice of psychology. By requesting that a licensed psychologist administer and interpret certain batteries of psychological tests, BDD does not impinge upon or impede the responsibility of the psychologist to employ his independent professional judgment with respect thereto. In this regard, BDD imposes no requirements with respect to the manner in which the results of such tests are to be interpreted. Thus, the consulting psychologist remains completely free to form his own independent evaluation of the results of such tests, and what they portend about the disability claimant's mental and emotional health. It is my understanding that BDD makes no attempt to influence the consulting psychologist in any way in this regard. Further, it is left to the discretion of the consulting psychologist to determine whether psychological tests in addition to those requested by BDD shall be administered in order to determine the existence and extent of a claimant's disability. Thus, a licensed psychologist who agrees, at the request of BDD, to administer and interpret certain batteries of psychological tests without supervisee assistance clearly does not surrender his responsibility to exercise his independent professional judgment and to make diagnostic decisions with respect thereto.<sup>3</sup>

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<sup>3</sup> The State Board of Psychology also notes that the policy guidelines of BDD in this particular respect arguably contravene the holding of the court in Serednesky v. Ohio Department of Public Welfare, No. 78AP-826 (Franklin County Ct. App. November 27, 1979)(unreported). The decision of the court of appeals in Serednesky v. Ohio Department of Public Welfare, however, is clearly inapposite with respect to the question now posed by the Board. In Serednesky the court considered a challenge by a psychologist to an administrative rule promulgated by the Department of Public Welfare (now the Department of Human Services, see R.C. 5101.01) that limited state reimbursement for psychological services performed under the federal Medicaid program to only those services rendered by the psychologist himself, and prohibited reimbursement for services provided by unlicensed supervisees, and considered whether such rule conflicted with the pertinent federal statutes and regulations addressing the same subject. In this regard the applicable federal law permitted reimbursement for any medical care

Finally, BDD's policy guidelines do not violate the statutory scheme governing the practice of psychology set forth in R.C. Chapter 4732, nor do they intrude upon the jurisdiction of the State Board of Psychology to enforce the provisions of that chapter and the administrative rules that the Board has promulgated thereunder. In this regard, BDD's policy guidelines do not relieve psychologists and their supervisees of their responsibility to comply with the requirements of R.C. Chapter 4732, and to adhere to the rules adopted by the State Board of Psychology that regulate the practice of psychology and the utilization of the services of supervisees by licensed psychologists. Further, BDD's policy guidelines do not deprive the State Board of Psychology of any of the powers conferred upon it by statute to define and establish qualifications of those persons desiring to engage in the practice of psychology or to serve as supervisees to licensed psychologists.

Accordingly, based on the foregoing it is my opinion, and you are hereby advised, that the Bureau of Disability Determination may adopt and implement policy guidelines addressing the utilization of the services of unlicensed supervisees in the administration of psychological tests to disability claimants by licensed psychologists from whom the Bureau purchases consultative and diagnostic services. The Bureau of Disability Determination may require that certain batteries of such psychological tests shall be administered and interpreted by a licensed psychologist, without the assistance of a supervisee, and the adoption and implementation of such a policy by the Bureau does not constitute regulation of the practice of psychology.

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"furnished by licensed practitioners within the scope of their practice as defined by State law." See 42 U.S.C. §1396d(a)(6). Insofar as the functions of unlicensed supervisees come within the scope of a psychologist's practice under Ohio law, see R.C. 4732.10(B)(5); R.C. 4732.22(C), (D); 7 Ohio Admin. Code Chapter 4732-13, the court determined that the Department could not limit reimbursement to only those services performed by a licensed psychologist himself, thereby withholding reimbursement for the value of services provided by unlicensed supervisees, since such a policy would be contrary to the express language of 42 U.S.C. §1396d(a)(6), as interpreted with reference to state law.

Thus, the decision in Serednesky v. Ohio Department of Public Welfare may be cited for the limited proposition that the activities of unlicensed supervisees employed by a licensed psychologist fall within the psychologist's scope of practice pursuant to the terms of R.C. 4732.10(B)(5), R.C. 4732.22(C), (D), and 7 Ohio Admin. Code Chapter 4732-13. Such decision, however, furnishes no basis for further concluding that BDD may not require that certain batteries of psychological tests be administered by licensed psychologists, rather than by unlicensed supervisees.