

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 01-078

Community-Based Screening for Mental Health Services

QUESTIONS

1. Are Tenn. Code Ann. §§ 33-6-102 through 33-6-106 compatible with the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. 1395dd, also known as the “COBRA” or “anti-dumping” statute? Is there a difference whether or not an examination takes place at a facility that provides in-patient mental health treatment?

2. Is Tenn. Code Ann. § 33-6-105's targeting of “publicly funded or potentially publicly funded persons” discriminatory? May individuals be treated differently based on their source of payment or type of coverage? Does it violate provider non-discrimination obligations under TennCare or other provider contracts?

3. Do Tenn. Code Ann. §§ 33-6-102 through 33-6-106 present a potential conflict with the settlement agreement in *Grier v. Neel*, No. 79-3107 in the U.S. District Court for the Middle District of Tennessee?

4. How do the above issues impact the mandatory pre-screener approval process for voluntary admissions, Tenn. Code Ann. § 33-6-105(1)?

OPINIONS

1. There is no direct conflict between EMTALA and Tenn. Code Ann. §§ 33-6-102 through 33-6-106 and, therefore, no preemption.

2. Individuals may be treated differently based on their source of payment or type of coverage if the legislation bears a rational relationship to a legitimate governmental interest. Tenn. Code Ann. § 33-6-105's applicability to “publicly funded or potentially publicly funded persons” is consistent with its stated purpose and federal requirements to provide treatment in the least restrictive environment. The legislation, therefore, bears a rational relationship to a legitimate governmental interest. For these reasons, there is also no violation of provider non-discrimination obligations under TennCare or other provider contracts. Contract terms are always subject to any legislation that might be enacted.

3. Tenn. Code Ann. §§ 33-6-102 through 33-6-106 do not conflict with the settlement agreement in *Grier v. Neel, et al.*, Case No. 79-3107 in the U.S. District Court for the Middle District of Tennessee.

4. The analysis herein is also applicable to the mandatory pre-screener approval process for voluntary admissions codified in Tenn. Code Ann. § 33-6-105(1).

ANALYSIS

1. The provisions of EMTALA only preempt a state or local law requirement when such requirement directly conflicts with a requirement of EMTALA. 42 U.S.C.A. § 1395dd(f). There is no direct conflict between EMTALA and Tenn. Code Ann. §§ 33-6-102 through 33-6-106 and, therefore, no preemption. The result is the same irrespective of whether or not an examination takes place at a facility that provides in-patient mental health treatment.

EMTALA was enacted to prevent hospitals from refusing to accept or treat patients with emergency medical conditions because they lacked medical insurance. *Thornton v. Southwest Detroit Hospital*, 895 F.2d 1131 (6th Cir. 1989). EMTALA provides that if any individual comes to a hospital emergency department and requests examination or treatment, the hospital must provide appropriate screening to determine whether an emergency medical condition exists. 42 U.S.C.A. §1395dd(a). If the hospital determines that the individual has an emergency medical condition, the hospital must stabilize that condition before discharging or transferring the person, unless a physician certifies that the “medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual” and the transfer is an appropriate transfer. 42 U.S.C.A. §§ 1395dd(b) and (c)(1). An emergency medical condition is defined as a manifestation of acute symptoms sufficiently severe to place in serious jeopardy the health of the individual absent immediate medical attention. 42 U.S.C.A. § 1395dd(e)(1). This definition includes psychiatric manifestations. 59 C.F.R. Part 489 (1994); *see, e.g., Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995). To stabilize an emergency medical condition is “to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility. . . .” 42 U.S.C.A. § 1395dd(e)(3)(A). A transfer is defined as “the movement (including the discharge) of an individual outside a hospital’s facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital” 42 U.S.C.A. § 1395dd(e)(4). EMTALA applies to all hospitals receiving Medicare funds that offer emergency services. 42 U.S.C.A. § 1395dd(e)(2); 59 C.F.R. Part 489 (1994). Civil monetary penalties may be imposed on participating hospitals and physicians responsible for examining, treating, and/or transferring individuals at those hospitals for negligent violations of EMTALA’s requirements. 42 U.S.C.A. § 1395dd(d)(1). A civil cause of action against participating hospitals is also available to individuals personally harmed and medical facilities that suffer a financial loss as a direct result of a violation of EMTALA by the participating hospital. 42 U.S.C.A. § 1395dd(d)(2).

Tenn. Code Ann. §§ 33-6-102 through 33-6-106 establish a community-based screening process designed to provide services for publicly funded service recipients in the least restrictive environment. Tenn. Code Ann. §§ 33-6-102 and 33-6-104(a). A private hospital or treatment resource may also elect to have the screening process applied to privately funded persons at the private hospital or treatment resource. Tenn. Code Ann. § 33-6-104(c). Pursuant to the screening process, a publicly funded or potentially publicly funded person with mental illness or serious emotional disturbance cannot be voluntarily admitted to inpatient treatment without the approval of a mandatory pre-screening agent. Tenn. Code Ann. §§ 33-6-105(1) and 33-6-201 *et seq.* In addition, a publicly funded or potentially publicly funded person with mental illness or serious emotional disturbance may not be involuntarily admitted or committed unless the mandatory pre-screening agent provides one of the two required certificates of need.¹ Tenn. Code Ann. §§ 33-6-105(2) and 33-6-201 *et seq.* The mandatory pre-screening agent must assure that alternative services are available and offered if he or she determines, upon evaluation of the individual, that the individual does not meet admission criteria. Tenn. Code Ann. § 33-6-106(a). If this determination occurs after another professional has approved the person for admission or prepared a certificate of need, the certifying professional must relinquish responsibility for the person to the mandatory pre-screening agent. Tenn. Code Ann. § 33-6-106(b). The individual may not be transported or admitted to a hospital or treatment facility until the mandatory pre-screening agent has completed a certificate of need. Tenn. Code Ann. § 33-6-106(c). Mandatory pre-screening agents are designated by and have only the authority granted by the Commissioner of the Department of Mental Health and Developmental Disabilities. Tenn. Code Ann. § 33-6-104(b) and (c).

Tenn. Code Ann. §§ 33-6-102 through 33-6-106 do not prevent a hospital or its physicians from fulfilling their obligations under EMTALA. The mandatory pre-screening agent would not even be involved until the individual is screened and determined to have an emergency medical condition that might require in-patient treatment. Thereafter, there is nothing in the statute to prevent the hospital from stabilizing the individual before any discharge or transfer could occur, even if responsibility for the person is relinquished to the mandatory pre-screening agent pursuant to Tenn. Code Ann. § 33-6-105(2). In addition, since the mandatory pre-screening agent must assure that alternative services are available and offered if he or she determines, upon evaluation of the individual, that the individual does not meet admission criteria, it does not appear that any necessary and appropriate treatment would not be provided, only that such treatment might be provided in a less restrictive environment. The effective date of Tenn. Code Ann. §§ 33-6-102 through 33-6-106 was March 1, 2001. The Department of Mental Health and Developmental Disabilities has not yet promulgated rules to implement the statute. These rules could be used to clarify the issues raised herein.

¹ These certificates of need must satisfy the statutory requirements for emergency involuntary admission to inpatient treatment or for judicial commitment for involuntary care and treatment set forth in Tenn. Code Ann. §§ 33-6-403 and 33-6-502 respectively. Those statutes require that: (1) the individual have a mental illness or serious emotional disturbance, (2) the individual pose an immediate substantial likelihood of serious harm due to the mental illness or serious emotional disturbance, (3) the individual require care, training, or treatment due to the mental illness or serious emotional disturbance, and (4) all available less drastic alternatives to placement in a hospital or treatment resource are unsuitable to meet the individual's needs.

2. As is described in more detail below, individuals may be treated differently based on their source of payment or type of coverage if the legislation bears a rational relationship to a legitimate governmental interest. Tenn. Code Ann. § 33-6-105's applicability to “publicly funded or potentially publicly funded persons” is consistent with its stated purpose and with federal policy and case law requiring that treatment occur in the least restrictive environment. The legislation, therefore, bears a rational relationship to a legitimate governmental interest. For these reasons, there is also no violation of provider non-discrimination obligations under TennCare or other provider contracts. Contract terms are always subject to any legislation that might be enacted.

Acts of the General Assembly are presumed to be constitutional. *See e.g., Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978). In evaluating the constitutionality of a statute, a court must indulge every presumption and resolve every doubt in favor of constitutionality. *Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995).

A right is fundamental if it is explicitly or implicitly guaranteed by the Constitution. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-4 (1973). A suspect class is one that “commands extraordinary protection from majoritarian political process” because of a “history of purposeful unequal treatment” or “a position of political powerlessness.” *Id.* at 28. “[I]f a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has recognized a very limited number of fundamental rights, such as the right to interstate travel, the right to vote and the right to have access to the courts. *Doe v. Sundquist*, 943 F. Supp. 886, 896 (M.D. Tenn. 1996).

In *Brown v. Campbell County Board of Education*, 915 S.W.2d 407 (Tenn. 1995), the Tennessee Supreme Court discussed the three levels of scrutiny applicable to discrimination claims and concluded that claims in which the class allegedly discriminated against is not a suspect class, should be scrutinized under the rational basis test. *Id.* at 413-14. Recipients of public funding are not a suspect class. *See Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). Under the rational basis test, the inquiry is whether the classification system has a reasonable relationship to a legitimate state interest. “Unless the individual challenging the statute can establish that the differences are unreasonable, the statute must be upheld.” *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993). If the classification is naturally and reasonably related to that which it seeks to accomplish it has passed the rational basis test and has met constitutional standards. *Id.*

Tenn. Code Ann. § 33-6-105's applicability to “publicly funded or potentially publicly funded persons” is consistent with its stated purpose, i.e., to “maintain a system to assure the most appropriate and effective services for publicly funded service recipients.” Tenn. Code Ann. § 33-6-102. The community-based screening process is also consistent with federal policy and case law requiring that treatment occur in the least restrictive environment in that it is “designed to provide alternatives to hospitalization, minimize

length of confinement, promote speedy return to the community and maximize the service recipients' ability to remain in a community setting." Tenn. Code Ann. § 33-6-104(a); *see Olmstead v. Zimring*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). The legislation, therefore, bears a rational relationship to a legitimate governmental interest.

3. Tenn. Code Ann. §§ 33-6-102 through 33-6-106 do not conflict with the settlement agreement in *Grier v. Neel, et al.*, formerly *Bailey v. Tennessee Department of Public Health*, No. 79-3107 (D.TN. filed March 9, 1979). The settlement agreement applies to the TennCare program and its contractors, not to general state law. *Grier's* requirement that a managed care contractor provide at least two business days' notice of certain provider-initiated reductions, terminations or suspensions of services is not applicable, as Tenn. Code Ann. §§ 33-6-102 through 33-6-106 do not involve a reduction, termination or suspension of services, but rather an initial determination of whether or not to admit an individual to in-patient mental health treatment. Additionally, the statutes do not prevent a person from exercising any appeal rights established under the settlement agreement.

4. The above analysis is also applicable to the mandatory pre-screener approval process for voluntary admissions codified in Tenn. Code Ann. § 33-6-105(1).

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