S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 02-088

TennCare Coverage of Drug Treatment

QUESTIONS

Shelby County operates a general sessions drug treatment court. Drug treatment participants are selected from a pool of non-violent drug offenders. Participants are placed in an intensive drug treatment program. Generally, participants enter guilty pleas on the front end, with their sentencing suspended pending completion of the treatment program. The main features of the drug treatment are hands-on monitoring by the judge, frequent random drug screens, and appropriate sanctions for failure to comply with program requirements (sometimes including a day or so in jail). Upon successful completion, the case is dismissed. If a defendant does not adhere to the treatment program, he or she is taken out of the program, and the case is handled in the normal fashion for such criminal offenses.

Currently, federal and city funding covers treatment. However, the court is not operating at its full potential due to the lack of treatment dollars.

1. May defendants who participate in the drug treatment court program and who otherwise meet the criteria of TennCare eligibility have their drug treatment costs covered by TennCare?

2. Specifically, does TennCare Rule 1200-13-12-.02(3)(b)4 or any other provision(s) of the Bureau of TennCare rules prohibit their eligibility?

OPINIONS

1-2. TennCare program rules and regulations impose at least three (3) obstacles to obtaining TennCare coverage of the costs of the drug treatment court program for TennCare enrollees who are participants in the treatment program. Depending upon the circumstances, these obstacles may preclude such coverage, in whole or in part.

ANALYSIS

In the first place, Tenn. Comp. Adm. R. & Regs. 1200-13-12-.02(3)(b)4 (March 2002), concerning "Technical Eligibility Requirements for TennCare," provides that a person is not eligible for either of the non-Medicaid categories of TennCare (*i.e.*, the "uninsured" and "uninsurable" categories) if he or she is an "inmate." Tenn. Comp. Adm. R. & Regs. 1200-13-12-.02(5)(b)15 (March 2002), concerning "Loss of Eligibility," states that non-Medicaid eligibility for TennCare shall cease when an individual becomes incarcerated as an inmate. "Inmate" is defined at Tenn. Comp. Adm. R. & Regs. 1200-13-12-.01 (March 2002) as:

> [A]n individual confined for a criminal offense in a local, state, or federal prison, jail, youth development center, or other penal or correctional facility, including a furlough from such facility.

Therefore, if a TennCare enrollee becomes an "inmate," as defined above, he or she may be disenrolled from the TennCare program. At such time, of course, TennCare coverage would be unavailable for any of the individual's medical costs, including the costs of any drug treatment program.

Second, Tenn. Comp. Adm. R. & Regs. 1200-13-12-.10 (March 2002), entitled "Exclusions," provides that TennCare managed care organizations and behavioral health organizations are not obligated to pay for non-covered services. Non-covered services include:

> Medical services for individuals committed to penal institutions, whether, local, state or federal.

Tenn. Comp. Adm. R. & Regs. 1200-13-12-.10(4) (March 2002). This exclusion is consistent with federal Medicaid regulations, which preclude federal financial participation ("FFP") in state Medicaid programs[1] for services provided to "[i]ndividuals who are inmates of public institutions as defined in [42 C.F.R.] § 435.1009." 42 C.F.R. § 435.1008(a)(1). 42 C.F.R. § 435.1009 defines an "inmate of a public institution" as a person who is "living in a public institution." It defines "institution" as "an establishment that furnishes (in single or multiple facilities) food, shelter, and some treatment or services to four or more persons unrelated to the proprietor." *Id.* "Public institution" is defined as "an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control," and includes "correctional or holding facilities for individuals who are prisoners, have been arrested or detained pending disposition of charges, or are held under court order as material witnesses or juveniles."

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[1]Federal dollars (FFP) provide approximately two-thirds of the funding of the TennCare program.

Id.

Under state law, state agencies are precluded from funding care or services where federal resources are not available. Tenn. Code Ann. § 71-5-106(a)(1) mandates that eligibility for public medical assistance "shall be determined in a manner which will ensure that medical assistance is provided, within the limits of available resources subject to federal financial participation." *See also* Tenn. Atty. Gen. Op. No. 97-010 (February 4, 1997), in which we cited to the above federal regulations and state law, and opined that the TennCare program may properly deny coverage of medical charges incurred by an incarcerated TennCare enrollee, either before or after he or she is convicted of criminal charges.

Therefore, under the above-cited regulations, if a TennCare enrollee is committed to a local, state or federal penal institution or becomes an inmate of a public institution, his or her medical expenses, including the costs of any drug treatment program, may be excluded from coverage under the TennCare program.

Finally, Tenn. Comp. Adm. R. & Regs. 1200-13-12-.09 (March 2002), entitled "Third Party Resources," provides, in pertinent part, that "TennCare shall be the payor of last resort, except where contrary to federal or state law." TennCare regulations define "third party" as "any entity or funding source other than the enrollee or his/her responsible party, which is or may be liable to pay for all or part of the cost of medical care of the enrollee." Tenn. Comp. Adm. R. & Regs. 1200-13-12-.01 (March 2002). Concerning your inquiry, this regulation would require that other funding sources, such as the federal and city funding of the drug treatment court program which you have described, be exhausted before TennCare coverage of the program would be obligated.[2]

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[2]In this opinion, we have discussed TennCare regulations that have been in place for many years. Effective July 1, 2002, the federal Centers for Medicare and Medicaid Services (CMS) has approved a new TennCare Demonstration Project for five (5) years. While this new TennCare waiver makes substantial changes to many aspects of the program, the regulatory provisions which have been discussed in this opinion are largely unchanged, as is set out below.

In implementation of the new waiver, the TennCare program has filed new public necessity rules and regulations, pursuant to Tenn. Code Ann. § 4-5-209. These include the following regulatory provisions:

1. Tenn. Comp. Adm. R. & Regs. 1200-13-14-.02(2)(a)6 (July 2002), concerning "Technical and Financial Eligibility Requirements for TennCare Standard," provides that a person is not eligible for TennCare Standard (*i.e.*, that part of the TennCare program which covers eligible persons who do not qualify for Medicaid) if he or she is an "inmate." Tenn. Comp. Adm. R. & Regs. 1200-13-14-.02(5)(r) (July 2002), concerning "Loss of Eligibility," states that eligibility for TennCare Standard shall cease when an individual becomes incarcerated as an inmate. "Inmate" is defined at Tenn. Comp. Adm. R. & Regs. 1200-13-14-.01(36) (July 2002) as:

> [A]n individual confined for a criminal offense in a local, state, or federal prison, jail, youth development center, or other penal or correctional facility, including a furlough from such facility.

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2. Tenn. Comp. Adm. R. & Regs. 1200-13-14-.10(1)(c) (July 2002) and 1200-13-13-.09(1)(c) (July 2002), entitled "Exclusions," and pertaining to TennCare Standard and TennCare Medicaid enrollees, respectively, provide that TennCare managed care contractors cannot authorize or pay for non-covered services, and that such non-covered services include "[m]edical services for individuals committed to penal institutions, whether local, state or federal."

3. Tenn. Comp. Adm. R. & Regs. 1200-13-14-.09(6) (July 2002) and 1200-13-13-.08(6) (July 2002), entitled "Third Party Resources," and pertaining to TennCare Standard and TennCare Medicaid enrollees, respectively, provide that "TennCare shall be the payor of last resort, except where contrary to federal or state law."