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Opinion No. 07-42

Operating Guidelines of the Division of Mental Retardation Services

QUESTION

Would the Division of Mental Retardation Services be required to promulgate "operating guidelines" as rules under the Uniform Administrative Procedures Act ("UAPA") if Tenn. Code Ann. §§33-1-309(b) and (c) are repealed?

OPINION

No. As the "operating guidelines" are applicable to providers through contract with the Division of Mental Retardation Services, they concern only the internal management of state government and do not affect the private rights, privileges or procedures available to the public so as to fall within the exception to the definition of a "rule" under the UAPA.

ANALYSIS

Under the provisions of Tenn. Code Ann. §33-1-109, the legislature has directed that the "operating guidelines" of the Division of Mental Retardation Services ("DMRS") be adopted pursuant to designated procedures, including notice and the opportunity for comment. As defined in this statute, "operating guidelines" means:

> . . . instructions to service providers that the division deems or intends to be mandatory upon such providers. Interpretive instructions, other nonmandatory guidance from the division and rules adopted pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, are not operating guidelines.

Tenn. Code Ann. §33-1-109(b).

DMRS has incorporated its "operating guidelines" within its Provider Manual. The DMRS Provider Manual is a comprehensive manual intended to outline the basic principles and requirements for delivery of quality services to persons with mental retardation. The Provider

Manual includes both mandatory and nonmandatory instructions for providers. Not all sections of the Provider Manual are applicable to all providers.

The UAPA defines "rule" as an "agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency." Tenn. Code Ann. §4-5-102(10). DMRS is an "agency" as that term is defined in Tenn. Code Ann. §4-5-102(2):

> "Agency" means each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases.

Mental Retardation Services is currently operating as a division of the Department of Finance and Administration. In 1996, the oversight of the management and operation of the developmental centers and community services for individuals with mental retardation was transferred by Executive Order from the Department of Mental Health and Developmental Disabilities (formerly Department of Mental Health and Mental Retardation) to the Department of Finance and Administration. Executive Order Number 9 (2/7/96) and Executive Order Number 10 (10/14/96). *See also* Executive Order Number 21 (7/29/99) and Executive Order Number 30 (3/8/02). The Department of Mental Health and Developmental Disabilities, however, retains statutory authority to promulgate rules as required by Title 33. Tenn. Code Ann. §33-1-309. Therefore, unless the "operating guidelines" fall within one of the statutory exceptions to the definition of a "rule" under Tenn. Code Ann. §4-5-102(10), they would be required to be promulgated as rules under the UAPA absent the provisions of Tenn. Code Ann. §§33-1-309(b) and (c).

The UAPA's definition of a "rule" specifically excludes "statements concerning only the internal management of state government and not affecting private rights, privileges or procedures available to the public." Tenn. Code Ann. §4-5-102(10)(A). As opposed to licensure requirements for providers, the "operating guidelines" were created as guidelines to be imposed only on those providers under contract with DMRS.[1] As such, the "operating guidelines" are statements concerning only the internal management of DMRS and do not affect private rights, privileges or procedures available to the public. The duty to comply with the provisions of the "operating guidelines" is a requirement of the contract with DMRS. Imposition of any penalty for failure to comply with the "operating guidelines" is only allowed as provided in the provider contract.[2]

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[1]Licensed providers who are providing services to individuals outside of any contract with DMRS are not required to comply with the "operating guidelines" as a requirement of their licensure. The "operating guidelines" apply only to those providers seeking reimbursement from the State under a contract with DMRS.

[2]Although sanctions are imposed as provided in the provider contract, the legislature has directed that proceedings by DMRS to impose sanctions upon licensed providers be conducted in accordance with the UAPA. Tenn. Code Ann. §33-2-408.

Accordingly, as terms of a state contract, the "operating guidelines" would not be required to be promulgated as rules under the UAPA if Tenn. Code Ann. §§33-1-309(b) and (c) are repealed.[3]

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[3]In 2006, the legislature amended Tenn. Code Ann. §33-1-309 to include a requirement that Intermediate Care Facilities for persons with mental retardation (ICF/MR) comply with "rules and operating guidelines made applicable to ICF/MR facilities" by DMRS. As these facilities are not under contract with DMRS, application of the operating guidelines to such facilities would need to be implemented through rules promulgated under the UAPA.