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Opinion No. 08-119

Application of 2002 Pub. Chap. 652

QUESTION

Does 2002 Pub. Chap. 652 prohibit licensed home care organizations providing professional support services from serving persons with mental retardation in places other than in their regular or temporary place of residence, such as in a mental retardation adult habilitation day treatment facility?

OPINION

No, we do not read the applicable statutory language as expressly prohibiting provision of professional support services to a person with mental retardation in places other than the person's residence, when that person also receives services from that home care organization in his or her regular or temporary place of residence. Therefore, absent adoption of a more express prohibition, in our opinion a licensed home care organization providing professional support services may do so in an appropriate non-residential setting, such as in a mental retardation adult habilitation day treatment facility, to persons with mental retardation who also receive services from that organization in their regular or temporary place of residence.

ANALYSIS

2002 Pub. Chap. 652 amended certain sections of Titles 33 and 68 of the Tennessee Code regarding professional support services provided to individuals with mental retardation or developmental disabilities. These amendments now are codified primarily in Title 68. Tenn. Code Ann. § 68-11-201(36) defines "professional support services" as "nursing and occupational, physical or speech therapy services provided to individuals with mental retardation or developmental disabilities pursuant to a contract with the state agency financially responsible for such services." Tenn. Code Ann. § 68-11-201(18)(D) reads, in pertinent part:

> The [Board for Licensing Health Care Facilities] shall establish, by rules, standards of authorization for a home care organization to be qualified to provide home health services, home medical equipment services or hospice services. . . The standards for licensure of professional support services shall be the same as those applicable to personal support services agencies licensed under title 33; provided,

> that the [Department of Health] adopts by rule additional standards specifically for professional support services after consultation with the commissioner of mental health and developmental disabilities.

Tenn. Code Ann. § 68-11-201(18)(A) defines the term "home care organization." This definition states that a "home care organization" "provides home health services, home medical equipment services, professional support services or hospice services to patients [1] on an outpatient basis in either their regular or temporary place of residence." An entity is a "home care organization" if it does any of the actions described in that section. *Id.* One such action is when an entity "[c]ontracts to provide professional support services with the state agency financially responsible for services to individuals with mental retardation or developmental disabilities." [2] Tenn. Code Ann. § 68-11-201(18)(A)(v).

Because Tenn. Code Ann. § 68-11-201(18)(A)'s definition of "home care organization" includes the phrase "provides . . . professional support services. . . to patients on an outpatient basis in either their regular or temporary place of residence," you question whether professional support services provided through home care organizations must be provided *exclusively* in a service recipient's regular or temporary place of residence. For the reasons that follow, we conclude that the answer is no.

In our view, the definition of "home care organization" set out at Tenn. Code Ann. § 68-11-201(18)(A) does not contain language expressly prohibiting provision of professional support services in places in addition to a service recipient's residence. We believe that this conclusion is supported by related provisions of Titles 33 and 68, applicable licensure regulations, and other legal requirements of the Division of Mental Retardation Services. A primary rule of statutory construction is that statutes relating to the same subject matter must be construed *in pari materia* and should be harmonized if practicable. *State ex rel. Baugh v. Williamson County Hospital*, 679 S.W.2d 934, 936 (Tenn. 1984). Statutes relating to the same subject or having the same general purpose shall be construed *in pari materia* so as to make the legislative scheme operate in a consistent and uniform manner. *State v. Hughes*, 512 S.W.2d 552 (1974). The construction of one such statute may be aided by considering the words and the legislative intent indicated by the language of another statute. *Belle-Aire Village, Inc. v. Ghorley*, 574 S.W.2d 723 (1978).

We began this analysis by examining Tenn. Code Ann. § 68-11-201(18)(D), a related statute. It provides that the standards for licensure of "professional support services" shall be the same as

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[1]The statutes and rules cited in this opinion refer variously to "patients," "individuals," "consumers," and "service recipients," and we use these terms interchangeably to mean persons with mental retardation.

[2]The Division of Mental Retardation Services, within the Department of Finance and Administration, is both the operational administrative agency for Medicaid waiver programs for people with mental retardation, as well as the state agency responsible for the administration of other programs that provide services to people with mental retardation.

those applicable to "personal support services agencies" licensed under title 33.[3] We have thus examined Tennessee Department of Mental Health and Developmental Disabilities licensure rules that set out the minimum program requirements for such personal support services agencies, *i.e.*, Tenn. Adm. R. & Regs. 0940-5-38-.01, *et seq*. These rules include a definition of "personal support services." Under the definition, certain services are considered "personal support services," even though they are not provided solely within the strict confines of the home setting. These include "shopping" and "[p]ersonal assistance to access community activities such as transportation, social, recreational or other personal activities." Tenn. Adm. R. & Regs. 0940-5-38-.01(5).

We find this significant. First, the statutory definition of "personal support services" found at Tenn. Code Ann. § 33-2-402(6) includes, as does Tenn. Code Ann. § 68-11-201(18)(A)'s definition of "home care organization," language concerning provision of such services in a recipient's residence. Thus, Tenn. Code Ann. § 33-2-402(6) defines "personal support services" as "nursing consultation, education services, and other personal assistance services as defined by rule, which are provided to individuals with substantial limitation in two (2) or more major life activities in either their regular or temporary residences . . ." However, as is demonstrated by its regulatory definition of "personal support services" contained at Tenn. Adm. R. & Regs. 0940-5-38-.01(5), the Department of Mental Health and Developmental Disabilities has not interpreted the statutory language as prohibiting the provision of personal support services in non-residential settings to persons also receiving those services in their residences.

We have also examined the Board for Licensing Health Care Facilities' rules concerning licensure standards for home care organizations providing professional support services; *i.e.*, Tenn. Adm. R. & Regs. 1200-8-34-.01, *et seq.* These are the "additional standards specifically for professional support services" referenced in Tenn. Code Ann. § 68-11-201(18)(D). Such professional support services are provided by licensed professionals, by licensed home care organizations, or by entities referred to as "waiver service agencies."[4] No provision of these rules expressly restricts provision of professional support services solely to the service recipient's residence.

Finally, we note that the Tennessee Home and Community Based Services Waiver for the Mentally Retarded and Developmentally Disabled Under § 1915(c) of the Social Security Act ("Statewide" MR Waiver) also anticipates that certain professional support services may be provided

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[3]As noted above, Tenn. Code Ann. § 68-11-201(18)(D) also directs the Department of Health to adopt by rule additional standards specifically for professional support services after consultation with the Commissioner of the Department of Mental Health and Developmental Disabilities.

[4]The Tennessee Home and Community Based Services Waiver for the Mentally Retarded and Developmentally Disabled Under § 1915(c) of the Social Security Act ("Statewide" MR Waiver) requires that nursing services, occupational therapy services, physical therapy services and speech therapy services each be licensed by the Department of Health under Tenn. Adm. R. & Regs. 1200-8-34-.01, *et seq*. This requirement applies to all professional support services providers. Appendix B-2 (A), "Provider Qualifications, Licensure and Certification Chart." (A copy of the "Statewide" MR waiver may be accessed at http://www.state.tn.us/tenncare/forms/statewiderenewalrequest.pdf; visited 3/14/08).

outside the strictly residential setting to persons who also receive those services within their residences: for example, nursing services "shall be provided in home and community settings, as specified in the Plan of Care, excluding inpatient hospitals, nursing facilities, and [ICFs/MR]." Appendix B-1(t), "Extended State plan services." This is consistent with state policy, as expressed in Tenn. Code Ann. § 33-1-201: "[i]t is the policy of the state to plan on the basis of and to promote the use of private and public service providers, without regard for funding source, to achieve outcomes and accomplishments that create opportunities for service recipients to have the greatest possible control of their lives in the least restrictive environment that is appropriate for each person."

In summary, we do not read the language of 2002 Pub. Chap. 652 as expressly prohibiting home care organizations providing professional support services from providing such services in places other than service recipients' residences, when those persons also receive such services in their residences, particularly when that language is read together with related provisions of Titles 33 and 68, applicable licensure regulations of the Departments of Health and Mental Health and Developmental Disabilities, and other legal requirements of the Division of Mental Retardation Services. Therefore, absent adoption of a more express prohibition, in our opinion a licensed home care organization providing professional support services may do so in an appropriate non-residential setting, such as in a mental retardation adult habilitation day treatment facility, to persons with mental retardation who also receive services from that organization in their regular or temporary place of residence.

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