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Opinion No. 09-42

"New Beds" - Developmental Centers – Tenn. Code Ann. § 71-5-105(b)(2)

QUESTIONS

1. Under Tenn. Code Ann. § 71-5-105(b)(2), which increased the cap on the number of private ICF/MR beds to permit 160 "new beds" by 2009 for "persons from developmental centers," if a person from the developmental centers dies or is discharged after admission to a "new bed," may that space be filled only by another person from a developmental center?

2. If a "new bed" becomes available but no person in the developmental centers meets the facility's admission criteria, may that bed be filled by someone not then in a developmental center?

3. Is a person recently transferred from a developmental center to a new placement, e.g., a waiver program, eligible for a "new bed?"

4. As the number of persons in the developmental centers diminishes and is eventually reduced to zero, can these "new beds" be filled with other persons eligible for ICF/MR facilities?

OPINIONS

1. Yes. Tennessee Code Annotated § 71-5-105(b)(2) expressly provides that "[t]hese 'new beds' shall be filled by persons from the developmental centers."

2. Yes. We believe that the requirement that "[t]hese 'new beds' shall be filled by persons from the developmental centers" can be reasonably interpreted to include "class members" previously, but not presently, in a developmental center who require an ICF/MR level of care.

3. Yes. We believe that "class members" recently transferred from a developmental center to new placements could be eligible for a "new bed" as "persons from the developmental centers."

4. No. We do not believe that non-class members would be eligible for a "new bed" absent some change in the statute.

ANALYSIS

1. Until 2006, the total number of beds in private for-profit and private not-for-profit intermediate care facilities for persons with mental retardation (ICF/MR) facilities was capped at six hundred sixty-eight (668) statewide. Tenn. Code Ann. § 71-5-105(b)(1). Beginning July 1, 2006, the Legislature increased the "total number of beds in ICF/MR facilities . . . by forty (40) beds per year for the next four (4) years, resulting in a maximum of eight hundred twenty-eight (828) beds by July 1, 2009."[1] Tenn. Code Ann. § 71-5-105(b)(2). The Legislature further required that "these new beds shall be filled by persons from the developmental centers." *Id*.

The first question is whether, if a person from the developmental centers dies or is discharged after admission to a "new bed," that bed could be filled only by another person from a developmental center. Our role in statutory interpretation is to ascertain and give effect to the intention and purpose of the legislature. *Eastman Chemical Company v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004) (citations omitted). "Legislative intent is determined 'from the natural and ordinary meaning of the language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.' " *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007) (quoting *Ozborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004)).

In this instance, the Legislature required that "these new beds shall be filled by persons from the developmental centers." Tenn. Code Ann. § 71-5-105(b)(2). "[W]hen the word 'shall' is used in statutes it is ordinarily construed as being mandatory and not discretionary." *JJ & TK Corp. v. Board of Com'rs of City of Fairview*, 149 S.W.3d 628, 631 (Tenn.Ct.App. 2004) (quoting *Gabel v. Lerma*, 812 S.W.2d 580, 582 (Tenn.Ct.App.1990)). Therefore, the Legislature explicitly mandated that these "new beds" be filled only by a person from a developmental center.

2. The second question is whether, if a "new bed" becomes available but no person in the developmental centers meets the facility's admission criteria, that bed could be filled by someone not then in a developmental center. Your question appears to raise the issue of whether a person who is not presently but was at one time in a developmental center could qualify for a "new bed." Since the Legislature mandated that these "new beds" be filled only by a person from a developmental center, the answer to this question turns on the meaning of the term "person from a developmental center." The statute does not define this term; therefore, we must again rely on principles of statutory construction to ascertain its meaning. *State v. Alford*, 970 S.W.2d 944, 945 (Tenn. 1998).

> When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's

[1] When initially introduced, this language increased the number of ICF/MR beds to 868 by adding 50 beds per year for four years and required the Division of Mental Retardation Services to fill these beds either with persons residing in a state developmental center or with persons on the waiting list maintained by DMRS for persons eligible for and seeking ICF/MR services or home and community based waiver services. SB 2958/HB 3026, 104th General Assembly (TN 2006). Amendment 1 to House Bill 3026, which reduced the cap to 828 beds to be filled by persons from the developmental centers, was subsequently enacted. 2006 Tenn. Pub. Acts Ch. 761.

> application. Where an ambiguity exists, we must look to the entire statutory scheme and elsewhere to ascertain legislative intent and purpose.

Eastman Chemical Company, 151 S.W.3d at 507 (citations omitted).

It is our understanding that Tenn. Code Ann. § 71-5-105(b)(2) was enacted to assist the State to comply with the various federal court orders and settlements governing the care and treatment of class members in the cases *United States v. State of Tennessee*, No. 92-2062 (W.D. Tenn. 1992)[2] and *People First of Tennessee, et al., v. Clover Bottom Developmental Center, et al.*, No. 95-1227 (M.D. Tenn. 1995).[3] While some of these class members remain at one of the three state developmental centers, many class members have left the developmental centers for placements in the community. Therefore, we believe that the term "person from a developmental center" could be reasonably interpreted to include a class member who has already left a developmental center for a community placement who subsequently requires an ICF/MR level of care.

3. The third question is whether a person recently transferred from a developmental center to a new placement, e.g., a waiver program, would be eligible for a "new bed." As discussed above, we believe that the term "person from a developmental center" could be reasonably interpreted to include a class member who has already left a developmental center for a community placement who subsequently requires an ICF/MR level of care.

4. The last question is whether, as the number of persons in the developmental centers diminishes and is eventually reduced to zero, these "new beds" can be filled with other persons eligible for ICF/MR facilities. Inasmuch as the statute explicitly requires that "these new beds shall be filled by persons from the developmental centers" and in view of the discussion above, we do not believe that non-class members would be eligible for a "new bed" absent some change in the statute.

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Attorney General and Reporter

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[2] The Order Granting Class Certification, entered September 26, 1995, defines "class members" as:

> All persons who on or after December 12, 1989, have resided, or are residing or will reside at the Arlington Developmental Center; all persons who have been transferred to Arlington from other settings such as intermediate care facilities or skilled nursing facilities but remain defendants' responsibility; and all persons at risk of being placed at Arlington Developmental Center.

[3] The Settlement Agreement defines class members as "all persons who presently reside or will reside at Clover Bottom Developmental Center (including the Harold Jordan Center), Greene Valley Developmental Center or Nat T. Winston Developmental Center, and all persons who have resided there at any time since December 22, 1992."

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