STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

October 27, 2014

Opinion No. 14-95

Regulation of Off-Campus Hospital-Based Facilities for Outpatient Services

QUESTIONS

1. Are there any restrictions on the type of outpatient diagnostic and therapeutic services that can be provided in an off-campus hospital-based facility for such outpatient services, assuming (a) the professional staff members at the facility are properly licensed and acting within the scope of their licenses, (b) no service is being provided that would require a certificate of need under Tenn. Code Ann. § 68-11-1607(a)(4), and (c) the facility complies with life safety and other licensing standards applicable to the type of diagnostic and therapeutic services provided?

2. Does the phrase "outpatient diagnostic and therapeutic services" in Tenn. Code Ann. § 68-11-209(f) include examination, evaluation, and treatment of patients who need care on an emergency basis, but who do not require hospitalization?

3. Is there any prohibition against a hospital-based facility providing outpatient diagnostic and therapeutic services on an emergency basis 24 hours per day, 7 days per week?

4. Is a hospital required to obtain a certificate of need in order to establish an off-campus facility for outpatient diagnostic and therapeutic services when the facility would cost less than $5 million and no services that would be provided require a certificate of need under Tenn. Code Ann. § 68-11-1607(a)(4)?

OPINIONS

1 to 3. The Tennessee Department of Health has reasonably interpreted Tenn. Code Ann. § 68-11-209(f) as not imposing restrictions on the type of outpatient diagnostic and therapeutic services that can be provided in an off-campus hospital-based facility for outpatient diagnostic and therapeutic services, so long as the hospital has sole administrative control over the facility and the facility complies with all applicable laws, regulations, and standards governing its establishment and operation, including building requirements, life safety requirements, and other requirements applicable to the particular services being provided. Thus, the term "outpatient diagnostic and therapeutic services" in § 68-11-209(f) would include 24-

hour-per-day/7-day-per-week examination, evaluation, and treatment of patients who need care on an emergency basis but who do not require hospitalization.

4. As a general matter, no. But there are exceptions. For example, the Tennessee Health Services and Development Agency has reasonably interpreted Tenn. Code Ann. § 68-11-1607(a)(1) as requiring a certificate of need for a free-standing, off-campus hospital emergency department.

ANALYSIS

1 to 3. Only one Tennessee statute addresses off-campus hospital-based facilities for outpatient diagnostic and therapeutic services. Tenn. Code Ann. § 68-11-209(f) provides as follows:

> Notwithstanding any rules and regulations of the [Board for Licensing Health Care Facilities], a hospital may provide outpatient diagnostic and therapeutic services at locations other than the hospital's main campus without obtaining a waiver from the board; provided, that such other locations are under the sole control of the hospital.

The Tennessee Department of Health licenses and regulates hospitals and other health-care facilities through the Board for Licensing Healthcare Facilities. *See* Tenn. Code Ann. §§ 68-11-202(a), -203.[1] No statute, however, defines the "outpatient diagnostic and therapeutic services" that may be provided by such hospital-based facilities under § 68-11-209(f).[2] And there is no indication, either in this subsection's enacting legislation or elsewhere, whether or to what extent the General Assembly intended to restrict the meaning of that term for purposes of this statute.[3]

---

[1] Subsection (f) was added to § 68-11-209 in 1999, *see* 1999 Tenn. Pub. Acts, ch. 353, § 2, but it is unclear what particular Board rules the legislation was meant to override.

[2] The term "outpatient diagnostic services" is defined by statute, but only for purposes of defining an "outpatient diagnostic center." *See* Tenn. Code Ann. § 68-11-201(30)(A). The definition of "outpatient diagnostic center" appears not to include an off-campus hospital-based facility, because it expressly excludes a facility where "the outpatient diagnostic services are provided as the services of *another* licensed healthcare institution that reports such . . . services on its joint annual report." *Id.* (emphasis added).

[3] The remainder of the 1999 legislation that enacted this subsection addressed the Department of Health's review of building plans for health-care facilities. *See* 1999 Tenn. Pub. Acts, ch. 353, §§ 1, 3. And the legislative history reveals only that this subsection was intended to "eliminate the requirement that hospitals obtain a waiver of licensure to provide outpatient services at locations other than the hospital's main campus as long as they are under the sole control of the hospital." House Health & Human Resources Committee, Remarks of Rep. Gary Odom on H.B. 1054, 101st General Assembly (Apr. 27, 1999).

This Office understands, though, that the Department of Health interprets the plain language of Tenn. Code Ann. § 68-11-209(f) as permitting hospitals to establish facilities providing outpatient diagnostic and therapeutic services at off-campus locations, provided that the establishing hospital has sole administrative control over any such outpatient facility. The facility must also comply with all applicable laws, regulations, and standards governing its establishment and operation, including building requirements, life safety requirements, and other requirements applicable to the particular services being provided at the facility. This is a fair reading of the statute, and a state agency's interpretation of a statute that the agency is charged to enforce is entitled to great weight in determining legislative intent. *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998) (citing *Nashville Mobilphone Co., Inc. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976)).

The Department also views Tenn. Code Ann. § 68-11-209(f) as not imposing restrictions on the type of outpatient diagnostic and therapeutic services that can be provided in an off-campus hospital-based facility for outpatient diagnostic and therapeutic services. Thus, under this view, the phrase "outpatient diagnostic and therapeutic services" would include 24-hour-per-day/7-day-per-week examination, evaluation, and treatment of patients who need care on an emergency basis, but who do not require hospitalization. This interpretation of the statute is not unreasonable, particularly in the absence of any evidence of legislative intent to the contrary. This conclusion assumes, however, that such outpatient facility is in full compliance with all staff-licensing, certificate-of-need, and life safety requirements, as well as all other applicable standards and regulations.

4. The Tennessee Health Services and Planning Act, Tenn. Code Ann. §§ 68-11-1601 to -1631, addresses the requirements for certificates of need. A "certificate of need" is defined as a permit granted by the Tennessee Health Services and Development Agency ("HSDA") for "the establishment or modification of a health care institution, facility, or covered health service, at a designated location." Tenn. Code Ann. § 68-11-1602(2). *See id.* § 68-11-1607(a). A "health care institution" means "any agency, institution, facility or place, whether publicly or privately owned or operated, that provides health services and that is one (1) of the following: nursing home; recuperation center; hospital; ambulatory surgical treatment center; birthing center; mental health hospital; intellectual disability institutional habilitation facility; home care organization or any category of service provided by a home care organization for which authorization is required under part 2 of [Chapter 11 of Title 68]; outpatient diagnostic center; rehabilitation facility; residential hospice; or nonresidential substitution-based treatment center for opiate addiction." Tenn. Code Ann. § 68-11-1602(7)(A). A "facility" means "any real property or equipment owned, leased, or used by a health care institution for any purpose, other than as an investment." Tenn. Code Ann. § 68-11-1602(6). A "health service" means "clinically

related services such as diagnostic, treatment or rehabilitative services, and includes those services specified as requiring a certificate of need under § 68-11-1607." Tenn. Code Ann. § 68-11-1602(8).

Tenn. Code Ann. § 68-11-1607(a)(4) identifies the health-care services for which a certificate of need is required.[4] Tenn. Code Ann. § 68-11-1607(a)(2) provides that the modification of a hospital, including renovations and additions to facilities, requiring a capital expenditure greater than $5 million requires a certificate of need. Under these authorities, the establishment of an off-campus hospital facility for outpatient diagnostic and therapeutic services that would neither require a capital expenditure greater than $5 million nor initiate a service identified in § 68-11-1607(a)(4) would not generally require a certificate of need.

But there are exceptions. For example, the HSDA staff has issued one or more staff-determination letters[5] concluding that there is no authority for considering a project to establish a free-standing, off-campus hospital emergency department as other than the establishment of another hospital, for which a certificate of need would be required under Tenn. Code Ann. § 68-11-1607(a)(1).

> Emergency medical services are part and parcel of a hospital itself, and are specifically delineated as hospital services in [Tenn. Comp. R. & Regs. Chapter 1200-08-01]. Free-standing emergency departments are themselves acute-care hospitals, with both diagnostic services and multiple treatment rooms (general-purpose, trauma, cardiac, orthopedic, isolation) anticipating upwards of tens of thousands of patient visits annually arriving by ambulance and drive-in. By law, emergency departments must accept all emergent patients, including extremely serious (trauma, etc.) patients, 24 hours each day, as opposed to providing ancillary services to less distressed patients in an office setting. Life-threatening conditions requiring stabilization and transfer

---

[4] That statute requires a certificate of need for the initiation of any of the following health-care services: burn unit, neonatal intensive care unit, open heart surgery, extracorporeal lithotripsy, magnetic resonance imaging, cardiac catheterization, linear accelerator, positron emission tomography, swing beds, home health, hospice, psychiatric, rehabilitation or hospital-based alcohol and drug treatment for adolescents provided under a systematic program of care longer than twenty-eight (28) days, or opiate addiction treatment provided through a nonresidential substitution-based treatment center for opiate addiction.

[5] Tenn. Code Ann. § 68-11-1606(c)(4) vests the HSDA's executive director with the duty of overseeing the issuance of responses to requests for a determination regarding the applicability of the Health Services and Planning Act. HSDA rules provide that staff determinations represent the considered position of staff but do not necessarily represent the position of the HSDA. *See* Tenn. Comp. R. & Regs. 0720-08-.03(3).

> by ambulance to a full-service facility are not only anticipated, but invited.

Staff Determination Letter No. 2012-SDL-011, Erlanger Bledsoe Free Standing ED, Tenn. Health Servs. and Dev. Agency (June 19, 2012).

This is a reasonable interpretation of the applicable law. Tenn. Code Ann. § 68-11-1607(a)(1) requires a certificate of need for the establishment of "any kind of health care institution." A certificate of need would therefore be required for the establishment of a free-standing, off-campus hospital emergency department. [6]

HERBERT H. SLATERY III
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

SUE A. SHELDON
Senior Counsel

Requested by:

The Honorable Courtney L.D. Rogers
State Representative
110A War Memorial Building
Nashville, Tennessee 37243

[6] Likewise, if a hospital proposed to establish a facility to be primarily operated for the performance of outpatient surgical procedures at a new, off-campus location, the facility may qualify as an "ambulatory surgical treatment center" under § 68-11-201(3), for which a certificate of need would be required.