

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 2, 2015

Opinion No. 15-15

House Bill 604/Senate Bill 567, 109th Gen. Assemb. (Tenn. 2015), and House Bill 413/Senate Bill 583, 109th Gen. Assemb. (Tenn. 2015) - Licensure Standards for Facilities Providing Services to Disabled Persons

Question 1

Do the provisions of House Bill 604/Senate Bill 567, 109th Gen. Assemb. (Tenn. 2015), and House Bill 413/Senate Bill 583, 109th Gen. Assemb. (Tenn. 2015), violate the “most integrated setting” requirement of the Americans with Disabilities Act?

Opinion 1

We cannot predict with any degree of certainty what impact the statutory amendments in these proposed bills would have on the availability of cost-effective home and community-based residential alternatives to institutional care for the elderly and adults with physical disabilities. But to the extent that the imposition of more onerous licensure requirements on the providers of such home and community-based alternatives operates to increase the risk of unjustified institutional placement of such individuals or to otherwise impede the State’s obligation to administer its services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, the proposed amendments could place the State at risk of legal challenge under the Americans with Disabilities Act.

Question 2

Do the bills comply with the United States Supreme Court’s opinion in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999)?

Opinion 2

See response to Question 1.

ANALYSIS

Title II of the Americans with Disabilities Act (“ADA”) prohibits discrimination based on disability in the provision of public services by governmental entities. 42 U.S.C. § 12132. The regulations that implement the ADA’s discrimination prohibition require that public entities “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities” and “make reasonable modifications in policies,

practices, and procedures” as necessary “to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130.

The United States Supreme Court has determined that “unjustified institutional isolation of persons with disabilities is a form of discrimination” based on disability and is prohibited by the ADA. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999). Accordingly, Title II of the ADA requires states to provide community-based placements for individuals with disabilities when their treatment professionals determine that community placement is appropriate, the affected individual does not oppose community placement, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with disabilities. *Olmstead*, 527 U.S. at 607.

Tennessee’s Long-Term Care Community Choices Act of 2008, presently codified at Tenn. Code Ann. §§ 71-5-1401 through 71-5-1422 (“the Act”) calls for the development of home and community-based residential alternatives to institutional placement. It provides a critical framework for the State’s plan for compliance with the ADA. Its objectives include the following goals and directives:

(a) The long-term care system shall recognize that aging is not a disease, but rather a natural process that often includes increasing needs for assistance with daily living activities. To the maximum extent possible and appropriate, the system shall be based on a model of care delivery that acknowledges that services delivered in home and community-based settings are not primarily medical in nature, but rather support services that will provide needed assistance with activities of daily living and that will allow persons to age in place in their homes and communities.

...

(c) The long-term care system shall promote independence, choice, dignity and quality of life for elderly or people with physical disabilities, or both, who need long-term care supports and services and shall include consumer-directed options that offer more choices regarding the kinds of long-term care services people need, where they are provided and who will deliver them, with appropriate mechanisms to ensure accountability for taxpayer funds.

...

(f) The long-term care system shall deliver needed supports and services in the most integrated setting appropriate and cost-effective way possible in order to utilize available funding to serve as many people as possible in home and community settings.

...

(h) The long-term care system shall offer a continuum of long-term care services that includes an expanded array of home and community-based options, including community-based residential alternatives to institutional care for persons who can no longer live alone, and that also includes nursing facility services as an integral part of the long-term care continuum for persons with the highest levels of need.

Tenn. Code Ann. § 71-5-1402(a), (c), (f), (h).

To achieve these objectives, the Act directed the Commissioner of Finance and Administration to develop and implement a plan for expanding cost-effective community-based residential alternatives to institutional care for persons who are elderly and/or adults with physical disabilities, including, but not limited to, the “development of multiple levels of assisted-care living facility services, adult family care homes, adult foster care homes, companion care models, and other cost-effective residential alternatives to nursing facility care.” Tenn. Code Ann. § 71-5-1411(a). It instructed the Commissioner and the Board for Licensing Health Care Facilities (“BLHCF”) to “develop and/or modify licensure requirements for such facilities to support a nursing facility substitute framework” for members who want to age in place in residences that offer increasing levels of cost-effective home and community-based care as an alternative to institutionalization as members’ needs change. Tenn. Code Ann. § 71-5-1411(b).

The Act amended existing statutory licensure requirements for assisted-care living facility services. Included were new provisions specifying that the purpose of such services is to promote the availability of residential alternatives to institutional care for persons who are elderly or who have disabilities in the least restrictive and most homelike environment appropriate. Tenn. Code Ann. § 68-11-201(4). Also included were new provisions directing the BLHCF, in consultation with the state fire marshal, to promulgate fire safety standards regulations that afford reasonable protection to assisted-care living facility residents without unduly disturbing the residential atmosphere to which they are accustomed. Tenn. Code Ann. § 68-11-201(4)(C)(vi).

To further effect the objectives of the Act, the General Assembly subsequently established new types of State-licensed residences in which twenty-four-hour residential care, including assistance with activities of daily living, is provided in a homelike environment to adults who are elderly, have a disability, or are suffering from the effects of a traumatic brain injury. *See, e.g.*, Critical Adult Care Home Act of 2009 (2009 Acts, Pub. Chap. 579); Traumatic Brain Injury Residential Home Act of 2012 (2012 Acts, Pub. Chap. 1086). In a number of instances, this legislation provides that such residences shall be subjected to less onerous licensure requirements than are applicable to nursing facilities and other institutional settings. For example, critical adult care homes and traumatic brain injury residential homes are required to “meet all state and local building, sanitation, utility and fire code requirements applicable to *single family dwellings*,” unless the BLHCF adopts more stringent standards as it deems necessary in order to ensure the health and safety, including adequate evacuation, of residents. Tenn. Code Ann. §§ 68-11-202(b)(1)(E) (emphasis added), 68-11-206(a)(4).¹

¹ In several other regulatory areas, consistent with statutory authority, the BLHCF has promulgated rules and regulations that impose upon residential alternatives such as assisted-care living facilities and critical adult care homes less stringent and more homelike licensure standards than are imposed upon nursing facilities. Its staffing regulations, for example, vary significantly among these facility types. Each nursing facility must have a written agreement with a physician who will serve as Medical Director of the facility and have responsibility for the medical care therein (Tenn. Comp. R. & Regs. 1200-08-06-.06(2)(c), (d)), must have a full-time licensed administrator who may not also function as director of nursing (Tenn. Comp. R. & Regs. 1200-08-06-.04(1)), and must have a housekeeping supervisor (Tenn. Comp. Adm. R. & Regs. 1200-08-06-.06(3)(1)). It must also have an organized nursing service that provides 24-hour nursing services supervised by a registered nurse, that is headed by a Director of Nursing who is a registered nurse and is responsible for the operation of the nursing service, that has a licensed practical nurse or registered nurse on duty at all times and at least two nursing personnel on duty each shift, and that provides at least two hours of direct care to each resident every day, including 0.4 hours of licensed nursing personnel time (Tenn. Comp. R. & Regs. 1200-08-06-.06(4)(a), (b), (d), (e)). In contrast, each assisted-care living facility must have an administrator who is certified by the BLHCF or licensed as a nursing home administrator (Tenn. Comp. R. & Regs. 1200-08-25-.03(9)(a)),

Thus, in order to meet its paramount objectives of providing services in the most integrated setting appropriate and in the most cost-effective way possible for as many people as possible in home and community settings, the Act, in its current form, permits some flexibility in developing licensing requirements for residential alternatives to nursing homes. Less onerous licensing requirements may translate into less expense in the establishment, maintenance, and operation of such residential alternatives, thereby fostering their viability and availability.

The amendments contemplated by the proposed legislation would remove the flexibility in licensing requirements for the residential alternatives and could, therefore, make them more costly, less viable, and less available. Proposed House Bill 604/Senate Bill 567 would add a new subsection (c) to Tenn. Code Ann. § 71-5-1411. This new subsection would direct the Commissioner of Finance and Administration, any department responsible for the oversight of any entity licensed under Title 68 or Title 33, and the BLHCF to ensure that licensure standards be enacted by statute “so that entities providing similar services . . . are subject to substantially the same licensure requirements, particularly with respect to building, life safety, sprinkler, and staffing and administration standards.” It would also direct them to ensure that entities providing services available to CHOICES Group 1 and Group 2 eligible individuals² “meet the same, or substantially the same, licensure standards as nursing homes.” Proposed House Bill 413/Senate Bill 583 would delete subsection (c) of Tenn. Code Ann. § 33-2-418. This subsection currently permits a residential facility or provider that is licensed by the Department of Intellectual and Developmental Disabilities to provide residential services to persons with intellectual or developmental disabilities to also provide residential services to the elderly or adults with physical disabilities.

an identified responsible attendant who is alert and awake at all times and a sufficient number of direct care employees to meet the residents’ needs (Tenn. Comp. R. & Regs. 1200-08-25-.06(1)(a)3), and a licensed nurse available as needed (Tenn. Comp. R. & Regs. 1200-08-25-.06(1)(a)4). A critical adult care home provider must be, or must employ a resident manager/substitute caregiver who is, licensed as a physician, nurse practitioner, registered nurse or respiratory therapist and/or hold national certification as a certified brain injury specialist (Tenn. Comp. R. & Regs. 1200-08-36-.02(14)(a), (b)); such qualified provider, resident manager or substitute caregiver must be on duty in the home 24 hours per day, along with staffing coverage that is adequate to meet the needs of residents (Tenn. Comp. R. & Regs. 1200-08-36-.04(7), 1200-08-36-.05(1)(d)).

² CHOICES Group 1 consists of individuals who are receiving TennCare-reimbursed care in a nursing facility. CHOICES Group 2 is composed of individuals age sixty-five and older and adults age twenty-one and older with physical disabilities who meet nursing facility level-of-care criteria, who qualify for TennCare under certain categories, and who need and are receiving CHOICES Home and Community Based Services as an alternative to nursing facility care. Tenn. Comp. R. & Regs. 1200-13-01-.02(22), (23).

We cannot predict with any degree of certainty the extent to which these proposed statutory amendments would adversely affect the availability of cost-effective home and community-based residential alternatives to institutional care for the elderly and adults with physical disabilities. But to the extent that the imposition of more onerous licensure requirements on the providers of such home and community-based alternatives operates to decrease availability and thereby increase the risk of unjustified institutional placement of such individuals or to otherwise impede the State's obligation to administer its services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, the proposed amendments could place the State at risk of legal challenge under the Americans with Disabilities Act.

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