STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 8, 2015

Opinion No. 15-56

House Bill 1136/Senate Bill 1192, 109th Gen. Assemb. (Tenn. 2015)—Notice requirements regarding State Group Homes

Question 1

Do the provisions of House Bill 1136/Senate Bill 1192, 109 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 the extent to which this proposed statutory amendment would adversely affect the availability of cost-effective home- and community-based residential alternatives to institutional care for persons receiving mental health services, alcohol and drug abuse prevention and/or treatment, or intellectual or developmental disabilities services. But to the extent that the imposition of notice requirements for these state-owned residential group homes operates to decrease availability and thereby to increase the risk of unjustified institutional placement 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 amendment could leave the State vulnerable to a legal challenge under the Americans with Disabilities Act.

Question 2

Does House Bill 1136/Senate Bill 1192, 109 Gen. Assemb. (Tenn. 2015) comply with the United States Supreme Court's ruling in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999)?

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See Response to Question 1.

ANALYSIS

Title II of the federal 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 implementing 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 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.

An individual is considered "disabled" under the ADA if he has (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has a record of such impairment, or (3) is regarded by his employer as having such an impairment. 42 U.S.C. § 12012. In addition to mental health disorders and intellectual and developmental disabilities, drug and alcohol abuse can constitute a disability for purposes of the ADA. *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 336 (6th Cir. 2002).

Tennessee Code Annotated, Title 33, Chapter 2, Part 4, governs licensure of private and state-owned facilities that provide mental health services, alcohol and drug abuse prevention and/or treatment, services for intellectual and developmental disabilities, and personal support services, including residential facilities and group homes. Tenn. Code Ann. § 33-2-403. These facilities, when operated by the State of Tennessee or other governmental entity, constitute the provision of public services by governmental entities as contemplated by Title II of the ADA, and therefore must be operated in the most integrated setting appropriate to the needs of the persons who will inhabit them.

House Bill 1136/Senate Bill 1192 would amend Title 33 to require the State to provide ninety (90) days' notice to each homeowner in an established neighborhood or otherwise developed identifiable residential area before opening any state-owned group home in the neighborhood or area to serve as a residential facility for adults or children, including persons with intellectual disabilities or children in the custody of the department of children's services. All state-owned group homes and residential facilities governed by Title 33, Chapter 2, Part 4, are likely to provide services to disabled persons as defined in the ADA because Part 4 is inapplicable to licensure of state operated facilities with purposes *other* than the provision of mental health services, alcohol and drug abuse prevention and/or treatment, or intellectual or developmental disabilities services. Tenn. Code Ann. § 33-2-403(b)(9).

We cannot predict with any degree of certainty the extent to which this proposed statutory amendment would adversely affect the availability of cost-effective home- and community-based residential alternatives to institutional care for persons receiving mental health services, alcohol and drug abuse prevention and/or treatment, or intellectual or developmental disabilities services. To the extent that the imposition of notice requirements for state-owned residential group homes operates to decrease availability and thereby increase the risk of unjustified institutional placement or 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 amendment could leave the State vulnerable to a legal challenge under the Americans with Disabilities Act.

Tennessee Code Annotated Title 37, Chapter 5, Part 5 governs licensing of child-care agencies of various types that house children, specifically excluding "entities or persons licensed or otherwise regulated by other agencies of the state or federal governments providing health, psychiatric, or psychological care or treatment or mental health care or counseling for children while the entity or person is engaged in such licensed or regulated activity." Tenn. Code Ann. § 37-5-503(3).

House Bill 1136/Senate Bill 1192 would amend Title 37 to require the State to provide ninety (90) days' notice to each homeowner in an established neighborhood or otherwise developed identifiable residential area before opening any state-owned group home or child-care institution in the neighborhood or area to serve as a residential facility for children, including children with intellectual and developmental disabilities.

To the extent this notice requirement applies to state-owned residential facilities for intellectually /developmentally disabled children and operates to decrease availability and thereby increase the risk of unjustified institutional placement or 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 amendment could leave the State vulnerable to a legal challenge under the Americans with Disabilities Act.

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