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Honorable Alva M. Lambert
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Hospice Programs – State Health Planning and Development – Certificate of Need – Grandfather Provisions

Providers who were licensed by the Alabama Department of Public Health ("ADPH") to provide in-home hospice services, or who had only received a letter of non-reviewability from the State Health Planning and Development Agency ("SHPDA"), as of the effective date of Act 2009-492, are required to obtain a Certificate of Need ("CON") to continue or commence operations.

SHPDA may adopt an emergency rule that providers licensed by ADPH on the effective date of the act may continue to operate within an expedited timeframe for consideration of their CON applications if SHPDA makes a written finding that there is an immediate danger to the public health, safety, or welfare.

Dear Mr. Lambert:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. Are providers who were licensed by the Alabama Department of Public Health to provide in-home hospice services, or who had only received a letter of non-reviewability from the State Health Planning and Development Agency, as of the effective date of Act 2009-492, required to obtain a Certificate of Need to continue such operations or prior to the commencement of operations?

2. If so, may existing providers continue operations for a period of time necessary for the CON Review Board to act on such CON applications?

3. If not, must existing providers obtain a new CON to expand in-home hospice services beyond the counties in which such hospice services were actually provided during the twelve months prior to the effective date of the act?

FACTS AND ANALYSIS

The Alabama Legislature has provided that health care resources, facilities, and services in this state should be planned for and regulated pursuant to a system of mandatory reviews carried out by the Statewide Health Coordinating Council ("SHCC") and SHPDA. The SHCC is authorized and organized pursuant to sections 22-4-7 and -8 to advise SHPDA on matters related to health planning and resource development. ALA. CODE § 22-21-260(15) (2006); *Ex parte Traylor Nursing Home, Inc.*, 543 So. 2d 1179 (Ala. 1988). The SHCC is currently composed of thirty-two members appointed by the Governor. The primary responsibility of SHCC is to prepare, review, and revise the State Health Plan ("SHP"). ALA. CODE § 22-21-260(13) (2006).

The SHP is a comprehensive plan intended and designed to "provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of the

state." ALA. CODE § 22-21-260(13) (2006). The current SHP is codified in chapter 410 of the Alabama Administrative Code. ALA. ADMIN. CODE r. 410-2-1-.01 to 410-2-5-.05 (2007). The SHP is utilized by SHPDA's Certificate of Need Review Board to enforce the CON statute in a manner consistent with the SHP. Section 22-21-263(a) of the Code, as amended, specifically mandates that "[n]o institutional health services which are subject to this article shall be permitted which are inconsistent with the State Health Plan." ALA. CODE § 22-21-263(a) (2006).

The CON statute requires the issuance of a CON as a prerequisite to the offering or operation of any "new institutional health service." ALA. CODE §§ 22-21-263, -265(a) & -266 (2006). The CON statute defines "institutional health services" as "health services provided in or through health care facilities . . . including the entities in or through which such services are provided." ALA. CODE § 22-21-260(9) (2006). "Health care facilities" are themselves defined under section 22-21-260(6) of the Code to include general and specialized hospitals and related facilities, such as laboratories and out-patient clinics, skilled nursing and intermediate care facilities, public health centers, ambulatory surgery centers, kidney disease treatment centers, community mental health centers, alcohol and drug abuse facilities, facilities for the developmentally disabled, and home health agencies and health maintenance organizations.

On May 13, 2009, Governor Riley signed Act 2009-492 into law, which amended section 22-21-260(6) to include "hospice service providers" within the definition of a "health care facility" for state health planning and development purposes. 2009 Ala. Acts No. 2009-492. The act also amended section 22-4-2(7) of the Code of Alabama to include "hospice services" within the definition of a "health care facility" and amended section 22-21-29 of the Code of Alabama by eliminating the provision that had placed a moratorium on the licensing of hospices by the ADPH, except those that obtained a letter of non-reviewability from SHPDA by July 7, 2006, and filed an application for licensure as a hospice with ADPH within twelve months of the date of the letter of non-reviewability. ALA. CODE § 22-4-2(7) (2006); ALA. CODE § 22-21-29 (2006). ADPH, as the administrative arm of the State Board of Health, is authorized to license hospitals, including hospices, pursuant to section 22-21-20(1) of the Code of Alabama. ALA. CODE § 22-21-20(1) (2006).

Hospice services are provided through inpatient facilities or in-home care. In-home hospice providers maintain administrative offices within the state, but provide all care and treatment to patients within their homes. The *2004-2007 Alabama State Health Plan* references in-home

hospice services; however, SHPDA has not previously exerted jurisdiction over these services. SHPDA has instead issued letters of non-reviewability opining that these services are exempt from the CON requirements, but has continued to regulate inpatient hospice facilities, as required for health care facilities defined under section 22-21-260(6).

By its terms, Act 2009-492 became effective immediately upon approval of the Governor and did not contain any express grandfather clause for existing hospice providers or providers who had not yet been licensed by ADPH. Therefore, these providers must obtain a CON to continue or commence operations. In light of this conclusion, the answer to your third question is moot.

The plain language of the act operates to require a complete cessation of hospice services for Alabama citizens pending issuance of a CON for each existing provider. The fundamental rule of statutory construction is to ascertain and give effect to the intent of the Legislature in enacting the statute. *Ex parte Ala. Dep't of Mental Health & Mental Retardation*, 840 So. 2d 863, 867 (Ala. 2002). A literal interpretation of a statute that would defeat the purposes of the statute should not be adopted if another reasonable interpretation can be given to it. *Odum Lumber Co. v. S. States Iron Roofing Co.*, 36 Ala. App. 270, 272, 58 So. 2d 641, 643 (1951). Courts do not interpret provisions in isolation, but consider them in the context of the entire statutory scheme. *Siegelman v. Ala. Ass'n of School Boards*, 819 So. 2d 568, 582 (Ala. 2001).

The more reasonable construction is that the Legislature intended an expedited review process for existing providers licensed by ADPH. Sections 22-21-274 and 22-21-275 of the Code of Alabama provide SHPDA with the authority to prescribe rules and regulations for the review procedures and criteria for applications for and issuance of Certificates of Need. ALA. CODE §§ 22-21-274, 22-21-275 (2006). SHPDA is a state agency whose rules are subject to compliance with the Alabama Administrative Procedure Act ("AAPA"). Opinion to Honorable Allen Sanderson, Member, House of Representatives, dated September 6, 2000, A.G. No. 2000-229. The AAPA is codified at section 41-22-1, *et seq.*, of the Code of Alabama. ALA. CODE § 41-22-1 to 41-22-27 (2000 & Supp. 2008). Section 41-22-5(a) requires public notice and a hearing on the adoption of a rule. Section 41-22-5(b), however, provides that an emergency rule can be adopted without these requirements on a written finding of "an immediate danger to the public health, safety, or welfare." ALA. CODE § 41-22-5(b) (2000). Accordingly, SHPDA, with the advice and consultation of the SHCC, has the authority to adopt emergency rules that

hospice providers licensed by ADPH on the effective date of Act 2009-492 may continue to operate within an expedited timeframe for consideration of their CON applications. Such rules may also prescribe the criteria against which such applications may be reviewed.

CONCLUSION

Providers who were licensed by ADPH to provide in-home hospice services, or who had only received a letter of non-reviewability from SHPDA, as of the effective date of Act 2009-492, are required to obtain a Certificate of Need to continue or commence operations.

SHPDA may adopt emergency rules that providers licensed by ADPH on the effective date of the act may continue to operate within an expedited timeframe for consideration of their CON applications if SHPDA makes a written finding that there is an immediate danger to the public health, safety, or welfare.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:

BRENDA F. SMITH
Chief, Opinions Division

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