

**NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF HEALTH SERVICE REGULATION
RALEIGH, NORTH CAROLINA**

**IN RE: REQUEST FOR)
DECLARATORY RULING BY)
WILMINGTON TREATMENT) **DECLARATORY RULING**
CENTER)**

I, Jeff Horton, Acting Director of the Division of Health Service Regulation (the “Department” or the “Agency”), hereby issue this declaratory ruling to the Wilmington Treatment Center (“WTC”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. WTC has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling as to the applicability of Chapter 131E, Article 9 of the North Carolina General Statutes to the facts described below. For the reasons given below, I conclude that I must deny WTC’s requested ruling.

This ruling is binding on the Department and the person requesting it if the material facts stated in the Request are accurate and no material facts have been omitted from the request. The ruling applies only to this request. Except as provided by N.C.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. Joy H. Thomas, counsel for WTC, has requested this ruling on behalf of WTC and has provided the statement of facts upon which this ruling is based. Certain other facts are based on the Department’s files. The material facts are set out below.

STATEMENT OF THE FACTS

Effective July 14, 2000, the CON Section issued a CON to WTC for Project I.D. No. O-6149-99 to construct and operate 17 new adult chemical dependency treatment beds for a total of 38 adult and 6 adolescent chemical dependency treatment beds at its facility in Wilmington, North Carolina. In its CON application for Project I.D. No. O-6149-99, WTC represented that all 44 of its proposed beds would be Medicare and Medicaid certified. WTC also projected that 12 percent of its patients would be Medicare recipients and 5 percent would be Medicaid recipients.

Effective February 1, 2002, the CON Section issued a CON to WTC, for Project I.D. No. O-6429-01 authorizing WTC to incur a cost overrun for Project I.D. No. O-6149-99. WTC again stated in its CON application for Project I.D. No. O-6429-01 that all 44 of its beds would remain Medicare and Medicaid certified and that its projected payor mix still included 12 percent Medicare recipients and 5 percent Medicaid recipients.

Effective November 15, 2007, the CON Section issued a CON to WTC for Project I.D. No. O-7876-07 approving WTC's planned \$2.2 million renovation of its existing facility. WTC again stated in its CON application for Project I.D. No. O-7876-07 that all 44 of its beds would remain Medicare and Medicaid certified. However, it now projected that only 1 percent of its patients would be Medicare recipients and 1 percent would be Medicaid recipients. The CONs for Project I.D. Nos. O-6149-99, O-6429-01, and O-7876-07 all contained a similar condition that WTC shall materially comply with all representations made in its CON applications.

In this Request for Declaratory Ruling, WTC seeks a ruling that its proposed withdrawal from participation in the Medicare and Medicaid program does not violate the CON Law. WTC represents that it currently operates its 44-bed chemical dependency facility in Wilmington and,

since 2008, its Medicare and Medicaid utilization experience has been under 1 percent in each category as a percentage of total revenue.

ANALYSIS

N.C.G.S. § 131E-181(a) states

A certificate of need shall be valid only for the defined scope, physical location, and person named in the application.

N.C.G.S. § 131E-181(b) further provides that:

A recipient of a certificate of need, or any person who may subsequently acquire, in any manner whatsoever permitted by law, the service for which that certificate of need was issued, is required **to materially comply with the representations made in its application for that certificate of need.** The Department shall require any recipient of a certificate of need, or its successor, whose service is in operation to submit to the Department evidence that the recipient, or its successor, is in material compliance with the representations made in its application for the certificate of need which granted the recipient the right to operate that service. (emphasis added)

Thus, the CON law requires a full review of WTC's proposal when it proposes a material change in the physical location or scope of the project, the person named in the application, or a failure to comply with the representations made in its CON applications. In this case, the proposal by WTC to withdraw from the Medicare and Medicaid program represents a change in the scope of all of its approved projects (Project I.D. Nos. O-6149-99, O-6429-01 and O-7876-07) and a failure to materially comply with the representations made in its CON applications.

WTC represented in its CON applications for Project I.D. Nos. O-6149-99, O-6429-01, and O-7876-07 that all 44 of its chemical dependency treatment beds would be certified to participate in the Medicare and Medicaid program. In order to become and remain certified to participate in the Medicare and Medicaid program, facilities must comply with the Center for

Medicare and Medicaid Services' ("CMS") minimum health and safety standards. Therefore, WTC represented in all of its CON applications, that by becoming and remaining a Medicare and Medicaid certified facility, it would meet these minimum health and safety standards.

WTC also represented in both its CON application for Project I.D. No. O-6149-99 and its 2001 CON application for Project I.D. No. O-6429-01, that it expected 12 percent of its patients would be Medicare recipients and 5 percent would be Medicaid recipients. These representations in WTC's CON applications influenced the Agency's decision to find those applications conforming with the applicable statutory and regulatory review criteria.

WTC is correct in that none of the review criteria require an applicant to represent that it will participate in the Medicare or Medicaid programs. However, an applicant is required to "identify the population to be served by the proposed project." N.C. Gen. Stat. § 131E-183(a)(3). Further, an applicant must also "demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and members of medically underserved groups" (including Medicaid and Medicare recipients). N.C. Gen. Stat. § 131E-183(a)(13). As part of demonstrating the need for its proposed service, WTC chose to identify the Medicare and Medicaid populations as part of the population it proposed to serve.

Now, WTC states that even though it proposes to withdraw from the Medicare and Medicaid programs, it "will continue to offer services to all persons who meet the appropriate medical and clinical criteria for admission" and will "continue to make its services available to Medicare-eligible patients who present for treatment and wish to be served as private pay patients." WTC says nothing in its Request about continuing to offer services to Medicaid-eligible patients other than a general representation that it proposes to "shift utilization to medically indigent and low income persons and service these underserved populations through

its ‘scholarship’ care programs.” Nor does WTC make any representations that it will continue to meet the minimum health and safety standards set forth by CMS or any comparable health and safety standards.

WTC contends that the language of N.C. Gen. Stat. § 131E-181(b) limits the Agency to considering “cost increases” to the CON recipient in determining whether a proposal represents a material change. WTC’s contention is flawed. While N.C. Gen. Stat. § 131E-181(b) does mandate the Agency consider cost increases, it contains no prohibition on the consideration of other factors. Further, WTC’s interpretation of N.C. Gen. Stat. § 131E-181(b) is contrary to the purposes and intent of the CON Law.

CONCLUSION

For all the foregoing reasons, I conclude that WTC’s proposal to voluntarily withdraw from the Medicare and Medicaid programs would constitute:

(1) a material change in the scopes of Project I.D. Nos. O-6149-99, O-6429-01, and O-7876-07 in violation of N.C. Gen. Stat. § 131E-181(a), and

(2) a failure to comply with the representations made in WTC’s CON applications for Project I.D. Nos. O-6149-99, O-6429-01 and O-7876-07 in violation of N.C. Gen. Stat. § 131E-181(b).

For the foregoing reasons, I conclude that WTC’s request for declaratory ruling must be denied.

This the _____ day of February, 2010.

Jeff Horton, Acting Director
Division of Health Service Regulation
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States Postal Service in first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

Joy Heath Thomas
Law Office of Joy Heath Thomas
514 Daniels Street #182
Raleigh, NC 27605

This the _____ day of February, 2010.

Jesse Goodman
Acting Chief Operating Officer