



Committee Report, Vol. 16 , No. 1

**Department of Health and Human Services:
Statutory Compliance in Closing the Lincoln
Regional Center Community Transition
Program**

Legislative Audit Office

November 2009

Performance Audit Committee

Senator John Harms, Chair
Senator Danielle Conrad, Vice Chair
Speaker Mike Flood
Senator Lavon Heidemann
Senator Arnie Stuthman
Senator Dennis Utter
Senator John Wightman

Legislative Audit Office

Martha Carter, Legislative Auditor
Don Arp, Jr., Analyst
Clarence Mabin, Analyst
Angela McClelland, Analyst
Dana McNeil, Analyst
Stephanie Meese, Legal Counsel
Sandy Harman, Committee Clerk

Audit reports are available on the Unicameral's Web site (www.nebraskalegislature.gov)
or can be obtained from Martha Carter, Legislative Auditor, at (402) 471-2221.

LEGISLATIVE AUDIT OFFICE
Nebraska Legislature
State Capitol • Box 94945 • Lincoln, NE 68509-4945 • (402) 471-2221

Committee Report, Vol. 16 , No. 1

**Department of Health and Human Services: Statutory
Compliance in Closing the Lincoln Regional Center
Community Transition Program**

November 2009

Prepared by
Don Arp, Jr.
Angie McClelland

Table of Contents

I. Committee Recommendations

II. Performance Audit Section Report

III. Fiscal Analyst's Opinion

IV. Background Materials

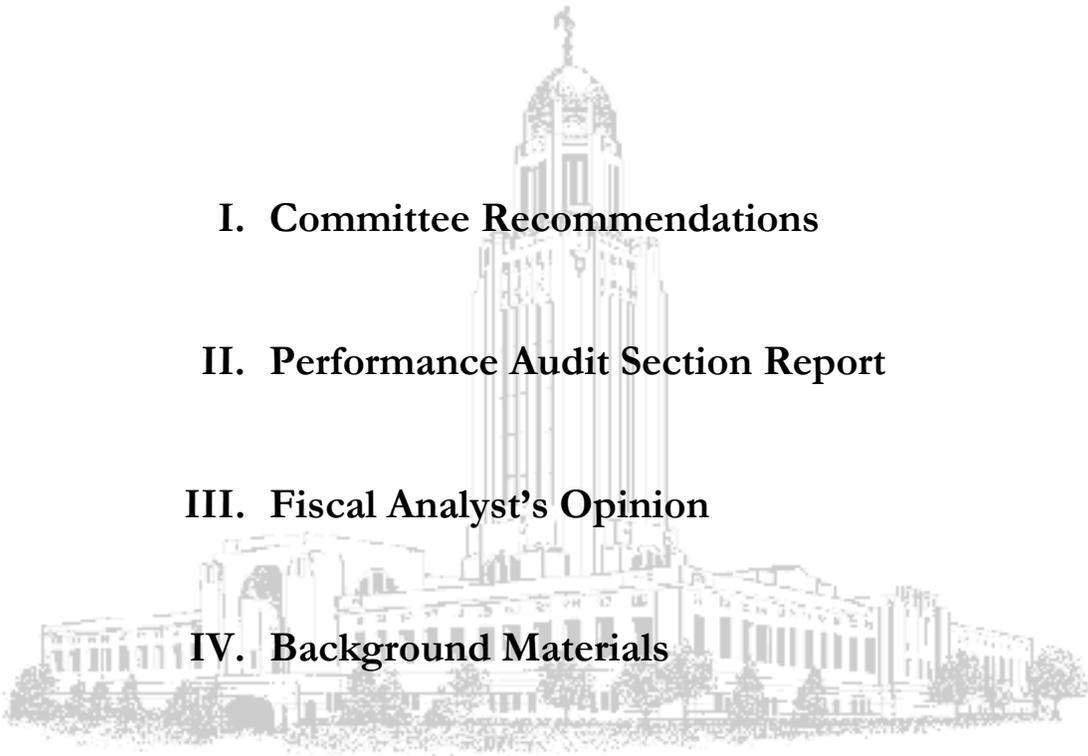


Table of Contents



I. Committee Recommendations

Committee Recommendations

Audit Summary

The Community Transition Program (CTP), founded in 1981 at the Lincoln Regional Center (LRC), served a special population of individuals with severe mental illness. In March 2009, the Department of Health and Human Services Division of Behavioral Health announced the closing of the program and discharged CTP patients or moved them into the general population at LRC.

Neb. Rev. Stat. § 71-810 contains a number of requirements, including notification of the Legislature and the Governor, which are triggered if a regional center is closed or services are reduced or discontinued. These requirements exist to ensure that individuals receiving regional center services continue to receive appropriate care if those services are reduced or eliminated.

The audit staff found sufficient, credible evidence that closure of the CTP program was likely to have constituted a reduction of a regional center behavioral health service, which should have triggered the notice provision of Neb. Rev. Stat. § 71-810(3). Audit staff disagreed with the Division Director's assertion that the notice provision applies only if an entire category of services, such as general psychiatric services, is eliminated or a regional center is closed. While the statutory definition of "regional center behavioral health services" is broad, we found that neither the plain language of the statute nor the legislative history support the Director's assertion. We also disagreed with the Director's assertion that a letter he sent to the Legislature after the decision to close the program had been made fulfilled the notice requirement.

Finally, audit staff found that DHHS's noncompliance with the notice requirements has serious ramifications, including bypassing the oversight mechanisms designed to safeguard the citizens using the affected service and inadequate transition planning—which are outcomes the Legislature had hoped to avoid by enacting the oversight provisions of § 71-810. Although the statute contains no penalty for noncompliance, it does require that funds from the reduced services be provided for community-based services.

Committee Recommendations

The Committee agrees with the audit staff's findings, including the finding that the Department of Health and Human Services Division of Behavioral Health (Division) should have given notice under Neb. Rev. Stat. § 71-810(3) of its intention to close the Community Transition Program. The Committee also believes that while there is some room for interpretation as to what constitute "regional center behavioral health services" for purposes of that notice requirement, the Department of Health and Human Services (DHHS) could have avoided the current confusion over this issue if it had promulgated regulations—as required by the 2004 Nebraska Behavioral Health Services Act—that included the criteria it believes trigger the notice requirement. The Committee is very concerned that as of November 2009, the regulations relating to the Act's implementation remained in draft form and did not include any of the criterion DHHS told the audit staff must come into play before notice is required.

Recommendation: The Committee strongly encourages DHHS to promulgate regulations implementing LB 1083 as soon as possible. In addition, DHHS should include the following in the implementation plan due to the Committee no later than 40 business days after the release of the report:

- proposed regulatory language that lists the criteria it believes trigger the notice requirement of § 71-810(3) (such as bed reductions, etc.);
- a list of all services currently provided at the three regional centers and indication of which of these would require notice if the regional center were to reduce or discontinue them. This list should also include the Diagnostic and Statistical Manual of Mental Disorders/IV diagnoses for patients who would receive each type of service; and
- discharge rules or policies (for the institution as a whole and for individual programs) for all types of patients at the three regional centers.

The Committee also recommends that the Executive Board of the Legislature designate the Clerk of the Legislature to receive any future notice under § 71-810(3) so that notice can be properly distributed to members of the Legislature for review. That action would add specificity to the statutory requirement that such notice be provided to the Legislature.

The Committee recognizes that when the notice provision of § 71-810 (3) applies, the requirement of § 71-810(4)—that any money saved from service reduction or discontinuation be provided to community-based services—also applies. However, as the Legislative Fiscal Analyst stated in his opinion on the draft performance audit report, the Lincoln Regional Center (LRC) would have to reduce existing services in order to transfer the approximately \$158,000 saved from CTP closure. The Committee is concerned that doing so would be counterproductive at a time when LRC is operating within significant fiscal constraints.

The Committee takes no position on the quality of services provided through CTP or whether or not the program should have been closed, as those questions are beyond the scope of this performance audit. The Committee believes that senators and others in state government must continue to put behavioral health reform into practice through progress towards the objectives of (1) a Lincoln Regional Center that provides for the most acute and at-risk patients, committed under LB 1083, and (2) a system of community-based service providers that has the capacity to offer modern and effective care for all mentally ill citizens in need, including those discharged from LRC.

Section Findings

Finding: There is sufficient, credible evidence that the closure of CTP is likely to have constituted a reduction of regional center behavioral health services, which should have triggered Neb. Rev. Stat. §§ 71-810(2) through (5).

Discussion: The definition of regional center behavioral health services contained in the Nebraska Behavioral Health Services Act is broad. However, neither the plain language of the statute nor the legislative history support the Division Director's argument that § 71-810 only applies to elimination of an entire category of services such as general psychiatric services or the closure of a regional center.

DHHS Compliance with § 71-810

Finding: When CTP was closed, DHHS did not comply with the provisions of § 71-810.

Discussion: Performance audit staff disagree with the Division Director's assertion that his April 2, 2009 letter to

the Health and Human Services' Committee chairman met the notice requirement in § 71-810. This letter was sent *after* the decision to close the program had been announced, thereby eliminating the potential for the Behavioral Health Oversight Commission to provide its statutorily required assessment of the sufficiency of DHHS's plans for the program's patients and eliminating the opportunity for the Legislature to have meaningful input on the decision.

Outcomes of Noncompliance

Finding: DHHS's noncompliance with § 71-810 has serious ramifications, including bypassing the oversight mechanisms designed to safeguard the citizens using the affected service and inadequate transition planning—which are outcomes the Legislature had hoped to avoid by enacting the oversight provisions of § 71-810.

Finding: Section 71-810 contains no penalty for noncompliance.

Finding: Section 71-810's requirement that funds from reduced services be provided for community-based services applies to the approximately \$200,000 saved through cancellation of LRC's contract with UNL to provide services to CTP. However, this section does not provide for the circumstance in which services are cut due to a budget shortfall.



II. Performance Audit Section Report

Performance Audit Section Draft Report

**Department of Health and Human Services: Statutory
Compliance in Closing the Lincoln Regional Center
Community Transition Program**

August 2009

Prepared by
Don Arp, Jr.
Angie McClelland

CONTENTS

INTRODUCTION	iii
SECTION I: The LRC Community Transition Program	1
The Community Transition Program.....	1
The Closure of CTP	2
SECTION II: Neb. Rev. Stat. § 71-810 and the Closure of the Community Transition Program	5
Provisions of Neb. Rev. Stat. § 71-810.....	5
Applicability of § 71-810 to the Closure of CTP and DHHS Compliance with Requirements of § 71-810	6
Outcomes of Noncompliance.....	10
SECTION III: Findings and Recommendations.....	15
Appendix A: Appendix A: Legislative History of LB 1083 (2004)	

INTRODUCTION

In June 2009, the Legislative Performance Audit Committee (Committee) directed the Legislative Performance Audit Section (Section) to conduct a performance audit of whether the Department of Health and Human Services' (DHHS) closure of the Lincoln Regional Center's (LRC's) Community Transition Program (CTP) was subject to the provisions of Neb. Rev. Stat. § 71-810 and, if so, whether DHHS complied with those provisions.

Specifically, the Committee directed the Section to:

- (1) Describe the level of services needed by the population previously served by CTP;
- (2) Describe how and when the services provided through CTP were reduced and eventually eliminated, including a description of the number of beds used by the program and how those beds were used following the program's elimination; and
- (3) Assess whether the provisions of sec. 71-810 applied to the Department's decision to close CTP and, if so, whether it complied with those provisions.

Section I of this report provides an overview of CTP, including discussion of treatment provided by CTP and the current location of the 15 patients in the program when it was closed. Section II examines the question of the applicability and compliance with § 71-810. Section III contains our findings and recommendations.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. The methodologies used are described briefly at the beginning of each section.

We appreciate the cooperation and assistance of DHHS personnel during the audit.

SECTION I: The LRC Community Transition Program

In this section we will answer the first two scope statement questions which describe the Community Transition Program (CTP) and when the services provided through CTP were reduced and eventually eliminated.

The Community Transition Program

The Community Transition Program (CTP),¹ founded in 1981 at the Lincoln Regional Center (LRC), treated a special population of patients. The LRC CEO said that, “Those patients that were transferred to CTP were in need of longer term treatment due to the complexity of their severe and persistent mental illness.”² A former director of the program noted that CTP was a “specialized program with specialized services” meant to serve a specific population of people who were “stuck” in the regional centers and those who are in the “revolving door” going into and out of institutional treatment.³

Patients admitted to CTP, most suffering from schizophrenia and extreme depression, had histories of unsuccessful treatment in other settings and could not, due to safety issues, function in settings less restrictive than LRC.⁴ According to one researcher, CTP admitted “only the most disabled and treatment-refractory individuals with mental illness in the state of Nebraska” and used stringent criteria to determine admission into the program.⁵

Treatment

Program staff said that CTP was different from other LRC programs because, in addition to the typical treatment array of psychiatric services offered at LRC, CTP employed a specific type of treatment called behavior management.⁶ The CTP procedures manual states that behavior management is meant to reduce or eliminate undesirable behaviors and/or increase the frequency of desirable behaviors. This is accomplished through a system of selectively delivered rewards that depend upon the occurrence or absence of specified individual behaviors.⁷

While they were in treatment, CTP patients had behavioral management programs that were part of the standard individual treatment plans compiled by staff from the areas of psychiatry, nursing, social work, occupational therapy, and

others.⁸ Each patient's behavioral management plan identified specific behaviors that the treatment team decided the patient needed to change or new behaviors the patient needed to learn.⁹ Staff prepared a monthly progress report for each patient that a PhD-level staff person would review and approve. Staff trained to monitor patients' behavioral management progress collected the data for these progress reports.¹⁰

LRC, through a long-standing contract with the University of Nebraska-Lincoln (UNL) Department of Psychology, obtained the services of licensed psychologist faculty members and PhD-level graduate students who staffed CTP and did much of the data analysis for the program. The former CTP program director said that all activities under contract were direct clinical services. Program evaluation and research-related activities were provided through other university resources.¹¹

Program Size

Initially consisting of 40 beds, CTP shrank to 17 after a facility remodeling in August 2006.¹² The LRC CEO stated that the 23 beds formerly in CTP were reallocated to Forensics Services and sex offender treatment. After CTP closed, the remaining 17 CTP beds were also reallocated to sex offender treatment.¹³

The Closure of CTP

Although the Department of Health and Human Services (DHHS) Division of Behavioral Health (Division) and LRC leadership reported that they had been planning for the closure of CTP for over a year before the program actually closed, the first substantive meeting occurred in December 2008 when leadership from the Division and LRC met with the chairperson of the UNL Department of Psychology to discuss possible contract reductions for the next budget cycle that could affect the department's provision of services to LRC, especially involving CTP. By February 20, 2009, DHHS informed the department that it intended to reduce its contract.¹⁴ The CEO of LRC informed the psychology department of the exact nature of the reductions in a March 2, 2009, letter: UNL's \$300,000 contract would be reduced to \$96,522, thus eliminating funds for UNL staff associated with CTP.¹⁵

LRC leadership informed staff assigned to CTP of the closure in March.¹⁶ DHHS informed the families of CTP patients of

the closure in late-March.¹⁷ This notification brought some media attention as families questioned DHHS' decision and what would happen to the patients in the program.¹⁸

On April 2, 2009, the Division Director sent a letter to the chairperson of the Legislature's Health and Human Services Committee explaining what was happening with CTP; this letter was distributed to senators by the chair the next day.¹⁹ A few days after dissemination of this letter, all LRC staff received an e-mail explaining changes planned for LRC and the closure of CTP.²⁰

Events Leading to the Closure of CTP

December 3, 2008

Division Director and LRC CEO meet with UNL Psychology Department chair to discuss possible contract reductions.

February 20, 2009

Division Director and LRC CEO meet with UNL Psychology Department chair again and inform him of contract reduction.

March 2, 2009

LRC CEO sends UNL Psychology Department chair a letter detailing the reductions.

March 2009

LRC CTP staff told of program closure.

Late March 2009

Families of CTP patients find out about closure.

April 2, 2009

Division Director sends a letter to chair of Health and Human Services Committee explaining what is happening to CTP.

April 3, 2009

Chair of Health and Human Services Committee distributes the Division Director's letter to the Legislature.

April 6, 2009

LRC staff notified via e-mail of the discontinuation of CTP.

May 1, 2009

Deadline to complete consolidation of CTP.

CTP Patients

As of April 1, 2009, CTP had 15 patients.²¹ According to LRC leadership, they planned to have reassignments of CTP patients completed by June 30, 2009, but due to the departure of contracted CTP staff the deadline moved up to May 1.²² These patients were moved as follows:

- five were discharged into the community; and
- ten patients remain at LRC, five of whom have NRRI (Not Responsible by Reason of Insanity) status.²³

Notes

¹ The Community Transition Program (CTP) has had several names over the years, including the Psychiatric Rehabilitation Program (PRP).

² Response to Legislative Performance Audit Committee by Bill Gibson, July 23, 2009.

³ Interview with Mary Sullivan, July 16, 2009.

⁴ Browne, Myla, *The Community Transition Program: Policy, Process, and Outcomes*, doctoral dissertation prepared under supervision of Prof. William Spaulding, August 2005, pg. 13.; Thea L. Rothman, et al *An Evaluation of the Community Transition Program: Psychiatric Rehabilitation for People with Severe, Disabling, and Treatment Resistant Psychiatric Conditions in Nebraska's Health and Human Services System*, February 2005, pg. 8.

⁵ Browne, pg. 23. The criteria are: 18 years of age or older; meets DHHS clinical and administrative criteria for severe and persistent mental illness/psychiatric disability; found to be mentally ill and dangerous by a Mental Health Board, subject to commitment absent the action of a guardian, or who are Not Responsible by Reason of Insanity (NRRI) status; demonstrated inability to function safely and acceptably in any currently available and less restrictive setting; have record of high hospital use (more than 60 days per year), multiple, acute/short term admissions (2 or more a year), high use of emergency services, or currently actively psychotic and dangerous, not responding after 30 days of inpatient treatment; and an intelligence quotient of 70 or above.

⁶ Interview with Mary Sullivan, July 16, 2009.

⁷ LRC Psychiatric Rehabilitation Program Procedures Manual, March 25, 2009 revision, pg. 33.

⁸ LRC Psychiatric Rehabilitation Program Procedures Manual, March 25, 2009 revision, pgs. 12-17 and Browne 2005, pgs. 24-25.

⁹ LRC Psychiatric Rehabilitation Program Procedures Manual, March 25, 2009 revision, pgs. 35-36.

¹⁰ Interview with Mary Sullivan, July 16, 2009.

¹¹ E-mail from Mary Sullivan, former CTP program director, July 30, 2009

¹² Interview with Scot Adams et al, July 23, 2009.

¹³ Interview with Scot Adams et al, July 23, 2009.

¹⁴ E-mail from Bill Gibson, LRC CEO, July 27, 2009.

¹⁵ E-mail from Bill Gibson, LRC CEO, July 27, 2009; and letter from Bill Gibson to UNL, March 2, 2009.

¹⁶ Interview with Will Spaulding, July 7, 2009.

¹⁷ Young, Jo Anne, "Advocates: Regional center transition program must be restored," *Lincoln Journal-Star*, June 12, 2009.

¹⁸ Young, Jo Anne, "Families frustrated by closing of Regional Center program," *Lincoln Journal-Star*, April 1, 2009.

¹⁹ Letter from Scot Adams to Senator Tim Gay, April 2, 2009; letter from Sen. Tim Gay to members of the Legislature, April 3, 2009.

²⁰ Memo from Bill Gibson to LRC Employees regarding Organizational Changes, e-mailed to LRC staff, April 6, 2009.

²¹ Response to Legislative Performance Audit Committee by Bill Gibson, July 23, 2009.

²² Interview with Scot Adams and Bill Gibson, July 23, 2009.

²³ Response to Legislative Performance Audit Committee by Bill Gibson, July 23, 2009.

SECTION II: Neb. Rev. Stat. § 71-810 and the Closure of the Community Transition Program

In this section, we report the results of our evaluation of whether the Department of Health and Human Services' (DHHS's) closure of the Lincoln Regional Center's (LRC's) Community Transition Program (CTP) was subject to the provisions of Neb. Rev. Stat. § 71-810 and, if so, whether the closure violated any of these requirements. In conducting this analysis, we reviewed relevant statutes and other documentation. We also interviewed DHHS personnel and former CTP personnel.

Provisions of Neb. Rev. Stat. § 71-810

Section 71-810 was enacted in 2004 as part of LB 1083, the Nebraska Behavioral Health Services Act (Act). Under the Act, the DHHS Division of Behavioral Health (Division) is charged with encouraging and facilitating the development and provision of an appropriate array of community-based behavioral health services with the goals of increasing client access to services and reducing the demand for regional center-based services.¹ To this end, § 71-810 describes the circumstances in which regional center behavioral health services may be reduced or discontinued and the process DHHS must follow when intending to make such changes.²

The Act defines "behavioral health services" as:

services, including, but not limited to, consumer-provided services, support services, inpatient and outpatient services, and residential and nonresidential services, provided for the prevention, diagnosis, and treatment of behavioral health disorders and the rehabilitation and recovery of persons with such disorders.³

When such services are provided at a regional center, they are "regional center behavioral health services."⁴

Conditions and Notice to Governor and Legislature

Under § 71-810, the Division may reduce or discontinue a regional center behavioral health service if other appropriate services, with sufficient capacity, are available within a regional center or in the community. Specifically, a regional center behavioral health service may be reduced or discontinued if:

- appropriate community-based services or other regional center behavioral health services are available for every person receiving the regional center services that would be reduced or discontinued;
- such services possess sufficient capacity and capability to effectively replace the service needs which otherwise would have been provided at such regional center; and
- no further commitments, admissions, or readmissions for such services are required due to the availability of community-based services or other regional center services to replace such services.⁵

If these conditions are met, and the Division still *intends* to make the reduction or discontinuation, § 71-810 requires the Division to provide notice to both the Governor and the Legislature that contains detailed documentation of the community-based services or other regional center services that would replace the eliminated service.⁶ Once the notice is submitted, the Behavioral Health Oversight Commission (BHOC) is required to review it and submit its opinion as to whether the conditions for reducing or discontinuing services have been met to both the Governor and the legislative Health and Human Services Committee. In its report, BHOC must also note the evaluation criteria it used in assessing compliance.⁷

Changes in Personnel and Expenditures

In reducing or discontinuing regional center behavioral health services under § 71-810, the Division must make corresponding reductions to service personnel and expenditures. The Division must also reallocate the service's funding to the development and provision of community-based services.⁸

Applicability of § 71-810 to the Closure of CTP and DHHS Compliance with Requirements of § 71-810

Prior to the audit and during the audit, the Director of the Division of Behavioral Health (Division Director) argued that § 71-810 did not apply to the closure of CTP. However, later in the audit, he argued that DHHS has complied completely with the provisions of § 71-810. Based on the analysis that follows, we believe that closure of CTP did trigger § 71-810 but DHHS did not comply with its provisions.

Applicability

When CTP was closed, the Division Director stated in a letter to the Chair of the Legislature's Health and Human Services Committee

that he did not believe § 71-810 applied.⁹ He reiterated that position to us during this audit.¹⁰

The Division Director offered two points to support this position. First, he argued that the statutory definition of a “regional center behavioral health service” applies only to the broad categories of services offered by LRC—such as general psychiatric services or forensic mental health services—not to the specific types of treatment provided to LRC patients, such as that provided through CTP. Since LRC continued to provide general psychiatric services even after CTP was closed, he argued that closure of CTP constituted elimination of a program but not of a regional center behavioral health *service*.¹¹ He explained this position in a letter to the Chair of the Legislature’s Health and Human Services Committee, stating that:

General Psychiatric Services will continue. CTP is just one treatment program under General Psychiatric Services. The full complement of clinical and support services, such as medical, social work, nursing, psychology, and other therapists will all remain in force.¹²

The Performance Audit Section disagrees with the Division Director’s interpretation of the definition of regional center behavioral health services. We based our analysis on the approach taken by the Nebraska Supreme Court in interpreting statute—starting with the plain language of the statute and, if necessary, considering the legislative history of the bill that contained that language.¹³

As mentioned previously, the relevant definition of “regional center behavioral health services” is:

consumer-provided services, support services, inpatient and outpatient services, and residential and non-residential services, provided for the prevention, diagnosis, and treatment of behavioral health disorders and the rehabilitation and recovery of persons with such disorders.¹⁴

Analyzing the plain language of the statute, we conclude the definition is not limited to categories of behavioral health services, such as general psychiatric services, as the Division Director suggests. Because the breadth of the plain language leaves the definition somewhat unclear, we also reviewed the legislative history of LB 1083 (2004). We found nothing in that history to suggest that the Legislature intended for behavioral health services to be defined as the Division Director suggests.

In the absence of more specific statutory language or clear intent from the legislative history, it is equally possible that the Legislature intended the definition of behavioral health service for the purpose of § 71-810 to include the more specific types of treatments to patients. We found that although there was no debate specifically on the definition of behavioral health services, the legislative history reflects a serious concern about the well being of people receiving regional center services if those services were to be discontinued.¹⁵ This concern would apply equally to the reduction or elimination of a broad category of services or of a single program.

We also note that when an agency needs to interpret a statute in order to implement it, the standard means for doing so is through promulgation of regulations under the Administrative Procedure Act.¹⁶ Final regulations must be reviewed and approved by the Attorney General to ensure they comply with the underlying statutory authority. The Nebraska Behavioral Health Services Act required DHHS to adopt regulations; however, none have been promulgated. The Division Director provided us with draft regulations implementing the Act, but that draft does not include the Division Director's interpretation of behavioral health services.

In addition, the Division Director's explanation that closure of a program within a category of services did not cause a reduction in services is incorrect. When CTP closed, certain contract services were eliminated and the remaining resources affiliated with the program were removed from general psychiatric services and reassigned to the forensic mental health services category. Consequently, even using the Division Director's definition, elimination of CTP *did* cause a reduction in general psychiatric services.

The Division Director's second explanation for why he believes the closure of CTP did not trigger the provision of § 71-810 is that he believes that a reduction or discontinuation of services only triggers § 71-810 if there is a reduction in:

- the number of regional center beds;
- the number of regional center staff; or
- the amount of the program's budget.¹⁷

According to the Division Director, none of these apply to the CTP closure.¹⁸

We disagree with this explanation as well. First, we found no evidence that the Legislature intended § 71-810 to apply only if a regional center eliminated beds. Neither the plain language of the statute nor the legislative history supports this contention.

Second, the portion of § 71-810 that relates to reductions in personnel and other expenditures is not a condition that must be met in order for services to be eliminated. Instead, it contains requirements that come into play when such services are cut, including that:

the division shall make appropriate corresponding reductions in regional center personnel and other expenditures related to the provision of such services.¹⁹

This section goes on to state that:

All funding related to the provision of regional center services that are reduced or discontinued under this section shall be reallocated and expended by the division for purposes related to the statewide development and provision of community-based services.²⁰

Closure of CTP did result in a reduction of personnel provided through a contract with the University of Nebraska-Lincoln, which was reduced to \$96,522 from a reported total of approximately \$300,000.²¹ Reading the statute strictly, the language requires that this money be reallocated to the development of community-based services. However, the LRC CEO stated on more than one occasion that his primary consideration in closing the program was the need to save money to fill a budget shortfall.²² Statute does not provide for circumstances where regional center services were cut due to a budget shortfall.

FINDING: There is sufficient, credible evidence that the closure of CTP is likely to have constituted a reduction of regional center behavioral health services, which should have triggered Neb. Rev. Stat. §§ 71-810(2) through (5).

FINDING: Section 71-810's requirement that funds from reduced services be provided for community-based services applies to the approximately \$200,000 saved through cancellation of LRC's contract with UNL to provide services to CTP. However, this section does not provide for the circumstance in which services are cut due to a budget shortfall.

Compliance

Although initially arguing that § 71-810 did not apply to the CTP closure, the Division Director later argued that DHHS had complied completely with the provisions of § 71-810.²³ According to the Division Director, the letter sent to the Health and Human Services Committee Chair on April 2, 2009, which was circulated to the whole

Legislature and the Governor, provided the notice required by § 71-810.²⁴

The Performance Audit Section disagrees that the Division Director's April 2, 2009 letter meets the notice requirements of § 71-810. First, the letter was clearly not intended to provide such notice as it states that: "[W]e do not believe this transition triggers provisions of 71-810."²⁵ More importantly, however, it is clear that the Legislature intended for the notice required under § 71-810 to occur *before* a reduction or discontinuation of services occurred, not afterwards, as was the case with CTP.

Section 71-810(3) states that "The division shall notify the Governor and Legislature of any *intended* reduction or discontinuation of regional center services under this section" (emphasis added). It goes on to require that after notice is provided to the Legislature and the Governor, the BHOC must assess the information provided in the notice and report to the Legislature and Governor on whether the BHOC believes that the information meets the statutory requirement regarding alternative services being in place prior to reduction or discontinuation of a regional center service.²⁶

By April 2, DHHS was well past the point of "intending" to close CTP: in February, DHHS notified UNL that the contract for staff who worked in the program would be cancelled for the following fiscal year²⁷ and in March, CTP staff and patients' families were told that the program was closing.²⁸

<p>FINDING: When CTP was closed, DHHS did not comply with the provisions of § 71-810.</p>
--

While § 71-810 does not require that the Legislature or Governor take any action in response to the notice it received or to the BHOC report, it is clear in the legislative history of LB 1083 that the purpose of those two steps was to give the Legislature an additional opportunity for oversight when regional center services were going to be reduced.²⁹ The Legislature is not required to act, but would have the information to act if it so chose. Providing notice after the decision to close CTP had already been announced conflicts directly with that purpose.

We also note that the Division Director argued that the version of BHOC that was in place in the Spring of 2009 was not authorized to meet the requirements of § 71-810, and we disagree with that argument. Prior to July 1, 2008, BHOC was part of the Legislature; subsequently, it was part of the Executive Branch. The Division Director believes that when BHOC became part of the Executive Branch, it

lost the authority to meet the § 71-810 requirements.³⁰ We found nothing in statute or legislative history to support this argument. In fact, while § 71-810 was amended to remove the phrase that made BHOC part of the Legislature, its duties were left untouched.³¹

Outcomes of Noncompliance

The Nebraska Behavioral Health Services Act, which contains § 71-810, contains no penalty for noncompliance with that section; however, it arguably provides a remedy in that it requires DHHS to transfer to community-based services the funds that had gone to eliminated service. In addition, the closing of CTP without complying with this section has had potentially negative outcomes on former CTP patients.

As indicated previously, the legislative history of LB 1083 (2004) reflects the Legislature's concern that people receiving regional center services would get the treatment they needed if regional center services were eliminated. Consequently, the most important purpose of the notice required by § 71-810 is to demonstrate that DHHS planned appropriately for the transition of patients from the service being reduced or discontinued to the community-based or other regional center service. The evidence regarding the closing of CTP suggests that such planning was insufficient.

The absence of adequate planning for the 15 former CTP patients is reflected in the experience of the five former CTP patients who are committed to LRC by courts that found them not responsible for alleged criminal actions due to mental illness—commonly referred to as not responsible by reason of insanity, or NRRI status. In April, when the pending closure of CTP was announced, the Division Director stated his expectation that patients would be moved to men's or women's general psychiatric units at LRC stating that, "We do not anticipate moving anyone into the forensic unit."³² However, five patients were moved to the forensic unit and remain there as of July 23, 2009.³³

In addition, LRC did not pursue court approval of these five patients' move to the forensic unit until *after* the move had taken place. The lack of planning for these moves is documented in Lancaster County court documents relating to former CTP patient Shane Tilley.³⁴

On June 15, 2009, a Lancaster County judge ordered LRC to develop a new treatment plan for Mr. Tilley, who was moved to the forensics program when CTP was closed.³⁵ In his motion asking the court to enforce its existing order, Mr. Tilley contended that the "conditions of his current placement [in the forensic unit] are more restrictive than those conditions set forth in the Order of January 26, 2009."³⁶

By law, such plans must be the “least restrictive treatment alternative appropriate” for the patient.³⁷

A news article on the hearing on Mr. Tilley’s motion reported that the county attorney “conceded the state was no longer complying and asked that the state be given an opportunity to prepare a new treatment plan.”³⁸ In other words, the county attorney acknowledged that LRC had moved Mr. Tilley without having first obtained the court’s approval that the forensic program provided the appropriate treatment for him and, consequently, was not in compliance with the court’s order.

The manner in which LRC attempted to gain the court’s approval of this move also demonstrates insufficient planning. An April 2, 2009 letter from Mr. Tilley’s treatment team (which included a psychiatrist) to the court explained that CTP would be closed, Mr. Tilley could be moved to one of two other LRC programs, and a new treatment plan developed.³⁹ The letter also states that “the decision as to which of these two options Mr. Tilley will be transferred is within the exclusive purview of LRC Administration.”⁴⁰

On April 15, 2009, two other LRC psychiatrists wrote to the court and, citing the earlier letter, noted that it was inaccurate to state that the placement decision rested solely with LRC administration and asked the court to for permission to move Mr. Tilley, *and several other patients*, to the forensic program.⁴¹ The judge’s response reflects the inappropriateness of this request. She stated: “I can not take any action based upon a letter, let alone a letter from a non party” and suggested the doctors contact the county attorney.⁴²

The court’s order requires a new plan be developed by August 1, 2009, and set an August 13 hearing to review the plan.⁴³

FINDING: Section 71-810 contains no penalty for noncompliance.

FINDING: DHHS’s noncompliance with § 71-810 has serious ramifications, including bypassing the oversight mechanisms designed to safeguard the citizens using the affected service and inadequate transition planning—which are outcomes the Legislature had hoped to avoid by enacting the oversight provisions of § 71-810.

Notes

¹ Neb. Rev. Stat. § 71-810(1).

² Neb. Rev. Stat. § 71-810(2-5).

³ Neb. Rev. Stat. § 71-804(3).

⁴ Neb. Rev. Stat. § 71-804(11).

⁵ Neb. Rev. Stat. § 71-810(2).

⁶ Neb. Rev. Stat. § 71-810(3).

⁷ Neb. Rev. Stat. § 71-810(3).

⁸ Neb. Rev. Stat. § 71-810(4).

⁹ Letter to Senator Tim Gay from Scot L. Adams, Ph.D., April 2, 2009.

¹⁰ Interview with Scot Adams and others, July 23, 2009.

¹¹ Telephone conversation with Scot Adams, July 7, 2009 and interview with Scot Adams and others, July 23, 2009.

¹² Letter to Sen. Tim Gay from Scot L. Adams, Ph.D., April 2, 2009.

¹³ Statutory interpretation holds that if the language of a statute is clear on its face, there is no need to go beyond the plain language of the statute. The Nebraska Supreme Court has stated “where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.” *Hill v. City of Lincoln*, 330 N.W.2d 471, 474 (Neb. 1983). Indeed, “if the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.” *Ameritas Life Ins. Corp. v. Balka*, 601 N.W.2d 508, 515 (Neb. 1999). However, when the language of a statute is “ambiguous and must be construed, recourse should be had to legislative history for purpose of discovering intent of lawmakers.” *Worley v. City of Omaha*, 348 N.W.2d 123, 124 (Neb. 1984).

¹⁴ Neb. Rev. Stat. § 71-804(3).

¹⁵ This concern was first expressed during the Committee hearing on the bill and continued throughout floor debate. See Appendix A for more discussion of the legislative history of LB 1083.

¹⁶ Neb. Rev. Stat. §§ 84-901 to 84-919.

¹⁷ Telephone conversation with Scot Adams, July 7, 2009 and interview with Scot Adams and others, July 23, 2009

¹⁸ Telephone conversation with Scot Adams, July 7, 2009 and interview with Scot Adams and others, July 23, 2009.

¹⁹ Neb. Rev. Stat. § 71-810(4).

²⁰ Neb. Rev. Stat. § 71-810(4).

²¹ Letter from Bill Gibson, LRC CEO, to Dennis McChargue and David Hansen, Clinical Psychology Training Program, University of Nebraska-Lincoln Department of Psychology, March 2, 3009; Young, JoAnne, “Advocates: Regional center transition program must be restored,” *Lincoln Journal Star*, June 12, 2009

²² Young, JoAnne, “Advocates: Regional center transition program must be restored,” *Lincoln Journal Star*, June 12, 2009 and interview with Scot Adams et al, July 23, 2009.

²³ Telephone conversation with Scot Adams, July 28, 2009.

²⁴ Telephone conversation with Scot Adams, July 28, 2009.

²⁵ Letter to Sen. Tim Gay from Scot L. Adams, Ph.D., April 2, 2009.

²⁶ Neb. Rev. Stat. § 71-810(3).

²⁷ E-mail from Bill Gibson, LRC CEO, July 27, 2009; Letter from Bill Gibson, LRC CEO, to Dennis McChargue and David Hansen, Clinical Psychology Training Program, University of Nebraska-Lincoln Department of Psychology, March 2, 3009.

²⁸ Young, JoAnne, “Families frustrated by closing of Regional Center program,” *Lincoln Journal-Star*, April 1, 2009.

²⁹ For example, the bill’s introducer states: “Changes proposed in LB 1083 are intended to ensure that the behavioral health reform and implemented and reform goals are achieved through intensive legislative oversight.” (Senator Jim Jensen, March 23, 2004, pg. 12144.)

³⁰ Telephone conversation with Scot Adams, July 28, 2009.

³¹ LB 928 (2008).

³² Young, JoAnne, “Families frustrated by closing of Regional Center program,” *Lincoln Journal-Star*, April 1, 2009.

³³ Interview with Scot Adams et al, July 23, 2009.

³⁴ No confidential information regarding Mr. Tilley is released in this audit report. All of the information used was gathered from public documents.

³⁵ *State v. Tilley*, Order, CR06-571, June 15, 2009.

³⁶ *State v. Tilley*, Motion to Enforce Previous Order, Case No. CR06-571, June 4, 2009.

³⁷ Neb. Rev. Stat. § 29-3703(2).

³⁸ Pilger, Lori, “Tilley to get new treatment plan,” *JournalStar.com*, June 16, 2009.

³⁹ Letter to Karen Flowers, District Judge, from Jeff Coffman, MD; Caryn Gekas, RN; Kerry Miller Loos, LCSW; Linda Paulsen, RN; A. Jocelyn Ritchie, Ph.D.; Kalan Root, PLCSW; and Will Spaulding, Ph.D., April 2, 2009.

⁴⁰ Letter to Karen Flowers, District Judge, from Jeff Coffman, MD; Caryn Gekas, RN; Kerry Miller Loos, LCSW; Linda Paulsen, RN; A. Jocelyn Ritchie, Ph.D.; Kalan Root, PLCSW; and Will Spaulding, Ph.D., April 2, 2009.

⁴¹ Letter to Karen B. Flowers, District Judge, from Dr. Y. Scott Moore, Forensic Psychiatrist, and Dr. Vijay Dewan, Clinical Director, April 15, 2009.

⁴² Letter from Karen B. Flowers, District Judge, to Dr. Y. Scott Moore, Forensic Psychiatrist, and Dr. Vijay Dewan, Clinical Director, April 23, 2009.

⁴³ *State v. Tilley*, Order, CR06-571, June 15, 2009.



III. Fiscal Analyst's Opinion

State of Nebraska

LEGISLATIVE COUNCIL

RECEIVED

SEP 24 2009

LEGISLATIVE AUDIT



PATRICK J. O'DONNELL
Clerk of the Legislature

CYNTHIA G. JOHNSON
Director of Research

JOANNE PEPPERL
Revisor of Statutes

MICHAEL CALVERT
Legislative Fiscal Analyst

MARSHALL LUX
Ombudsman

2009
EXECUTIVE BOARD
JOHN WIGHTMAN, Chairman
JOHN NELSON
MIKE FLOOD
CHRIS LANGEMEIER
RUSS KARPISEK
TOM WHITE
RICH PAHLS
DEB FISCHER
MARK CHRISTENSEN
LAVON HEIDEMANN (ex officio)

Legislative Fiscal Office
PO Box 94604, State Capitol
Lincoln, NE 68509-4604

September 23, 2009

Martha Carter, Legislative Auditor
Nebraska Legislature
Room 1201 – State Capitol
Lincoln, NE 68509

Dear Martha:

This letter is written in response to your request for our opinion as to whether the Department of Health and Human Services (HHS) can implement the recommendations in the audit of the Lincoln Regional Center's Community Transition Program (CTP) within their current level of appropriations.

It appears the only recommendation which could have financial implications for HHS is the recommendation to instruct the Division of Behavioral Health to transfer the money saved from the UNL psychologists' contract to community-based behavioral health programs. The report states that the "Closure of CTP did result in a reduction of personnel provided through a contract with the University of Nebraska-Lincoln, which was reduced to \$96,522 from a reported total of approximately \$300,000".

Upon consultation with HHS it was learned that the FY2008-09 contract with UNL for psychologists' totaled \$254,478. The FY2009-10 contract is for \$96,521, which is a reduction in cost of \$157,957 of general funds. The reduction in the contract eliminated the services of two psychologists for the CTP.

If the recommendation is made to transfer \$157,957 of general funds to community-based behavioral health programs on an on-going basis, then the budget of the Lincoln Regional Center will need to be reduced by a like amount. The reduction will allow HHS to operate within the current level of appropriations, but services in the regional center will need to be reduced by the amount of the transfer. The transfer could be implemented within the supplemental budget bill that will be passed in the 2010 Session.

Thank you for the opportunity to provide input on the financial impact of the performance review of the CTP. If you have any questions regarding the information provided in this letter, please let us know.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandy Sostad". The signature is fluid and cursive.

Sandy Sostad, Program Analyst

A handwritten signature in black ink, appearing to read "Mike Calvert". The signature is fluid and cursive.

Mike Calvert, Legislative Fiscal Analyst



IV. Background Materials

BACKGROUND MATERIALS

The “background materials” provided here are materials (in addition to the Section’s report) that were available to the Committee when it issued the findings and recommendations contained in Part III of this report. They include:

- the Section’s draft findings and recommendations (provided for context);
- the agency’s response to a draft of the Section’s report;
- the Legislative Auditor’s summary of the agencies’ response;
- the summary of testimony given at the public hearing; and
- Appendix A: Legislative History of LB 1083 (2004)

Section Findings and Recommendations

The following are the Performance Audit Section's findings and recommendations for the report.

Applicability of § 71-810 to Closure of the Community Transition Program (CTP).

Finding: The closure of CTP triggered § 71-810.

Discussion: The definition of regional center behavioral health services contained in the Nebraska Behavioral Health Services Act is broad. However, neither the plain language of the statute nor the legislative history support the Division Director's argument that § 71-810 only applies to elimination of an entire category of services such as general psychiatric services.

DHHS Compliance with § 71-810

Finding: When CTP was closed, DHHS did not comply with the provisions of § 71-810.

Discussion: Performance audit staff disagree with the Division Director's assertion that his April 2, 2009 letter to the Health and Human Services' Committee chairman met the notice requirement in § 71-810. This letter was sent *after* the decision to close the program had been announced, thereby eliminating the potential for the Behavioral Health Oversight Commission to provide its statutorily required assessment of the sufficiency of DHHS's plans for the program's patients and eliminating the opportunity for the Legislature to have meaningful input on the decision.

Outcomes of Noncompliance

Finding: DHHS's noncompliance with § 71-810 has serious ramifications, including bypassing the oversight mechanisms designed to safeguard the citizens using the affected service and inadequate transition planning—which are outcomes the Legislature had hoped to avoid by enacting the oversight provisions of § 71-810.

Finding: Section 71-810 contains no penalty for noncompliance.

Finding: Section 71-810's requirement that funds from reduced services be provided for community-based services applies to the \$200,000 saved through cancellation of LRC's contract with UNL to provide services to CTP. However, this section does not provide for the circumstance in which services are cut due to a budget shortfall.

Recommendations

Recommendation: The Committee should instruct the Division of Behavioral Health to transfer the money saved from the UNL psychologists' contract to community-based programs.

Recommendation: For future instances of regional center behavioral health service reductions, the Committee should consider examining whether the oversight the Legislature wanted is being achieved given the findings of this audit. The Committee may wish to specifically consider these questions:

- Does the Committee agree with our interpretation of the definition of regional center behavioral health services?
- What entity will review reduction/discontinuation of service notices since BHOC has sunset?
- Should statute contain a penalty or remedy for noncompliance?
- What should happen when, due to a budget shortfall, funds may not be available for transfer?

To the extent that the Committee is satisfied that the existing process is providing the intended oversight, no changes are needed. If there are areas in which the Committee is dissatisfied, it could consider amending the statute to address its concerns.

Recommendation: The Committee may wish to require DHHS to report to the Committee: (1) the placement of any of the five former CTP patients who have been discharged should they return to LRC and (2) placement changes for any of the 10 former CTP patients who currently remain at LRC. This information should be reported to the Committee within 10 business days of the placement change.

September 14, 2009

RECEIVED

SEP 14 2009

TO: Honorable Chair Harms
Senator Danielle Conrad, Vice Chair
Speaker Mike Flood
Senator LaVon Heidemann
Senator Arnie Stuthman
Senator John Wightman

LEGISLATIVE AUDIT

FROM: Scot L. Adams, Ph.D., Director
Division of Behavioral Health
Department of Health and Human Services



DHHS reviewed the August 3, 2009 Legislative Performance Audit Section – Draft Report “Department of Health and Human Services: Statutory Compliance in Closing the Lincoln Regional Center Community Transition Program.” DHHS appreciates the feedback from the Legislative Performance Audit Section (hereinafter “Auditors”), even as we engaged in three meetings and lengthy communications about many important items.

DHHS agrees with the Auditors that if the Legislature wants notification of every change that takes place at regional centers, then the language in Neb. Rev. Stat. § 71-810 is likely too vague and ambiguous (page 7 & 12 of draft report). DHHS disagrees with the Auditors findings and recommendations as they appeared in the rough draft. Underlying § 71-810 was the Legislature’s concern about the closure of state hospitals as expressly noted in the general purpose provisions of the Nebraska Behavioral Health Services Act as a whole. We believe the statute does not require notification of every change and § 71-810 language was never intended to apply to treatment modality consolidation or other treatment planning decisions by DHHS clinical professionals.

DHHS focused on the narrow question posed by this audit, asking whether the CTP treatment modality is a “service” that requires notification under Neb. Rev. Stat. § 71-810. Eleven other changes in which DHHS notified the Legislature, provides useful context. Briefly, we believe:

- 1) that the CTP treatment modality is *not* a service under the statute, therefore
- 2) *no* § 71-810 notification was required, even as DHHS provided courtesy notice of CTP consolidation to the Legislature, and the Behavioral Health Oversight Committee.

During July, 2009 audit interviews, DHHS submitted written documentation of those eleven other changes taking place at regional centers since the passage of the Nebraska Behavioral Health Services Act. Some of those changes triggered § 71-810 notification, while others did not. These previous occurrences established the DHHS application of the statute and compliance with formal notification. These previous decisions show that isolated treatment modalities do

not rise to the level of a “service” and no previous actions by regional centers to consolidate a treatment modality have ever been challenged in this manner. Indeed, the Legislature has never provided any feedback on these past formal and courtesy notices.

An omission from the Auditors August 3 brief sketch is any mention of the general purposes of the Nebraska Behavioral Health Services Act as referenced in § 71-802 and § 71-803. The meaning of all provisions cannot be understood separate from general purposes of the Act. In Subsection (4) there was no “corresponding reductions in regional center personnel or other expenditures.” Under subsection (5), there was no need to “provide regional center employees with appropriate training and support to transition such employees into positions as may be necessary for the provision of such state-operated services.” Although CTP consolidation yielded minor cost savings, **there was no LRC budget reduction. There was no loss of beds, no positions eliminated, and no employees displaced.** Neb. Rev. Stat. § 71-810 does not apply to treatment modality consolidation because the § 71-802 general purpose (7) to “authorize the closure of regional centers” was not fulfilled when the CTP treatment modality was consolidated. The legislative history clearly indicates concern about the closure of state hospitals, not the consolidation of a treatment modality.

The Auditors acknowledged that DHHS has a viable alternative statutory interpretation. Some deference should be afforded to the DHHS interpretation under the law.

Some of our disagreements are based on the Auditors selective reading of the legislative history provided in Appendix A of the draft report. DHHS includes those portions below, adding material in *italics* that the Auditors did not include:

The Legislature's concern about the well-being of patients receiving regional center services when those services were eliminated is reflected through out the legislative history of LB 1083, beginning with the Health and Human Services Committee hearing on the bill. Referring to the broad goal of moving people from regional center services to community-based services, the bill's introducer states:

*We must pursue the goal of transitioning persons from state regional centers to appropriate community based services, not only because of the Supreme Court decision on *Olmstead v. L.C.*, because it is the right thing to do. We have to do this in a way that protects the public safety and ensures that no person currently at a regional center will go without services that they need or deserve.¹ We should utilize the expertise and dedication of state employees in the community. And we should do whatever we can to provide economic development and other assistance to those communities that experience the closure of a regional center. Inpatient treatment should be utilized less, regional centers services should be consolidated, and sufficient community-based services should be developed to better serve*

September 14, 2009

Page 3

the needs of customers in a less restrictive, more cost effective manner.

As the primary author of this legislation, Senator Jenson distinguished “consolidation” from “closure” in his remarks to the Health and Human Services Committee.

We agree with the Auditors when they write, “based our analysis on the approach taken by the Nebraska Supreme Court in interpreting statute [sic]” (Page 7, Section 2). However, DHHS is concerned with the Auditors selective legal analysis as noted in endnote 13 in Section II of the rough draft. Again, DHHS includes those portions below, adding material in *italics* that the Auditors did not include.

“Statutory interpretation holds that if the language of a statute is clear on its face, there is no need to go beyond the plain language of the statute. The Nebraska Supreme Court has stated “where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.” *Hill v. City of Lincoln*, 330 N.W.2d 471, 474 (Neb. 1983). Indeed, “if the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.” *Ameritas Isle Ins. Corp. v. Balka*, 601 N.W.2d 508, 515 (Neb. 1999). However, when the language of a statute is “ambiguous and must be construed, recourse should be had to legislative history for purpose of discovering intent of lawmakers.” *Worley v. CO, of Omaha*, 348 N.W.2d 123, 124 (Neb. 1984). *The Nebraska Supreme Court also stated “a sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.” Chase 3000, Inc. v. Public Service Com'n 273 Neb. 133, 728 N.W.2d 560 (Neb.,2007). “Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.” Chase 3000, Inc. v. Public Service Com'n 273 Neb. 133, 728 N.W.2d 560 (Neb.,2007). “The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the legislature so that different provisions of the act are consistent, harmonious, and sensible.” State v. County of Lancaster, 272 Neb. 376, 721 N.W.2d 644, (Neb.,2006).”*

Endnote 13 appropriately cites Nebraska Supreme Court authority regarding two rules of statutory interpretation, but neglects to cite additional Supreme Court authority regarding other equally relevant rules. Selective citations in the August 3 Draft Report appear arbitrary.

In summary, we disagree with the Auditor’s Findings and Recommendations because: 1) §71-810 refers to closing hospitals and beds, not treatment modalities; 2) The April 2, 2009, letter given to all senators, while a courtesy letter, met the criteria for notice; 3) The language of the statute, and silence by the Unicameral to prior notices, leaves sufficient room for reasonable people to disagree on the issue.

We remain willing to improve the statute’s clarity if needed.

ⁱ Senator Jim Jensen. February 25,2004, pg. 15.

LEGISLATIVE AUDITOR'S SUMMARY OF AGENCY RESPONSE

Neb. Rev. Stat. § 50-1210 requires the Legislative Auditor to “prepare a brief written summary of the response, including a description of any significant disagreements the agency has with the Section’s report or recommendations.” On September 14, 2009, the Director of the Department of Health and Human Services Division of Behavioral Health (Division Director) submitted the agency’s response to a draft of the Performance Audit Section’s audit report. The Legislative Auditor’s summary of that response follows.

Throughout this audit, including in the response to the draft report, DHHS representatives have disagreed with our statutory interpretation but failed to present credible evidence to refute it. They have also failed to set forth a cohesive argument to support another interpretation. (The Division Director’s response misstates our position on their alternative interpretation. What we actually said, repeatedly, was that *if* DHHS representatives provided a sound alternative statutory interpretation in their written response, we would acknowledge that. However, as explained below, they failed to do so.) Consequently, we continue to believe that there is sufficient, credible evidence that the closure of CTP is likely to have constituted a reduction of regional center behavioral health services, which should have triggered Neb. Rev. Stat. §§ 71-810(2) through (5).

Notice Provisions Apply to Circumstances Beyond Regional Center Closing

In the agency’s written response, the Division Director argues that the notice provisions of § 71-810 did not apply to the CTP closing (which he refers to as a “treatment modality consolidation”) because the notice provisions come into play only if a regional center is closed. Specifically, he states that:

“[T]he § 71-802 general purpose (7) to “authorize the closure of regional centers” was not fulfilled when the CTP treatment modality was consolidated. The legislative history clearly indicates concern about the closure of state hospitals, not the consolidation of a treatment modality.”

There is no question that the potential closure of state regional centers was a focal point of the discussion on the bill that contained the provisions of § 71-810. It is also true that one of the act’s general purposes is to authorize regional center closures. However, §§ 71-810(2) through (5) are not limited to regional center closures, and the Director fails to explain how a general statement of purpose can limit that broader statutory language.

The relevant language states that the notice provisions apply when the Division intends to “reduce or discontinue regional center behavioral health services.” While closure of a regional center could constitute discontinuation of services, this language is certainly broad enough to include other types of service reductions.

In addition, the legislative history shows that the Legislature removed the language “or cease the operation of a regional center” from the notice provisions of §§ 71-810(2) through (5) to create another subsection relating to regional center closing, which includes its own notice

provision.¹ We believe that if the Legislature had intended for the provisions of the previous subsections to apply only to regional center closings, it would not have created a distinct subsection addressing those situations.

Other Applicability Arguments

The Division Director reiterates arguments he made during the audit that the notice provisions of §§ 71-810(2) through (5) do not apply to the CTP closing because “there was no LRC budget reduction. There was no loss of beds, no positions eliminated, and no employees displaced.” As we explain on pages 8 and 9 of the draft report, we believe these arguments are without merit.

The Division Director also notes that DHHS has demonstrated its interpretation of § 71-810(2) through (5) a number of times and the Legislature has voiced no objection until now. We can respond only by saying that this is the first time we have been asked to look at the issue.

In addition, the Division Director states that “As the primary author of this legislation, Senator Jenson [*sic*] distinguished “consolidation” from “closure” in his remarks to the Health and Human Services Committee.” We reviewed the citation for this statement but could not find any such distinction. Senator Jensen simply said that:

“Inpatient treatment should be utilized less, regional center *services should be consolidated*, and sufficiently community-based services should be developed to better serve the needs of customers in a less restrictive, more cost effective manner.” (Emphasis added.)

We agree that consolidation of regional center services was within the Legislature’s intention and have never argued that DHHS did not have the authority to close CTP. Our argument is that doing so likely constituted a reduction of regional center behavioral health services and, consequently, DHHS was obliged to comply with §§ 71-810(2) through (5).

Methodology

The Division Director criticizes our legislative history analysis and our approach to statutory interpretation. Although not stated explicitly, the Division Director’s concern with our legislative history analysis seems to be the belief that the history supports his perspective that the Legislature was concerned only with regional center closure. However, as stated in the draft report, we believe that the Legislature’s underlying concern was what would happen to patients when services were reduced or discontinued as more emphasis was placed on community-based services; a concern that applies equally to regional center closure and other types of service reduction. The Division Director has provided nothing to refute this belief or the evidence in the draft report that suggests former-CTP patients have suffered precisely the

¹ In FA 1574, the notice provisions of subsections (2) through (5) *did* apply to the closing of a regional center, as well as to the reduction or discontinuation of services. However, AM3329 to FA 1574 removed the language relating to closure and created subsection (6), which deals exclusively with regional center closure.

outcomes the Legislature was trying to avoid by enacting the notice provisions under discussion.

In terms of our statutory analysis, the Division Director criticizes us for a “selective legal analysis” and cites rules of statutory interpretation beyond those we cited, but fails to explain how application of those rules would lead to a different result. We applied our standard approach to statutory analysis and application of the additional rules cited did not change our result.²

DHHS Letter Did Not Meet Notice Provisions

Finally, the Division Director restates an argument made during the audit that, if the notice provisions did apply to the CTP closure, they were met with an April 2, 2009 “courtesy” notice sent to the Legislature and the Governor. We disagree with this assertion, as explained in detail on pages 9 and 10 of the draft report.

² While there are many different methods of statutory interpretation, our practice is to begin with the plain language of the statute and if this is unclear, we look to the legislative history for clarification. If at this point, we believe we can correctly interpret the meaning of the statute, our interpretation ends—there is no need to exhaust every possible method of statutory interpretation. Audit staff do not believe that this method is “arbitrary” (as stated in the agency’s response) as the Nebraska Supreme Court often ends its statutory interpretation at the same point. See e.g. *Coleman v. Chadron State College*, 466 N.W.2d 526 (Neb. 1991); *Williams v. Hjorth*, 430 N.W.2d 52 (Neb. 1988); *McDaneld v. Fischer*, 589 N.W.2d 172 (Neb. 1999).

Appendix A: Legislative History of LB 1083 (2004)

The Legislature's concern about the well-being of patients receiving regional center services when those services were eliminated is reflected through out the legislative history of LB 1083, beginning with the Health and Human Services Committee hearing on the bill. Referring to the broad goal of moving people from regional center services to community-based services, the bill's introducer states:

We have to do this in a way that protects the public safety and ensures that no person currently at a regional center will go without services that they need or deserve.¹

The introducer goes on to say that a major concern voiced about the initial version of the bill was: "a fear that community-based services would not be available and sustainable to replace those regional center services [that were eliminated]."² This concern is reiterated by the DHHS Chief Medical Officer/interim director who stated:

We must also continue to provide acute and secure services for individuals needing intensive treatment to ensure the protection and safety of both individuals and their communities.³

He continued, stating:

Great care is being taken in this proposed legislation and in the planning efforts to ensure that individuals are transitioned to the expanded array of community services.⁴

In response to these concerns, the Health and Human Services Committee proposed an amendment containing the language that became § 71-810. During debate on the proposed amendment several senators expressed their support for increased community-based services, while also expressing skepticism about whether those services would, in fact, be developed and sustainable. For example, one senator reminded his colleagues that a bill passed six years earlier with a goal of identifying community-based services as a means to reduce regional center services had been unsuccessful. Tying that experience to the plans in LB 1083, he stated: "No one is against community services. What we have here is a matter of who trusts who."⁵ Regarding a specific services—emergency

protective custody, or EPC, he stated “How do I know that the extra money going to EPC this year, the year we vote on this, is going to be there next year and the year after?”⁶ The Speaker of the Legislature echoed these concerns, stating:

[T]here is some lack of trust, I think, and not lack of trust in the people in the Legislature, not a lack of trust in the intentions of the people in the administration, but some skepticism about whether such a large undertaking and such a large project can be . . . completed in a seamless way so that you won't have people falling through the cracks that need services. . . . [S]o somehow you have to convince people that we not only have the right intentions, we have the ability and the money and the wherewithal and the organization to get this done in an orderly way, so that people won't be hurt in the process.⁷

Specifically discussing portions of the bill relating to regional center closures, another senator reiterated the concern that people not be hurt, stating: “I don't like to gamble with people's lives. I mean, we're really, really talking about people's lives here.”⁸

Concerns about whether appropriate services would be available when a regional center was closed continued on Select File. One senator stated:

We very, I think, legitimately were concerned that we didn't think some of the services would be there before the regional centers were closed. And in the compromise there's some extra oversight to watch so that doesn't happen, so we're very, very appreciative of that.⁹

Although some of these comments are directed to the need for services to be in place if and when a regional center was closed, the concern for patients' wellbeing applies equally to the reduction of regional center services without closure of the entire institution. It would be illogical for the Legislature to be concerned about the needs of patients' in one set of circumstances but not the other.

¹ Senator Jim Jensen, February 25, 2004, pg. 15.

² Senator Jim Jensen, February 25, 2004, pg. 16.

³ Dr. Richard Raymond, February 25, 2004, pg. 27.

⁴ Dr. Richard Raymond, February 25, 2004, pg. 29.

-
- ⁵ Senator Gene Tyson, March 17, 2004, pgs. 11621 & 11623.
⁶ Senator Gene Tyson, March 17, 2004, pgs. 11621 & 11623.
⁷ Senator Curt Bromm, March 17, 2004, pgs. 11627 & 11628.
⁸ Senator DiAnna Schimek, March 17, 2004, pg. 11642.
⁹ Senator Matt Connealy, April 6, 2004, pg. 13457.

Performance Audit Committee Reports: 1994 to 2009

- The State Foster Care Review Board: Authority, Conflicts of Interest, and Management Practices (December 2008)
- Personal Services Contracts: An Examination of Compliance and Oversight (October 2008)
- The Nebraska Information Technology Commission: An Examination of Statutory Compliance and the Project Review Process (November 2007)
- The Nebraska Lottery's Implementation of LB 1039 (February 2007)
- The State Department of Education's Student-based Teacher-led Assessment and Reporting System (February 2007)
- The Lincoln Regional Center's Sex Offender Services Program (August 2006)
- The Public Employees Retirement Board and the Nebraska Public Employees Retirement Systems: An Examination of Compliance, PIONEER, and Management (August 2006)
- The Nebraska Medicaid Program's Collection of Improper Payments (May 2005)
- The Lincoln Regional Center's Billing Process (December 2004)
- Nebraska Board of Parole (September 2003)
- Nebraska Department of Environmental Quality: Administering the Livestock Waste Management Act (May 2003)
- HHSS Personal-Services Contracts (January 2003)
- Nebraska Habitat Fund (January 2002)
- State Board of Agriculture (State Fair Board) (December 2001)
- Nebraska Environmental Trust Board (October 2001)
- Nebraska Department of Roads: Use of Consultants for Preconstruction Engineering (June 2001)
- Department of Correctional Services, Inmate Welfare Fund (November 2000)
- Bureau of Animal Industry: An Evaluation of the State Veterinarian's Office (March 2000)
- Nebraska Ethanol Board (December 1999)
- State Foster Care Review Board: Compliance with Federal Case-Review Requirements (January 1999)
- Programs Designed to Increase The Number of Providers In Medically Underserved Areas of Nebraska (July 1998)
- Nebraska Department of Agriculture (June 1997)
- Board of Educational Lands and Funds (February 1997)
- Public Service Commission: History of Structure, Workload and Budget (April 1996)
- Public Employees Retirement Board and Nebraska Public Employees Retirement Systems: Review of Compliance-Control Procedures (March 1996)
- Leaking Underground Storage Tank Program (December 1995)
- School Weatherization Fund (September 1995)
- The Training Academy of the Nebraska State Patrol and the Nebraska Law Enforcement Training Center (September 1995)
- Nebraska Equal Opportunity Commission (January 1995)
- The Interstate Agricultural Grain Marketing Commission (February 1994)

