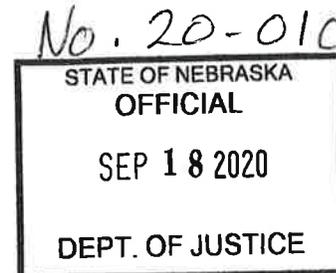




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Necessity of Legislation to Implement the Department of Health and Human Services' "YRTC & Youth Facilities Initial Transition Plan"

REQUESTED BY: Senator Sara Howard, Senator Tom Brandt, Senator Steve Halloran, and Senator Dave Murman
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office as to whether the Legislature must enact legislation prior to the Department of Health and Human Services ("DHHS") taking certain actions relating to its "YRTC & Youth Facilities Initial Transition Plan," dated July 15, 2020. At issue is DHHS' plan to move the Juvenile Chemical Dependency Program ("JCDP") currently located at the Hastings Regional Center ("HRC") to the Whitehall Campus at the Lincoln Regional Center ("LRC"), and then establish a youth rehabilitation and treatment center ("YRTC") for girls at the HRC. You have requested that we provide our guidance on these issues as soon as possible, "[g]iven DHHS's timeline to begin implementing this new plan by October 1, 2020."

BACKGROUND

Your opinion request letter references several statutes for our consideration. First, Neb. Rev. Stat. § 83-305 (2014), which "designates the [HRC] in Adams County as a state hospital for the treatment of mental illness." Second, under Neb. Rev. Stat. § 83-101.06 (2014), DHHS "shall . . . [a]dminister the clinical programs and services of the [HRC]" Third, DHHS is required to utilize a "rehabilitation model" for services

provided at the regional centers, which is defined as “a comprehensive approach to treatment and rehabilitation of a person with a disability caused by a mental illness in order to assure that such person can perform those physical, emotional, social, and intellectual skills needed to live and work in the community.” Neb. Rev. Stat. § 83-305.04 (2014). Lastly, you state that under Neb. Rev. Stat. § 71-810(3) (2018), DHHS is required to “notify the Governor and the Legislature ‘of any intended reduction or discontinuation of regional center services.’” In this regard, you indicate that under the proposed move to Whitehall, the number of beds available for the JCDP will be reduced from 24 to 8.¹

According to your opinion request letter, in 2017 the Legislature appropriated over \$5 million dollars to construct a new building at the HRC for the JCDP. The building was recently completed, but has not been used for the program. You state that appropriations for the operation of the HRC are found in Program 361, which falls under the budget program for all three regional centers (Program 365). You indicate that Whitehall falls under a different division and budget program. It is your understanding that the male youth in the JCDP will be moved to Whitehall on October 1, 2020.

With respect to the proposed plan to move the female youth currently housed at the YRTC-Kearney to the new building at the HRC, you state that DHHS plans to renovate the building to fortify the structure “so that it would serve a more correctional purpose and . . . accommodate the needs and behaviors of the females committed to the YRTC.” The YRTC at Geneva will then close. While DHHS had planned to move the girls by October 1, certain legislation passed last month (2020 Neb. Laws LB 1040, § 2) requires DHHS to complete a YRTC operational planning process prior to establishing a new YRTC in Hastings. You state that “DHHS may begin to renovate and retrofit the new building . . . to accommodate the female youth at the YRTC as soon as September. The girls would then be moved . . . in March 2021.”

ANALYSIS

With this background in mind, you have posed a number of questions to us regarding DHHS’ authority to implement the proposed plan under current law. We will discuss each of your questions separately below.

- I. Does the Legislature need to amend the law, specifically section 83-305, before the Chemical Dependency Program at the Hastings Regional Center is dismantled and the boys are moved to Whitehall in Lincoln?

Neb. Rev. Stat. § 83-305 (2014) states:

The state hospital established in Lancaster County for the treatment of mental illnesses shall be known as the Lincoln Regional Center. The state

¹ DHHS officials inform us that the notice required under § 71-810 was provided to the Governor and the Clerk of the Legislature on September 15, 2020.

hospital established in Madison County shall be known as the Norfolk Regional Center. The state hospital established in Adams County shall be known as the Hastings Regional Center.

“In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *State ex rel. BH Media Group, Inc. v. Frakes*, 305 Neb. 780, 793, 943 N.W.2d 231, 243 (2020); *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 123, 907 N.W.2d 301, 308 (2018). Section 83-305, ascertained from the entirety of its language considered in its plain, ordinary, and popular sense, designates three existing state hospitals for the treatment of mental illness as “regional centers.” The plain language of § 83-305 does not define “state hospital” or “regional center.” Notably, the JCDP is not referenced in § 83-305 nor is any other program or service.

Neb. Rev. Stat. § 83-108 (Cum. Supp. 2018)² provides, in pertinent part, that DHHS “shall have oversight and general control of the . . . hospitals for the mentally ill, [and] facilities and programs operated by the Office of Juvenile Services” DHHS also has broad authority over the admission, assignment and transfer of patients and residents in facilities under its jurisdiction. Neb. Rev. Stat. § 83-109 (Cum. Supp. 2018). As amended by 2020 Neb. Laws LB 1148, § 14 (effective date: November 14, 2020), Neb. Rev. Stat. § 83-108.04 provides that “[f]or children committed to the Office of Juvenile Services, [DHHS] may use other public facilities operated by [DHHS] for the care and treatment of such children or may contract for the use of space in another facility operated and utilized as a youth rehabilitation and treatment center in compliance with state law.”

With respect to the JCDP, Neb. Rev. Stat. § 43-407(2) (2018), amended by 2020 Neb. Laws LB 1148, § 12, and 2020 Neb. Laws LB 1188, § 6, with an effective date of November 14, 2020, provides, in pertinent part:

A juvenile may be committed by a court to the Office of Juvenile Services for placement at a youth rehabilitation and treatment center operated and utilized in compliance with state law pursuant to a hearing described in subdivision (1)(b)(iii) of section 43-286. The office shall not change a juvenile's placement except as provided in this section. If a juvenile placed at a youth rehabilitation and treatment center is assessed as needing inpatient or subacute substance abuse or behavioral health residential treatment, the Office of Juvenile Services may arrange for such treatment to be provided at the Hastings Regional Center or may transition the juvenile

² Section 83-108 was amended during the 2020 legislative session to give DHHS oversight and general control over “any facility operated and utilized as a youth rehabilitation and treatment center in compliance with state law.” 2020 Neb. Laws LB 1188, § 17 (effective date: November 14, 2020).

to another inpatient or subacute residential treatment facility licensed as a treatment facility in the State of Nebraska and shall provide notice of the change in placement pursuant to subsection (3) of this section. . . .³

(Emphasis added.) As indicated in the emphasized language above, the Office of Juvenile Services (“OJS”) *may* place a juvenile needing such treatment at the HRC or another inpatient or subacute residential treatment facility in the state. Section 43-407(2) gives the OJS the authority and discretion to place a juvenile where it deems appropriate. We do not read this provision as requiring that the treatment be provided at the HRC.

Our research indicates that Neb. Rev. Stat. 83-306, repealed by 2004 Neb. Laws LB 1083, § 149, previously required that “[t]he three state hospitals for the mentally ill described in section 83-305 shall provide care and treatment for all persons suffering from mental illnesses who are admitted to the state hospitals.” Neb. Rev. Stat. § 83-306 (Reissue 2002). Section 83-306(4) further specified treatment of a particular illness at a specific regional center: “Persons addicted to the excessive use of alcohol shall . . . be committed to the Hastings Regional Center” *Id.* However, even with a specific statutory requirement for the treatment of persons with a particular illness, this office previously concluded that the Department of Public Institutions, the agency responsible for operation of the HRC at that time, was not statutorily prohibited from terminating the Medical Detoxification program for individuals addicted to alcohol. Op. Att’y Gen. No. 49 (March 28, 1985). “Simply, no specific statute requires that a Medical Detoxification program must be maintained at the [HRC]. Whether the Medical Detoxification program at the [HRC] is terminated is a management decision which may be made by the Department of Public Institutions.” *Id.* at 2.

“The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.” *Stewart v. Nebraska Dep’t of Revenue*, 294 Neb. 1010, 1019, 885 N.W.2d 723, 730 (2016). This prior statute illustrates that the Legislature knows how to employ language expressing its intent to require certain programs at specific facilities, and did not use such language in § 43-407(2) or any other statute. Since no specific statute creates the JCDP or requires the program to be maintained at the HRC, it is our opinion that DHHS’ proposed plan to move the JCDP to Whitehall constitutes a management decision, for which no legislation is necessary.

The statutes cited in your opinion request letter do not change our conclusion in this regard. While Neb. Rev. Stat. § 83-101.06 (2014) requires DHHS to “administer the clinical programs and services” offered at the regional centers, this requirement is limited to those programs and services “as may be provided by the department.” The statute does not require DHHS to provide any particular service or program at HRC. Nor does it restrict the use of the HRC to only clinical programs. And while Neb. Rev. Stat. § 83-305.04 requires that DHHS “utilize a rehabilitation model when appropriate for services

³ We note that specific references to YRTC-Kearney and YRTC-Geneva in § 43-407 were struck by the 2020 legislation.

provided at the regional centers under the jurisdiction of the department,” there is nothing in your request letter or in the materials provided to us by DHHS to suggest this model will not be utilized when the JCDP is moved to Whitehall.

You have asked us whether § 83-305 must be amended before DHHS’ proposed plan to move the JCDP to Whitehall may proceed. Based on the foregoing, we conclude that no such amendment is necessary. DHHS has broad control and discretion over the facilities under its jurisdiction, the programs and services offered at those facilities, and the admission, assignment and transfer of the patients and residents to those facilities. Section 43-407 indicates that the treatment at issue may be provided at HRC or another facility in the state as determined by the OJS. Section 71-810 suggests that the HRC JCDP may be discontinued so long as the behavioral health services provided at Whitehall are sufficient to replace the services provided at HRC.⁴ In sum, we conclude that DHHS’ plan to move the JCDP to Whitehall appears to be authorized under existing law.

- II. Similarly, does the Legislature need to amend section 83-305 before a YRTC can be established at the Hastings Regional Center or before the Hastings Regional Center can be used to house the female youth from the YRTC since the YRTC at the Hastings Regional Center will not be a state hospital or used as a mental health facility as required under § 83-305? Must the provision establishing a state hospital in Adams County at the Hastings Regional Center be stricken?

As we concluded in response to your first question, there is no need to amend § 83-305 to create the proposed YRTC at the HRC. Under Neb. Rev. Stat. § 43-404 (2016),⁵ the OJS “shall have oversight and control of the youth rehabilitation and treatment centers.” Neb. Rev. Stat. § 43-405 (2016)⁶ authorizes the OJS to “[e]xercise all powers and perform all duties necessary to carry out its responsibilities under the Health and Human Services, Office of Juvenile Services Act.” Under Neb. Rev. Stat. § 43-407, “[t]he [OJS] shall design and make available programs and treatment services

⁴ Neb. Rev. Stat. § 71-810(2) (2018) provides, in pertinent part:

The division [of Behavioral Health] may reduce or discontinue regional center behavioral health services only if (a) 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, [and] (b) such services possess sufficient capacity and capability to effectively replace the service needs which otherwise would have been provided at such regional center

⁵ Amended by 2020 Neb. Laws LB 1188, § 3 (effective date: November 14, 2020).

⁶ Amended by 2020 Neb. Laws LB 1188, § 4 (effective date: November 14, 2020).

through youth rehabilitation and treatment centers.”⁷ Certain language in LB 1140 appears to further sanction DHHS’ ability to establish a YRTC at the HRC as proposed, subject to the conditions set out in the legislation:

The department shall not establish a new youth rehabilitation and treatment center or establish or move a youth rehabilitation and treatment center to a new or existing state or private facility until March 30, 2021, after the completion of the planning process required under this section. Youth committed to the [OJS] and residing at a youth rehabilitation and treatment center may be moved to an existing state or private facility on a temporary basis in the event of an emergency, pursuant to the emergency plans created under section 6 of this act, and in compliance with the requirements and restrictions in sections 7 and 8 of this act.

2020 Neb. Laws LB 1140, § 2, codified at Neb. Rev. Stat. § 43-427. In addition, we understand that there was no apparent need to enact enabling legislation prior to DHHS’ establishing the “YRTC-Lincoln” at the Lancaster County Youth Services Center earlier this year.

You have also asked whether the Legislature should strike the provision establishing a state hospital in Adams County at the HRC. According to DHHS officials, the HRC has not operated as a state hospital for the mentally ill for a number of years. We also understand that the JCDP is the only program currently offered at the HRC. Accordingly, the Legislature may want to consider amending § 83-305 to reflect the HRC’s actual use.

- III. Would the Legislature need to amend the law to redirect the appropriations designated in LB 330 (2017) for the construction of a building for the specific use of the Chemical Dependency Program so that the building may be used as a YRTC instead?

The specific appropriation referenced above states, in pertinent part:

The unexpended General Fund and Nebraska Capital Construction Fund appropriation balances existing on June 30, 2017, are hereby reappropriated.

⁷ As noted above, the Legislature eliminated references to “Youth Rehabilitation and Treatment Center-Kearney” and “Youth Rehabilitation and Treatment Center-Geneva” in § 43-407 in the 2020 legislation. *Cf.* Neb. Rev. Stat. § 83-107.01, amended by 2020 Neb Laws LB 1188, § 16 (effective date: November 14, 2020), which lists the state institutions under DHHS’ supervision, including the YRTCs at Kearney and Geneva, and sets out the gender separation requirements of the YRTCs “so long as the department operates” such facility.

[DHHS] is hereby authorized to repurpose reappropriated funds originally appropriated to this program for the renovation of Building 3 at the [HRC]. Such reappropriated funds shall be used to construct a facility at the [HRC] to house the chemical dependency program for males in state custody.

There is included in the reappropriated fund balances in this program an estimated \$2,897,000 to demolish buildings at the [HRC] determined by the Vacant Building and Excess Land Committee to be vacant as defined in section 72-811.

2017 Neb. Laws LB 330, § 8.⁸

This office has indicated on numerous occasions that appropriations bills must be restricted to appropriations only and cannot enact substantive law. Op. Att’y Gen. No. 91020 (March 25, 1991).⁹ “[A]n appropriations bill is separate and distinct from other substantive legislation.” Report of the Attorney General, 1979-1980, No. 289 at 416. Our position was based on constitutional provisions relating to appropriations bills, which require one subject and a new legislative act to amend or repeal existing law. Our prior opinions also pointed out the difficulty with including substantive provisions in appropriation bills: “One practical problem of putting such language in appropriation bills

⁸ As indicated, the 2017 appropriation was a reappropriation of funds originally appropriated to Program No. 919 for the renovation of Building 3 at the HRC. The legislative history of the project indicates that DHHS’ original capital construction project request was made for the 2013-2015 biennium budget cycle with a FY2014 request for \$6,876,890 for “[t]he renovation of Building #3 at the [HRC] to house a Chemical Dependency Treatment Program for 24 adolescent males.” 2013-2015 Capital Construction and Building Renewal Budget Request, October 4, 2012, at 4. The original appropriation was made via LB 198, § 11 (2013), which stated, “[DHHS] is hereby authorized to renovate Building No. 3 at the [HRC] to house the chemical dependency program serving adolescent males in state custody.” In 2015, the Legislature appropriated \$4,883,000 for FY2015-16, for the same purpose of renovating Building No. 3 to house the chemical dependency program. See LB 660, § 9 (2015). Most recently, the Legislature appropriated the undisbursed balances in Program No. 919 existing on June 30, 2019 and June 30, 2020. See LB 297, § 47 (2019). LB 297 contained no specific authorization language regarding these funds found in prior capital construction legislation in each of the three prior biennium budget cycles. DHHS’ 2019-2021 request simply seeks a reappropriation for “Program 919 Hastings Regional Center (HRC) Building No. 3 Renovation.” 2019-2021 Capital Construction and Building Renewal Budget Request, September 14, 2018, at 4.

⁹ See also Op. Att’y Gen. No. 35 (August 14, 2000); Op. Att’y Gen. No. 92054 (April 1, 1992); Opinion of the Attorney General No. 24, February 17, 1981; Report of the Attorney General, 1977–1978, No. 75 at 112 and No. 241 at 368; and Report of the Attorney General, 1975–1976, No. 201 at 281 and No. 214 at 296.

is the fact that such bills are in the nature of temporary laws. They are never placed with our permanent laws, but are only printed once, in the Session laws. Thus they do not come to the attention of persons having to deal with the government.” Opinion of the Attorney General to Governor Exon (March 25, 1974), 1974 Legislative Journal at 1313. There is no provision in the permanent laws that discusses “a facility at the [HRC] to house the chemical dependency program for males in state custody.” The only provision we could find relating to the JCDP is the reference to “inpatient or subacute substance abuse or behavioral health residential treatment” and the HRC in Neb. Rev. Stat. § 43-407.

The premise of your question appears to be that the language in LB 330 requires the JCDP to be housed at the new facility at the HRC. As explained above, appropriation bills do not create substantive provisions. And as indicated in our responses to questions I and II, DHHS already has the ability under current law to plan to use the HRC facility for a proposed YRTC. Consequently, the Legislature must decide as a matter of policy whether substantive legislation is necessary to restrict the use of the HRC facility.

IV. Would it be necessary for the Legislature to reallocate funds from the Hastings Regional Center operations budget, Program 361, to the operations budget at Whitehall prior to the establishment of the Chemical Dependency Program at Whitehall?

According to the 2019 mainline budget bill, LB 294, § 104, the HRC is listed as a program classification (No. 361) within DHHS Program No. 365, “Mental Health Operations.” According to DHHS officials, the administrative costs of operating the JCDP at HRC are currently paid from Program No. 365 and will continue to be paid from this program when JCDP is transitioned to Whitehall. Thus, it is not necessary for the Legislature to “reallocate” funds prior to the proposed move.

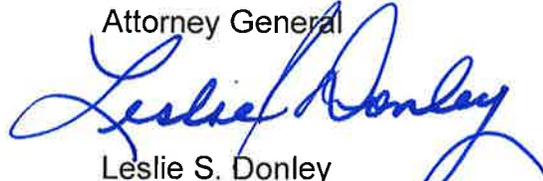
CONCLUSION

Based on the foregoing, it is our opinion that no legislative amendments to Neb. Rev. Stat. § 83-305 are necessary in order for DHHS to implement its “YRTC & Youth Facilities Initial Transition Plan.” While the proposed transfer of the JCDP to Whitehall may proceed as scheduled, DHHS is prohibited from establishing a new YRTC or establishing or moving a YRTC to a new or existing state or private facility until March 30, 2021, following the completion of the planning requirements set out in § 43-427. There is also no need to “redirect” the appropriation expended to construct the building originally intended for the JCDP, notwithstanding DHHS’ decision to repurpose the building.

Finally, other funding or administrative considerations regarding the regional centers, the OJS, or the YRTC's, are matters of policy as opposed to legal questions, which the Youth Rehabilitation and Treatment Center Special Oversight Committee¹⁰ or the Legislature as a whole is best equipped to address.

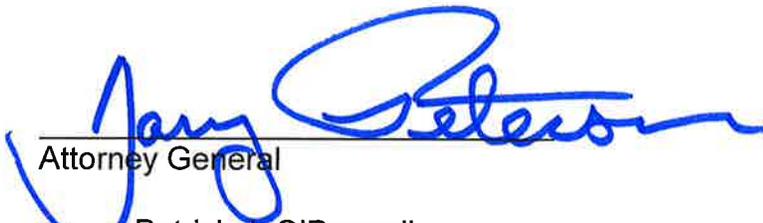
Sincerely,

DOUGLAS J. PETERSON
Attorney General



Leslie S. Donley
Assistant Attorney General

Approved by:



Attorney General
pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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¹⁰ See 2020 Neb. Laws LB 1144, § 4 (effective date: November 14, 2020).