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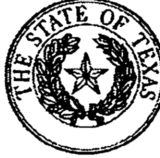

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Hon. Greg Abbott
Attorney General of Texas
Attention: Opinion Committee
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Re: Request for Opinion

Dear General Abbott:

On behalf of the Amarillo Hospital District, we request your opinion in regard to the legality of a proposed amendment to the Indigent Care Agreement between the Amarillo Hospital District and Universal HealthSystems, Inc.

BACKGROUND

The Amarillo Hospital District (" AHD" or "District") was created in 1959 pursuant to Article IX, Section 5(a) of the Texas Constitution, with the stated purpose of such creation being the assumption of the responsibility of providing medical and hospital care for indigent persons. TEX. CONST. art. IX, § 5(a). The organic statute provides that AHD is a "body politic and corporate, and its functions are declared to be governmental and public," and reiterates that the purpose is to provide hospital care for "indigent and needy persons." Acts 1959, 56th Leg., ch. 32, §1. [1]

In February, 1996, the AHD sold and transferred its hospital, Northwest Texas Hospital, and other assets to Universal Health Systems of Amarillo, Inc., a Texas corporation and wholly owned subsidiary of Universal Health Services, Inc., a Delaware corporation ("UHS"). As part of the consideration for the sale, and pursuant to Chapter 61 of the Texas Health & Safety Code, UHS agreed with AHD to assume and perform the District's

1 The original organizing statute was Acts 1957, 55th Legislature, ch. 136, passed before approval of the constitutional amendment. Acts 1959 is essentially a reenactment of the original statute.

obligation to provide for healthca ervices to the indigent and needy residents of the District. A copy of that Indigent Care Agreement ("Agreement") is attached for your reference. Per that agreement, the AHD currently pays UHS approximately $6.7 million per year to care for the needy and indigent. According to UHS, the actual cost of providing indigent health care in the district far exceeds the amount paid by AHD.

The Agreement specifies three tests a person must satisfy to qualify for publicly funded health care from AHD via UHS. In summary, the person must: (i) prove residency within the district; (ii) meet certain income limits, and, (iii) have no third party payor, such as governmental program or private insurance for health benefits or, have exhausted all such benefits. *Indigent Care Agreement,* Section 1. b. The intent of the third test is to assure that AHD is the provider of last resort for a person's health care. It is this third test that gives rise to the UHS Proposal and the Question Presented.

UHS is trying to control rising costs of providing health care to the needy and indigent. It appears that some patients are knowingly refusing to accept health insurance available through their employer, to satisfy the third test, and receive public assistance. The result is to deprive UHS of insurance reimbursement for costs of treating the person that would otherwise be available, but for the patient's manipulation. Consequently, UHS proposes to amend the Agreement to provide that patients who have commercial insurance available through their employer would be required to provide insurance for themselves and dependents as their primary payor. If the patient obtains services at a UHS facility, UHS will absorb the patient's insurance deductible or coinsurance through the indigent program as secondary payor. Persons who can provide evidence that employer-imposed premiums exceed 17% of the person's net income will be covered by the Indigent program and not required to accept their employer's insurance plan.

UHS' intent is to obtain reimbursement from the insurance plan for much of its costs in treating the person, rather than using limited funds from AHD that should be spent for the truly indigent. If a person exhausts the available insurance or its cost is excessive, then the person would be eligible for indigent and needy assistance if the person otherwise meets eligibility criteria.

While the AHD supports the efforts of UHS to reduce fraud, be efficient, and to assure that public funds of AHD are expended on persons who are actually indigent and needy, the general counsel for AHD has not been able to conclusively determine whether the UHS Proposal, if adopted, is a lawful requirement under the terms of the Agreement, Chapter 61 of the Health & Safety Code, the enabling legislation of the AHD, or the constitutions of Texas or the United States.

QUESTION PRESENTED

May the Amarillo Hospital District or its contractor, lawfully require a person to take available health insurance (e.g., an employer's health plan), as a prerequisite to qualifying for indigent health care?

DISCUSSION

AHD is solely responsible for the provision of health services to "indigent and needy persons" within the jurisdiction of the district. Acts 1959, 56th Leg., ch. 32, §1. The responsibility includes determining whether a patient in a District facility has the resources to pay for treatment. *Id.*, § 14 a. The District cannot adopt an eligibility standard that contravenes the constitutional duty to provide indigent. Op. Tex. Att'y Gen. No. DM-380 (1996). The question presented asks if the proposed amendment is permissible in light of this limitation.

To answer this question one must seek authority beyond the general boundaries of the organizing constitutional provision and statute. [2] The Legislature provides this authority in Chapter 61 of the Texas Health

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2 This question does not appear to implicate rights under the United States Constitution. Op. Tex. Att'y. Gen. No. JM-815 (1987)

and Safety Code, also known as tl digent Health Care and Treatment Act. AHD is a hospital district within the definition of this chapter, and is therefore subject to its provisions. TEX. HEALTH & SAFETY CODE ANN. § 61.002 (7)(Vernon 2001). Further, AHD, as a governmental entity, exercises only the power that is granted to it by the Legislature. Op. Tex. Att'y Gen. No. DM-29 (1991); Op. Tex. Att'y Gen. No. JC-0068 (1999).

Chapter 61 elaborates on the basic obligation of the District to provide of indigent care. For example, there are certain medical services a hospital district is required to provide "eligible residents." TEX. HEALTH & SAFETY CODE ANN. § 61.055(a)(Vernon 2001). An "eligible resident" is defined as a person who meets "income and resources requirements established by [Chapter 61] or by the . . . hospital district in whose jurisdiction the person resides." *Id.*, § 61.002 (3)(emphasis added). This language suggests a hospital district enjoys some discretion in setting eligibility requirements for qualifying as an indigent and needy person. Later in Chapter 61, this discretion is confirmed, but placed in the framework of an option: the hospital district may elect to follow eligibility standards established by the Texas Department of Health or "a less restrictive income and resources standard adopted by the . . . hospital district servicing the area in which the person resides." *Id.*, § 61.052 (a). Once the eligibility criteria are satisfied, there is an obligation to provide services to the patient. Id.

Requiring an applicant to apply for available health insurance would be a valid requirement provided it is either allowed by the Department of Health's eligibility standards or by less strict standards adopted by the District. Needless to say, explicit authority allowing the District to make such a requirement would obviate the need for this opinion. Therefore we must determine if there is implicit authority.

We first examine the eligibility standards set by the Department of Health, pursuant to the authority of the Health and Safety Code. *Id.*, §§ 61.006-008. The regulations are found in the Texas Administrative Code. Although the regulations specifically apply to counties, they are applicable to AHD by section 61.052. *Id., § 61.052.*

The standards contemplate that eligibility is determined at the time the applicant asks for aid. Eligibility is a "snapshot" of the applicant's status at that moment in time. Among the permissible inquiries into this status is whether there is existing health insurance. *Id.*, § 61.007 (5). The regulations specifically provide that existing health insurance is a resource that the hospital district is allowed to call upon for reimbursement. 25 TAC §14.204. In fact, by submitting an application for services, the applicant assigns any right of recovery from third parties, including insurance, to the District. *Id.*. at (g).

Assuming for the moment that the District could validly require an applicant to apply for available health insurance, there are definite limits to what could be considered "existing" insurance. On the one hand, in many insurance plans offered through employment, for example, health insurance is a part of a "cafeteria plan." In such a plan, an employee who elects not to participate in the plan could not change that election until the next enrollment period barring the existence of circumstances that are not relevant to this opinion. 26 C.F.R. § 1.125-4 (a). In this circumstance, the health insurance would be considered an "inaccessible" resource and therefore exempt from being considered as a resource. 25 TAC §14.105 (d)(3). On the other hand, the conscious decision not to take available insurance during the enrollment period with the forethought to manipulate the later "snapshot" hardly seems to be the legislative intent or good public policy. Other "availability" issues arise in the case of a health plan containing a preexisting condition clause or requiring a waiting period before the coverage begins.[3] In any situation in which the applicant is not able to access health insurance due to applicable law or the provisions of an employer's health insurance plan, the proposed amendment could not apply.

(requirement that counties support paupers does not create a property right actionable under the Due Process Clause). In addition, while your office cannot resolve factual issues, thus prohibiting your expressing an opinion on the validity of a particular eligibility standard (*See, for example, Op.Tex. Att'y Gen. No. DM-380 (1996)*) the question we ask can be resolved as a matter of statutory interpretation.

3 As an example, Potter County has elected under 42 U.S.C. §300gg-21 to exempt the Potter County Medical Benefit Plan from requirements limiting pre-existing condition exclusion periods.

While the prospect of being able ɔtain the insurance at a *future* date is nu sufficient to classify the insurance as "existing." *See, for ex., Op.Tex. Att'y Gen. No. JM-1094* (1989) (*hospital district had no authority under existing statute to seek reimbursement from an indigent person who subsequently recovered personal injury judgment)*, the issue presented here contemplates a backward look. That is, at the time the person seeks indigent health care and his/her resources are considered, one looks to see if the applicant *could* have obtained insurance but chose not to in order to qualify as indigent. Legally, the focus must remain on whether health insurance exists to cover the present need of the applicant or could have existed, but for the affirmative act of the person.

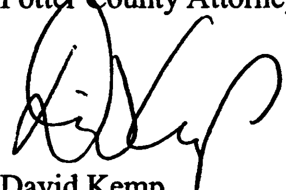
Within this limit, the Hospital, acting through the District's eligibility criteria, may commit to become a secondary payor for any eligible resident who can acquire health insurance and seeks services in the Hospital. Both the statutes and regulations allow a hospital district to request an eligible resident who is not receiving SSI/SSDI to "contribute a nominal amount toward the cost of the assistance." 25 TAC § 14.204 (f); § 61.005 (a). The hospital district may define the amount of the contribution. Id. Relying on this authority, the applicant's premium or out-of –pocket expense (if any) could be viewed as the nominal amount contributed. Such a provision would constitute a less restrictive eligibility requirement than is found in the regulations. The limitation on this option is that the contribution can only be requested. If the applicant is not able to make the contribution or is disqualified by a pre-existing condition, the District would not refuse to provide care. *Id.*

Conclusion

There appear to be legal limitations that could affect the proposed amendment. The terms of any medical insurance plan offered at the workplace could dictate whether such insurance is "available" or not. If medical insurance is available, the District may require an applicant to obtain it, but may not deny assistance if the applicant refuses. We look forward to your opinion.

Sincerely,

SONYA LETSON
Potter County Attorney



David Kemp
Assistant County Attorney

c: Mr. Marcus Norris
Amarillo Hospital District