

TARRANT COUNTY
OFFICE OF THE
CRIMINAL DISTRICT ATTORNEY

TIM CURRY
CRIMINAL DISTRICT ATTORNEY

November 21, 2003

Hon. Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

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OPINION COMMITTEE
HOSPITAL DISTRICT OFFICE
1025 SOUTH JENNINGS - SUITE 300
FORT WORTH, TEXAS 76104
(817) 927-1465

METRO (817) 429-5156-EXT. 5098
FAX (817) 338-4070

RE: May the Tarrant County Hospital District use its funds to establish a "self insurance" program providing liability coverage for JPS Physician Group, Inc. (a non-profit corporation established by the District) and/or that entity's physician and other health care provider employees?

Dear General Abbott:

Our office represents and provides legal services to the Tarrant County Hospital District. The District was created in 1959 pursuant to Article 9, Section 4 of the Texas Constitution and Article 4494n, V.T.C.S.A. Article 4494n has since been repealed and its provisions codified as Chapter 281 of the Health and Safety Code (the Code). Section 281.002 of the Code defines the District's statutory mission, which is "...to furnish medical aid and hospital care to the needy and indigent persons residing in the district."

The District provides a comprehensive array of health care services to the residents of Tarrant County (population estimated in excess of one million, four hundred thousand) through an extensive and increasingly sophisticated delivery system. It owns and operates John Peter Smith Hospital, a large, acute care general hospital as well as a substantial mental health facility known as Trinity Springs Pavilion, both located in Fort Worth. The District also owns and/or operates more than twenty primary care centers and other clinics located throughout Tarrant County. It employs in excess of three thousand individuals and its budget for its Fiscal Year 2004 is approximately 200 million dollars.

To further facilitate its mission, the District has established an HMO (MetroWest) pursuant to Section 281.0515 of the Code, and a non-profit corporation (JPS Physician Group, Inc.) pursuant to Section 281.0565 of the Code and Section 162 of the Occupations Code. This request for opinion deals

with JPS Physician Group, Inc. (JPSPG) and the ability of the District to provide JPSPG with funds to establish a self insurance program for that entity and/or its employees. Specifically, we ask if the District may use its funds for the creation of a JPSPG self insurance program that would cover JPSPG and/or its physician and other healthcare provider employees for health care and/or professional liability claims. We believe that the District may do so as long as it properly addresses certain constitutional issues described in our discussion below.

We seek your opinion on this matter because of Article III, Section 52 of the Texas Constitution, which generally prohibits the lending of credit or making a gift of public funds by a political subdivision of the State. The ability of a public entity such as the District to utilize public funds for the benefit of a private entity appears to hinge on three factors or requirements. The first is whether or not the use would serve a valid public purpose. The second is whether or not the public would receive adequate consideration in return for the expenditure, and the third is whether or not the governmental entity retains sufficient control to assure that the funds are used for the intended purpose(s). In Opinion No. JM-1030(1989), General Mattox cited and concurred with a long line of Attorney General opinions concluding that an expenditure of public funds is permissible if those three factors are met.

We believe that the nature of the relationship between the District and JPSPG is central to the question; therefore, we provide this description and history. JPSPG was established in March of 2003. It is a Texas non-profit corporation organized, and to be operated, exclusively to the benefit of the District, and to support, promote, and advance the mission of the District in a number of ways, including the provision of medical services. See Article IV of JPSPG's Articles of Incorporation (the Articles), which are submitted herewith as are JPSPG's Bylaws (the Bylaws).

Section 281.0565 of the Code authorizes the District to establish a "charitable organization" to facilitate the management of a district health care program by providing or arranging health care services, developing resources for health care services, or providing ancillary support services. The District has created JPSPG to assist the District in its mission of providing medical aid and hospital care to the needy and indigent persons residing in Tarrant County. See the Articles, the Bylaws, and the attached Resolution of the District Board of Managers. This type of physician-based, non profit corporation has been commonly employed by the Chapter 281 hospital districts to facilitate the Districts' provision of services pursuant to that law.

The first requirement stated above is that the expenditure must serve a valid public purpose. The governing body of the District, its Board of Managers, is faced each new fiscal year with expanding obligations to provide services and with ever decreasing resources, relative to the patient population it serves, to get the job done. The Board has determined to utilize JPSPG to assist the District in

getting the job done. Section 281.0565 authorizes the creation of an entity such as JPSPG to provide or arrange health care services, develop resources for health care services, or provide ancillary support services. JPSPG is a vital part of the strategic plans for the District that are approved by its governing body, the Board of Managers, in order to fulfill the District's statutory duties and to provide quality healthcare for the residents of Tarrant County, and it is anticipated that the District will contract with JPSPG to provide a wide range of services necessary to that end. In fact, while newly created, JPSPG is already providing services to the District and its patient population. For example, JPSPG physicians are already staffing the District's new cancer care center and its urgent care clinic, providing vital services to the needy and other residents of Tarrant County.

The public purpose of the District is to provide medical and hospital services for the needy and other residents of Tarrant County, and the Board of Managers has determined that JPSPG is crucial to accomplishing that purpose. In order to provide medical or other healthcare services on behalf of the District, JPSPG must employ or otherwise retain physicians and other healthcare providers. To do so, JPSPG must in some manner assure coverage for professional liability for these healthcare providers. The utilization of District funds for start up costs such as the self insurance fund discussed herein clearly would serve a valid public purpose. That purpose is to make healthcare services available to the needy and other residents of Tarrant County - indeed, the very reason for the District's existence.

In JM-1030, General Mattox concluded that the Texas Department of Mental Health and Mental Retardation could contract with private entities to provide services to mentally disabled clients of the Department. General Mattox further concluded that the Department may pay "start-up costs" to non-governmental entities, provided that the public receives adequate consideration and the governmental entity retains enough control over the expenditure of the funds to assure that the public purpose is actually fulfilled. We believe that the same rationale and policy reasons for General Mattox's finding in JM-1030 are applicable to the situation discussed herein.

The second requirement is that the public must receive adequate consideration for the expenditure of public funds. The exact nature of the contemplated self insurance program to be implemented is not yet known and, therefore, neither specific details nor contracts are submitted for your consideration. For example, the District does not and cannot currently know the exact amount of monies that would be dedicated to this purpose, what if any portion of the monies so dedicated would be repaid in kind by JPSPG, or the details of the ultimately determined self insurance program.

The determination of whether the expenditure of public funds meets the aforementioned three requirements, including the question of adequate

consideration is left, at least initially, to the sound discretion of the governing body of the governmental entity. See JM -1030 and the cases and opinions cited therein. Whatever the factors considered by the District's governing body in determining if the contemplated expenditure meets these constitutional requirements, it is clear that there can be many ways for the public to receive adequate consideration, and that repayment of start up costs such as the contemplated expenditure is not the only way. For example, it is noted in JM-1030, for example, that this requirement might be met by a contractual requirement to provide services for a certain period of time, or by a guarantee to provide service coupled with a partial forgiveness. For example, we believe that the assurance of a reliable source of quality healthcare services to serve the District and its statutory mission could serve as worthy consideration.

With regard to the third factor, the retention of sufficient controls to assure that the funds are being used as intended, one could hardly imagine a situation that would better allow the governmental entity to control the application of the funds. A review of the Bylaws makes it abundantly clear that the District has the authority and ability to control all JPSPG operations and activities, including the application or use of any District funds that might be dedicated to a JPSPG self insurance program. The District is the sole Member of JPSPG. That relationship, along with the provisions of the Bylaws, allow the District to exercise its authority, oversight and careful control over the entirety of the operations and activities of JPSPG. For example, Article II, Section 2 of the Bylaws provides that the Member appoints and removes members of the JPSPG Board of Directors. This Section also provides the Member with exclusive authority to take any action with respect to the Corporation that is not inconsistent with the law.

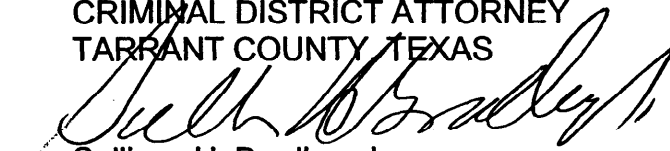
Section 5 of Article II of the Bylaws provides an extensive list of powers and actions reserved to the Member. The District would have the authority to prescribe the actuarial, accounting and other financial procedures for establishing and maintaining such a program. It would have the authority to monitor, audit, direct the program, and even terminate the program, subject only to any obligations that may have been assumed. It seems clear that the required elements of oversight and control are present or could be imposed by the District.

Finally, we believe it important to consider that JPSPG is not just another private entity with which the District does business. It is the District's creation as expressly authorized by Section 281.0565, created specifically and exclusively to serve the mission and purposes of the District and is subject to the District's control and oversight. Subsection 281.0565(c) goes so far as to provide that such an entity is a "unit of local government for purposes of Chapter 101, Civil Practice and Remedies." Perhaps JPSPG is best described as a "quasi-governmental" entity created by and serving the governmental purposes of the District. We believe that these facts plus the ability for the District to control JPSPG lend significant weight to our contention and belief that the District may indeed expend public funds to establish a professional liability self insurance program for

JPSPG, as long as the District's Board of Managers, exercising sound discretion and judgment, determines that the public will under the ultimate facts receive adequate consideration for the expenditure.

We look forward to your response. On behalf of the Tarrant County Hospital District, thank you very much for your attention to and efforts in this matter.

Very truly yours,
TIM CURRY
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY TEXAS



Sullivan H. Bradley, Jr.,
Assistant District Attorney

cc: David M. Cecero
Tim Curry
Marvin Collins