



ID# 12621
mJ

JOE LUCAS
COUNTY ATTORNEY

FIRST ASSISTANTS
REBECCA ROJO
GAYLE GARNER

EL PASO, COUNTY TEXAS

ROOM 201, CITY-COUNTY BUILDING

EL PASO, TEXAS 79901

RQ-88

(915) 546-2050

May 28, 1991

ASSISTANTS
LEE SHAPLEIGH
IRWIN M. SPECTOR
EDDIE L. MARTIN
MARIA GUADALUPE MARTINEZ
ANTONIO AUN
ERICH A. MORALES
KEN BARNES
MARLENE GONZALEZ-RUIZ
D. JEANNINE DALTON
ANTONIO RODRIGUEZ
FRANK M. LYNCH
CAROLYN PEARSON
GEORGE R. LOCKE
JANET BURNETT-WEATHERS
JAMES J. MORAN
JULIA MARTIN
EVANGELIN WECHSLER
LUCY E. DEL PRADO DIETZ
LUCILLE S. ZAVALA

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711-2548
Attn: Ms. Madeleine Johnson
Chairperson - Opinions Committee

RECEIVED
MAY 30 91
Opinion Committee

RE: El Paso County Hospital District -- Dental Health Services

Dear General Morales:

Pursuant to the provisions of Section 402.043 of the Texas Government Code, I hereby request an opinion from the Attorney General with regard to the following questions that have arisen in El Paso County, Texas.

QUESTIONS PRESENTED

1. Can El Paso County Hospital District (the "Hospital") eliminate the dental health clinic services described herein (the "Dental Services") currently provided by the Hospital?
2. If the Hospital eliminates the Dental Services, will it nonetheless remain financially responsible for paying for Dental Services performed by others upon indigent residents of the hospital district?

DISCUSSION

El Paso County Hospital District, also known as R.E. Thomason General Hospital (the "Hospital") is a county-wide hospital district created pursuant to the provisions of Tex. Const. art. IX, Section 4 and Chapter 281 of the Texas Health and Safety Code (formerly Article 4494n). The Hospital currently employs one full-time dentist, one part-time dentist, and three dental assistants, who perform so-called "urgent and emergent" dental

care to adults and children who are residents of El Paso County (the "Dental Services"). The Dental Services do not include routine fillings, check-ups, orthodontic work, or other cosmetic dentistry, but some denture work is performed on a limited basis. All Dental Services are performed in a clinic adjacent to and belonging to the Hospital. Approximately half of the dental patients are indigent. The Dental Services have been performed for approximately ten years, but because of severe budgetary constraints, the Hospital intends to cease providing such services.

Article IX, Section 4 provides that after a hospital district is created, the district "shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county" (emphasis added). Section 281.046 of the Health and Safety Code provides that as of the date the district first collects taxes, "the district assumes full responsibility for furnishing medical and hospital care for indigent and needy persons residing in the district."

It is clear that the Hospital can, in its sound discretion, stop providing the Dental Services. However, what is unclear is whether the Dental Services fall within the constitutional and statutory mandatory "medical and hospital care," and if so, whether the Hospital will remain financially liable for Dental Services performed by others to its indigent residents.

Section 285.051 of the Health and Safety Code (formerly Art. 4437c-2) provides that "[t]he governing body of a hospital district may order the . . . closing of all or part of a hospital owned and operated by the district" (emphasis added). The resolution authorizing such closing "must include a finding by the governing body that the . . . closing is in the best interest of the residents of the hospital district." *Id.* Section 285.052 requires the hospital district to hold an election on the closing under certain circumstances if a petition requesting an election is filed by at least ten percent of the qualified voters of the hospital district. See Jack County Hospital Dist. v. Jack County Citizens for Continued Hospital Care, 669 S.W.2d 147 (Tex. App.--Corpus Christi 1984, no writ) (indicating that voters can petition for an election on the issue of termination of emergency room service).

The Attorney General has held that the sale or closure of a hospital under the authority of the foregoing statute does not relieve the hospital district from liability for paying for the health care services required to be provided under the constitutional and statutory provisions creating the district and the Indigent Health Care and Treatment Act. Op. Tex. Att'y Gen. No. JM-864 (1988).

In that opinion, the Amarillo Hospital District, a hospital district created under Article IX, Section 5,¹ sought to close, sell or lease the Northwest Texas Hospital. The Attorney General held that if the board determined that closing the hospital was in the best interest of the district's residents, the board could do so, but that the hospital district would continue to be "legally responsible for providing medical care pursuant to the Indigent Health Care and Treatment Act," and could discharge that responsibility "through other public facilities, by contracting with a private provider, or through the purchase of insurance for eligible residents." Id.

In Op. Tex. Att'y Gen. No. H-703 (1975), the Attorney General stated that "A hospital district is liable for the medical care of its needy inhabitants, that is, its indigent residents. The district must either provide such care ... or must recompense the parties who do provide such care." (Emphasis added). This opinion addressed the specific question of whether the El Paso County Hospital District would be liable for the cost of medical care of indigent prisoners, and concluded that the Hospital is responsible for the care of indigent prisoners who are residents of the district.

What must be determined is whether, or to what extent, the constitutional and statutory mandate to provide "medical and hospital care" to indigents includes dental health services such as those described.

¹The Texas Constitution authorizes several types of hospital districts. In addition to Article IX, section 4, discussed above, which authorizes the creation of hospital districts in counties having a population of 190,000 or more and Galveston County, article IX, section 5 authorizes three specific hospital districts, Wichita County, Jefferson County and the City of Amarillo; Article IX, section 6, relates to the Lamar County Hospital District; Article IX, section 7, authorizes the Hidalgo County Hospital District; Article IX, section 8, authorizes the Comanche County Hospital District; and Article IX, Section 11, authorizes the creation of hospital districts in Ochiltree, Castro, Hansford and Hopkins Counties. Finally, Article IX, section 9, until the 1989 constitutional amendment, authorized the creation of hospital districts by special legislation. Numerous hospital districts have been created under this provision. See Tex. Rev. Civ. Stat. Ann. art. 4494g. (List of districts). The 1989 amendment to Article IX, section 9, now allows creation of hospital districts under that provisions either by special law or by general law. See Acts, 71st Leg. S.J.R. 34; ch. 206 (1989).

No case or Attorney General's opinion has been found expressly addressing this issue. There are, however, certain Attorney General opinions that discuss what constitutes "medical and hospital care," at least with respect to other hospital districts.

Article IX, Section 9, of the Texas Constitution (see n.1, supra) provides that hospital districts created under that section "shall assume full responsibility for providing medical and hospital care for its needy inhabitants" This language is virtually the same as the language quoted above in Article IX, Section 4, which defines the duties of the Hospital.

In a 1988 letter opinion, the Attorney General was asked whether the Jackson County Hospital District, or Jackson County was required to offer such health services as immunizations, pre-natal services, free drug prescriptions, or physician services to the needy inhabitants of the hospital district. Jackson County Hospital District is a hospital district created under Article IX, Section 9 of the Texas Constitution. The Attorney General stated that Jackson County Hospital District "is required to provide medical care for indigents who are residents of Jackson County." Op. Tex. Att'y Gen. No. LO-88-33 (1988). However, the Attorney General noted that the constitutional provision and the enabling statute do not expressly define what services the district must provide to indigent residents of the county. The Attorney General concluded that "it is within the sound discretion of the governing board of the hospital district to determine what health care services are necessary and what services are proper for the hospital district to provide for the needy inhabitants of Jackson County."

In a subsequent Attorney General opinion, the Attorney General was asked what was meant by the term "medical care" in Article IX, Section 9 of the Texas Constitution. In response, the Attorney General stated that "it is the responsibility of the board of directors of a hospital to determine what medical care is to be provided pursuant to Article IX, Section 9." Op. Tex. Att'y Gen. No. JM-1052 (1989).

These two opinions would seem to indicate that a hospital district board has wide discretion in determining what services it will provide. As discussed above, however, in Opinion No. JM-864, the Attorney General stated that although a district could terminate services, it would remain liable for providing the health care services required by the Constitution and statutes. Also, Opinion No. H-703, discussed above, states that a district must either provide medical care to its indigent resident "or must recompense the parties who do provide such care." Thus, if "medical care" include the Dental Services, one

could conclude by reading these opinions that a hospital district could terminate the Dental Services, but might remain financially responsible for providing such services, to its indigent residents "through other public facilities, by contracting with a private provider, or through the purchase of insurance for eligible residents." See JM-864, supra.

In a 1966 opinion, the Attorney General stated that "mental health services and mental retardation services constitute medical and hospital care, within the meaning of Section 9 of Article IX of the Constitution of Texas." Op. Tex. Att'y Gen. No. C-646 (1966). This opinion considered whether a county that was included within the boundaries of a hospital district could spend money to establish a community center for mental health and mental retardation services under Article 5547-203 of the Mental Health Code. Because of his conclusion that mental health services constituted "medical and hospital care" under the constitutional provision authorizing the hospital district, the Attorney General concluded that the county could not establish such a center because once a hospital district is created for the county, "the county does not have the power to levy taxes to provide for such medical services, as such power and obligation rest exclusively on the hospital district." Id. (emphasis added).

In 1967, and in response to Attorney General Opinion C-646, the Texas Constitution was amended to add Article IX, Section 13, which provides as follows:

§ 13. Participation of municipalities and other political subdivisions in establishment of mental health, mental retardation or public health services

Sec. 13. Notwithstanding any other section of this article, the Legislature in providing for the creation, establishment, maintenance and operation of a hospital district, shall not be required to provide that such district shall assume full responsibility or the establishment, maintenance, support, or operation of mental health services or mental retardation services including the operation of any community mental health and mental retardation centers which may exist or be thereafter established within the boundaries of such district, nor shall the Legislature be required to provide that such district shall assume full responsibility of public health department units and clinics and related public health activities or services, and the Legislature shall not be required to restrict the power of any municipality or political subdivision to levy taxes or issue bonds or other obligations or to

expend public moneys for the establishment, maintenance, support, or operation of mental health services, mental retardation services, public health units or clinics or related public health activities or services or the operation of such community mental health or mental retardation centers within the boundaries of the hospital districts; and unless a statute creating a hospital district shall expressly prohibit participation by any entity other than the hospital district in the establishment, maintenance, or support of mental health services, mental retardation services, public health units or clinics or related public health activities within or partly within the boundaries of any hospital district, any municipality or any other political subdivision or state-supported entity within the hospital district may participate in the establishment, maintenance, and support of mental health services, mental retardation services, public health units and clinics and related public health activities and may levy taxes, issue bonds or other obligations, and expend public moneys for such purposes as provided by law.

This constitutional provision, in summary, allows (but does not require) other political subdivisions to spend public money for mental health services and "public health units and clinics and related public health activities." It also provides that the legislature "shall not be required to provide that [hospital districts] shall assume full responsibility for ... public health department units and clinics and related public health activities or services" The Attorney General has stated that Article IX, Section 13, was not intended to limit the definition of medical care but was rather simply enabling legislation allowing other political subdivisions to provide certain health care services. JM-1052, supra.

In 1985, yet another constitutional amendment was passed by the voters. This provision, Article IX, Section 9A, provided that the legislature "may determine the health care services a hospital district is required to provide, the requirements a resident must meet to qualify for services, and any other relevant provisions necessary to regulate the provision of health care to the resident." To date, however, the legislature has not exercised its authority under this provision to state exactly what health care services a hospital district must provide. See Op. Tex. Att'y Gen. No. JM-1052 (1989) at n.2.

In addition to the constitution provisions, several statutes may be implicated in regard to the question as to what health services the Hospital must provide.

Section 61.055 of the Indigent Health Care and Treatment Act, (the "Act") Chapter 61, Health and Safety Code (formerly Article 4438f), provides that "A hospital district shall provide the health care services required under the Texas Constitution and the statute creating the district".² Thus, the Act does not in and of itself address dental health services to be provided by hospital districts. With respect to counties, however, the Act and implementing regulations expressly exclude dental care, "unless the service is covered as a physician service when provided by a licensed physician and the dentist ... can provide the service within the scope of his license." 40 T.A.C. § 14.202(d)(b) (1990-19 Supp); see also Health and Safety Code § 61.006(e).

In 1985, the legislature enacted the Texas Oral Health Improvement Act, Texas Health & Safety Code § 43.001 et seq., authorizing the Texas Department of Health "to provide comprehensive oral health services to eligible individuals." Id. § 43.004(a). Eligible individuals are generally indigent state residents, and services are provided by approved private and non-private dentists who are reimbursed for their services by the Texas Department of Health. See 25 T.A.C. §§ 49.2, 49.5.

It is my opinion that the legislature, by excluding dental services from being a mandatory county obligation under the Indigent Health Care and Treatment Act, and by simultaneously creating a state-funded program to fund indigent dental care under the Texas Oral Health Improvement Act, has recognized that dental care is not generally considered to be "medical care" required to be provided to indigents under state law. But see Op. Tex. Att'y Gen. No. MW-248 (1980) (stating that "medical treatment" required to be provided by the Department of Mental Health and Mental Retardation to persons in its care "necessarily embraces dental care.").

²The Indigent Health Care and Treatment Act Specifies certain mandatory health care services that must be provided by a county not served by a hospital district, Section 61.028, Health and Safety Code, and also specifies certain mandatory health care services that must be provided by a "public hospital." Section 61.054, Health and Safety Code. Under the Indigent Health Care and Treatment Act, however, a hospital district is excluded from the definition of "public hospital" and thus the Act exempts hospital districts from the mandatory services provisions of the act. See Op. Tex. Att'y Gen. No. JM-816 (1987); No. JM-722 (1987). The Act merely requires hospital districts to provide the services required to be provided by the constitutional and statutory provisions creating the district.

Honorable Dan Morales
May 28, 1991
Page 8

SUMMARY

Article IX, Section 4 of the Texas Constitution, and Chapter 281 of the Health and Safety Code impose a mandatory duty upon the El Paso County Hospital District to provide certain health care and hospital services to the needy residents of the district, but do not specify exactly what services must be provided. It appears that the hospital district board of managers can eliminate certain services, including the Dental Services, if it makes an affirmative finding that the elimination of such services is in the best interest of the district. It is my opinion that the Hospital can eliminate the Dental Services, and that the Hospital would not remain liable for paying for Dental Services provided by private or public entities to indigent residents of the Hospital District because the constitutional and statutory mandate to provide "hospital and medical care" does not include dental health care.

The undersigned hereby requests an opinion from the Attorney General on the foregoing issues at your earliest convenience.

Very truly yours,

Joe Lucas by *las*

Joe Lucas
El Paso County Attorney

/th

03-0111
0108