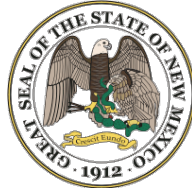


STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY



GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

December 1, 2022

The Honorable Ron Griggs
New Mexico State Senator
2704 Birdie Loop
Alamogordo, New Mexico 88310
Ron.griggs@nmlegis.gov

Re: Opinion Request – County Health Care Assistance Fund

Dear Senator Griggs:

You have requested our advice regarding certain financial implications relating to the County Health Care Assistance Fund (“Fund”) and the Indigent Hospital and County Health Care Act (“Act”), NMSA 1978 §§ 27-5-1 through 27-5-12.7. Specifically, you ask:

1. If a county does not in one fiscal year spend from the Fund the full amount allowed under NMSA Section 27-5-6(A) for administration and planning, does the remaining balance allowed for in administration and planning roll over for administrating and planning use in subsequent fiscal years? Or must the balance then be used only for actual assistance to indigent patients?
2. Does NMSA Section 27-5-7(D) allow for the remaining balance to be used for any authorized purpose of the Act?
3. What is a “health care provider” for purposes of the Act?
4. Does an individual or entity with a National Provider Identification Number assigned by the Centers for Medicare and Medicaid Services automatically qualify as a health care provider for purposes of the Act?
5. Does an Information and Referral/Assistance agency that provides information to indigent patients about the availability of health care providers and health care services, such as a 211 service, constitute a “health care service” for purposes of the Act?

There are several rules of statutory construction applicable to this matter. First is the primary goal of giving effect to the Legislature's intent. *State v. Torres*, 2006-NMCA-106, ¶ 8, 141 P.3d 1284. We analyze the Legislature's intent by looking at the whole statute. See *Allen v. McClellan*, 75 N.M. 400, 405 P.2d 405 (1965). We give plain and ordinary meaning to clear and unambiguous language. *State v. Calvert*, 2003-NMCA-028, ¶ 20, 62 P.3d 372 (2003). When a word or phrase is not defined in the statute, we determine the meaning by its context and common usage. *State v. Marshall*, 2004-NMCA-104, ¶ 7, 96 P.3d 801. Finally, we read the statute in its entirety and construe each part in connection with every other part in order to produce a harmonious whole.

One purpose of the Act is "to recognize that each individual county [in New Mexico] is the responsible agency for hospital transportation, hospital care or the provision of health care to indigent patients domiciled in that county, as determined by resolution of the board of county commissioners, in addition to providing support for the state's [M]edicaid program." NMSA 1978, § 27-5-2(A). And the Act creates a Health Care Assistance Fund. NMSA, § 27-5-7(A). The Fund, including all collections under the levy authorized by the Act and payments placed in the Fund, "shall be budgeted and expended only for the purposes specified in the [Act]." NMSA 1978, § 27-5-7(B).

1. The Act Does Not Authorize a County to Rollover Excess or Saved Fund Balances to Subsequent Fiscal Years for Administration and Planning.

The Act authorizes, but does not require, a county to "budget for expenditure on ambulance services, burial expenses, hospital or medical expenses for indigent residents of that county and for costs of development of a countywide or multi county health plan." NMSA 27-5-6(A). The legislature placed a check and balance on how much money may be allocated and spent annually on planning matters. Under the Act:

The combined costs of administration and planning shall not exceed the following revenues based on the previous fiscal year revenues for a fund that has existed for at least one fiscal year. . . . The percentages of the revenue in the fund that may be used for such combined administrative and planning costs is equal to the sum of the following:

- (1) ten percent of the amount of the revenues in the fund not over five hundred thousand dollars (\$500,00);
- (2) eight percent of the amount of the revenues in the fund over five hundred thousand dollars (\$500,000) but not over one million dollars (\$1,000,000); and
- (3) four and one-half percent of the amount of the revenues in the fund over one million dollars (\$1,000,000)[.]

NMSA 1978, § 27-5-6(A) (2014).

In 2008, we addressed a similar question that asked if a county could, under the same Act, rollover unused funds into planning fund budgets for ensuing fiscal years. *See Interpretation of NMSA 1978, Section 27-5-6(B)*, Op. Att’y Gen. 2008 WL324893 (N.M.A.G.).¹ In that Opinion, Valencia County had accumulated a large surplus in its Fund over several years and wanted to use that surplus for expenses to help build a new local, countywide hospital, and thus turned to the New Mexico Finance & Administration Department (DFA) for approval. But DFA informed Valencia County that “[t]he plain meaning of Section 27-5-6 NMSA is that administration and planning monies are calculated on a percentage of the previous fiscal year revenues and are limited to only those calculations.” *Id.* (quoting an April 26, 2007 letter from DFA’s General Counsel Judith Amer to Valencia County’s General Counsel Cynthia Wimberly). The letter continued:

[T]he Legislature knows how to create an accumulating, non-reverting special fund or a subaccount when it chooses. However, in this case, the Legislature expressly did not . . . [and there is nothing about how] planning funds from one fiscal year . . . [can be kept] segregated in subaccount of the Fund for expenditure in some subsequent fiscal year.

Id.

We agreed with DFA in 2008, and we still agree today because a county would necessarily require the express statutory authority to take the action of using unused allocated revenue and rolling it over into subsequent years. Since the Act does not grant such authority, any unused planning funds would need to go back into the Health Care Assistance Fund and be used for assistance to indigent patients. Because your question asks if the rollover funds must only be used for *actual* assistance to indigent patients, we note that NMSA § 27-5-7.1(5)[3] authorizes use of the fund for *administrative expenses* associated with burial or cremation, ambulance transportation, hospital care, and healthcare services for indigent patients. We conclude that such administrative expenses would also be allowed expenditures for a rollover balance.

2. The Remaining Balance May Be Used for Any Authorized Purpose of the Indigent Hospital and County Health Care Act.

Under the Health Care Assistance Fund portion of the Act (NMSA 1978, § 27-5-7), collections made pursuant to it, and all payments put in its fund, “shall be budgeted and expended only for those purposes specified in the [Act].” NMSA 1978, § 27-5-7(B). It also provides that, “[a]ny balance remaining in the fund at the end of the fiscal year shall carry over into the ensuing year” NMSA 1978, § 27-5-7(D). This section of the Act concludes with: “Money may be transferred to the fund from other sources, but no transfers may be made from the fund for any purpose other

¹ The Act was amended in 2014, which eliminated all the language from Section 27-5-6(A) and the language in 27-5-6(B) took its place. Except for the first sentence, the language currently in NMSA 1978, § 27-5-6(A) is identical to the 2008 version of 27-5-6(B).

than those specified in the Indigent Hospital and County Health Care Act.” NMSA 1978, 27-5-7(E). Based on the plain language of the Act, we conclude that NMSA 1978, § 27-5-7(D) does allow the remaining balance in the Fund to be used for any purpose specified in the Act.

3. “Health Care Providers” are Determined By Each County.

With the intentional removal of the defined phrase “health care provider” from the Act in 2014, as well as the removal of all references to a “county health care board,” we believe it was the Legislature’s intent to allow each individual county to determine its own meaning of “health care provider.” Defining a group of words is to give them meaning. *Merriam-Webster’s*, 11th edition. Clearly, the Legislature intended to give distinct meaning to the phrase “health care provider” when it defined it in the Act until 2014. It follows then that the Legislature intended to remove the distinct meaning when it removed the definition.

When we review all the changes made to the Act in 2014, we notice not just the repeal of NMSA 1978, § 27-5-5—which created a county health care board—but also that the word “board” was replaced by “county” throughout the Act. The overall effect is that the county itself is required to make determinations, approvals, and resolutions relating to health care services, which we believe also requires the county to do relating to providers. Here are some examples where the county is now responsible when previously it was the board:

- air ambulance services must be approved by the county (NMSA 1978, § 27-5-4(A))
- allowable costs and health care services are determined by resolution of the county (NMSA 1978, § 27-5-4(B) and (F))
- powers and duties now belong to the counties, not the board (NMSA 1978, § 27-5-6)
- the county now certifies the amount needed for its resident’s indigent health care needs (NMSA 1978 § 27-5-9(A))

Additional support that the Legislature intended each county to determine its meaning of “health care provider” is the small but significant change to NMSA 1978, § 27-5-7.1(A), which previously read that “[t]he fund *shall* be used to pay for [certain expenses].” (emphasis added). With the 2014 amendments, however, this section now reads that “[t]he fund *may* be used to pay for [certain expenses].” *Id.* (emphasis added). We believe the change from such mandatory language to the permissive language granting counties the authority to decide whether those certain expenses will be paid furthers our conclusion that the Legislature intended to give each county the authority and flexibility to determine the meaning of health care provider.

4. An Individual or Entity with a National Provider Identification Number Assigned by the Centers for Medicare and Medicaid Services Does Not Automatically Qualify as a Health Care Provider for Purposes of the Indigent Hospital and County Health Care Act.

According to the Centers for Medicare and Medicaid Services:

TOLL FREE 1-844-255-9210 TELEPHONE: (505)490-4060 FAX: (505)490-4883 www.nmag.gov
MAILING ADDRESS: P.O. DRAWER 1508 - SANTA FE, NEW MEXICO 87504-1508
STREET ADDRESS: 408 GALISTEO STREET - SANTA FE, NEW MEXICO 87501

The National Provider Identifier (NPI) is a Health Insurance Portability and Accountability Act (HIPAA) Administrative Simplification Standard. The NPI is a unique identification number for covered health care providers. Covered health care providers and all health plans and health care clearinghouses must use the NPIs in the administrative and financial transactions adopted under HIPAA. . . . [T]he numbers do not carry other information about healthcare providers, such as the state in which they live or their medical specialty. . . . As outlined in [HIPAA], covered providers must also share their NPI with other providers, health plans, clearinghouses, and any entity that may need it for billing purposes.

<https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/NationalProvIntStand/>, last accessed November 7, 2018.

Additionally, we found under Title 42 (Public Health), Chapter IV (Centers for Medicare and Medicaid Services), of the Code of Federal Regulations, that state Medicaid agencies must require all claims for payment contain the NPI of the referring physician, or other professional. 42 C.F.R. 455.440 (2018). Based on the information at hand, we conclude that the purpose of an NPI is to improve and protect electronic transmissions of health information under HIPAA and that health care plans, providers, and clearinghouses must use NPI's for administration and financial transactions. Therefore, a county may determine whether an individual or entity with an NPI qualifies as a health care provider for purposes of the Indigent Hospital and County Health Care Act.

5. An Information and Referral/Assistance Agency That Provides Information to Indigent Patients About the Availability of Health Care Providers and Services May Constitute a Health Care Service.

The Act defines health care services as “treatment and services designed to promote improved health in the county indigent population, including primary care, prenatal care, dental care, behavioral health care, alcohol or drug detoxification and rehabilitation, hospital care, provision of prescription drugs, preventive care or health outreach services, *to the extent determined by resolution of the county.*” NMSA 1978, § 27-5-4(F) (emphasis added). Here, the Legislature expressly granted authority to each county to resolve what it includes in “treatment and services designed to promote improved health in the county indigent population.” The Legislature listed specific services that must be included, but did not restrict the list. We note that “health outreach services” is included in the Legislature’s list, which could possibly include assistance agencies—so long as their services are designed to promote improved health among the county’s indigent population. Thus, under the Act, a county may resolve to include referral or assistance agencies in their list of health care services.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would

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be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

A handwritten signature in black ink that reads "Sally Malavé". The signature is written in a cursive style with a large initial "S".

Sally Malavé

Director, Open Government Division