

## **Opinion 07-05**

September 12, 2007

**OPINION OF: GARY K. KING, Attorney General**

**BY:** Andrea R. Buzzard, Assistant Attorney General

**TO:** The Honorable Jeannette Wallace, New Mexico State Representative, 1913 Spruce, Los Alamos, NM 87544

### **QUESTIONS:**

1. May Los Alamos County purchase individual health insurance policies for indigent patients using revenues from the county indigent hospital claims fund?
2. May Los Alamos County enroll indigent patients in the New Mexico State Coverage Insurance Program and, if so, pay the premium and co-payment amounts from either the county indigent hospital claims fund or from funds available pursuant to the Local Economic Development Act, NMSA 1978, §§ 5-10-1 to -13 (1993, as amended through 2003)?
3. May Los Alamos County contract with health care providers to provide services in advance of individual claims, such as reserving and paying for a given number of beds in an alcohol or drug rehabilitation center?
4. May Los Alamos County contribute monies from its county indigent hospital claims fund to those funds of other counties?

### **CONCLUSIONS:**

1. No. Los Alamos County lacks the authority, either expressly or by necessary implication, under the Indigent Hospital and County Health Care Act to purchase individual health insurance policies for indigent patients using revenues from the county indigent hospital claims fund.
2. No. Los Alamos County does not have the statutory authority under the Indigent Hospital and County Health Care Act to enroll indigent patients in the State Coverage Insurance program and pay premiums and co-payment amounts from the county indigent fund.
3. Yes. Los Alamos County has authority under the Indigent Hospital and County Health Care Act to contract with health care providers to provide services associated with alcohol or drug abuse treatment, which could include bed reservation.

4. No. Los Alamos County does not have the necessary statutory authority under the Indigent Hospital and County Health Care Act to contribute, directly, monies from its county indigent hospital claims fund to those funds of other counties. However, nothing in the Indigent Hospital and County Health Care Act prohibits Los Alamos County from transferring money from its indigent fund to the sole community provider fund to match federal funds for the state medicaid program. Los Alamos County may, therefore, indirectly benefit other counties by utilizing the resources of its indigent fund to augment the funds necessary to match federal funds for the support of the state medicaid program.

#### **BACKGROUND:**

The purpose of the Indigent Hospital and County Health Care Act, NMSA 1978, §§ 27-5-1 to -18 (1965, as amended through 2004) is "to recognize that the individual county of this state is the responsible agency for ambulance transportation or the hospital care or the provision of health care to indigent patients domiciled in that county for at least three months...." NMSA 1978, § 27-5-2 (A) (1997). The Act thus imposes a duty on each county to provide indigent health care for patients domiciled in that county and "provide[s] a means whereby each county can discharge this responsibility through a system of payments to ambulance providers, hospitals or health care providers for the care and treatment of, or the provision of health care services to, indigent patients." Id.

The Act creates, within each county, a "county indigent hospital and county health care board," composed of members of the board of county commissioners. NMSA 1978, § 27-5-5 (1993). Generally, the duties of that board are to administer claims made pursuant to the Act, to adopt rules, to review all claims for compliance with board rules and with the Act, to approve or reject claims, and to pay claims that the board has approved. See id. The board is specifically allowed to "contract with ambulance providers, hospitals or health care providers for the provision of health care services. NMSA 1978, § 27-5-6(Q) (2003).

The Act creates a procedure for payment of claims. Section 27-5-12 provides, in part:

- A. A hospital, ambulance service or health care provider filing a claim with the board shall:
- (1) file claim with the board of the county in which the indigent patient is domiciled;
  - (2) file claim for each patient separately, with an itemized detail of the total cost; and
  - (3) file with the claim a verified statement of qualification for ambulance service, indigent hospital care or care from a health care provider signed by the patient or by the parent or person having his custody to the effect

that he qualifies under the provisions of the Indigent Hospital and County Health Care Act....

NMSA 1978, § 27-5-12 (1997).

The Act defines "health care provider" as: "(1) a nursing home; (2) an in-state home health agency; (3) an in-state licensed hospice; (4) a community based health program operated by political subdivision of the state or other nonprofit health organization that provides prenatal care delivered by New Mexico licensed, certified or registered health care practitioners; (5) a community-based health program operated by a political subdivision of the state or other nonprofit health care organization that provides primary care delivered by New Mexico licensed, certified or registered health care practitioners; (6) a drug rehabilitation center; (7) an alcohol rehabilitation center; (8) a mental health center; (9) a licensed medical doctor, osteopathic physician, dentist, optometrist or expanded practice nurse when providing emergency services, as determined by the board, in a hospital to an indigent patient; or (10) a licensed medical doctor or osteopathic physician, dentist, optometrist or expanded practice nurse when providing services in an outpatient setting, as determined by the board, to an indigent patient with life-threatening illness or disability." NMSA 1978, § 27-5-4(N) (2004). The Act defines "health care services" as: "[T]reatment and services designed to promote improved health in the county indigent population, including primary care, prenatal care, dental care, provision of prescription drugs, preventive care or health outreach services, to the extent determined by resolution of the board." NMSA 1978, § 27-5-4(O) (2004).

The Act creates a "county indigent hospital claims fund." NMSA 1978, § 27-5-7 (1999). 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 Indigent Hospital and County Health Care Act." NMSA 1978, § 27-5-7(B) (1999). "Money may be transferred to the fund from other sources, but no transfers may be made from the fund for any purpose other than those specified in the Indigent Hospital and County Health Care Act." NMSA 1978, § 27-5-7(E) (1999).

Authorized uses of the fund are further specified at Section 27-5-7.1:

A. The fund shall be used:

- (1) to meet the county's contribution for support of sole community provider payments as calculated by the department for that county;
- (2) to pay for expenses of burial or cremation of an indigent person; and
- (3) to pay all claims that have been approved by the board that are not matched with federal funds under the state medicaid program.

B. The fund may be used to meet the county's obligation under Section 27-10-4 NMSA 1978.[1]

The statutory scheme created by the Indigent Hospital and County Health Care Act is one in which hospitals, ambulance companies and health care providers makes claims for payment from the county's indigent fund to the county's board, with respect to services rendered to indigent patients domiciled in that county. That board then reviews those claims and, if approved, pays them from the county indigent hospital claims fund.

## **ANALYSIS:**

### Health Insurance Policies

Certain general principles of law apply to these questions. One such principle is that "[a] county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976) (quoted in City of Albuquerque v. New Mexico Public Regulation Comm'n, 2003-NMSC-028, 3, 134 N.M. 472, 79 P.3d 297). Another principle would be that "[w]hen the Legislature confers an express power or imposes a duty upon a county and prescribes the method for exercising the power or discharging the duty, that method is exclusive." El Dorado at Santa Fe, Inc., 89 N.M. at 317; City of Clovis v. Crain, 68 N.M. 10, 13, 357 P.2d 667, 669 (1960) (where statute directs in definite terms the manner in which municipal acts are to be exercised, such statutory method must be substantially followed); Fancher v. Bd of County Comm'n, 28 N.M. 179, 189, 210 P. 237, 241 (1922) (where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded).

The Act makes no provision that would enable a county to purchase individual health insurance policies for indigent patients using revenues from the county indigent hospital claims fund. "Insurance is a contract whereby for consideration one party agrees to indemnify or guarantee another party against specified risks." Cordova v. Wolfel, 120 N.M. 557, 560, 903 P.2d 1390, 1393 (1995). If, in the question presented, it is contemplated that an insurance company would indemnify the county against the county's risks borne by the county indigent hospital claims fund associated with paying claims attributable to health care services rendered to indigent patients, such insuring mechanism is not specified in the Act. The statutory scheme created is more akin to "self-insurance." "Self-insurance is a process of risk retention whereby an entity 'set[s] aside assets to meet foreseeable future losses.'" Id. (citing Robert E. Keeton & Alan I. Widiss, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices § 1.3, at 14 (1988)). "Most authorities agree that self-insurance is not insurance." Id. at 560, 903 P.2d at 1393. If, instead, it is contemplated that the fund simply be used to purchase individual health insurance policies for each indigent patient, with the result that the indigent fund bears no expense other than the premium costs and perhaps any co-pays and deductibles, the authority for such mechanism does not appear in the statutory language and scheme set up by the Act. The Legislature could, if it wished, provide for such a mechanism by statutory change.

The Act indicates that both procedural and substantive limitations are placed upon Los Alamos County, as well as other counties, with respect to its indigent claims procedures and the provision of indigent health care to indigents of the county. Therefore, we conclude that Los Alamos County lacks the authority, either expressly or by necessary implication, to purchase individual health insurance policies for indigent patients using revenues from the county indigent hospital claims fund. See Westgate Families v. County Clerk of the Incorporated County of Los Alamos, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983) (Los Alamos County's authority to promulgate zoning ordinances must come from enabling legislation, and the exercise of power under zoning ordinance must be authorized by statute).

### State Coverage Issues

The State Coverage Insurance (SCI) program is authorized under a health insurance flexibility and accountability (HIFA) waiver under section 1115 of the Social Security Act, subject to special terms and conditions. See 8.262.400.3 NMAC. Rules issued by the New Mexico Human Services Department at Title 8, Chapter 262, Part 400 and at Title 8, Chapter 306, Parts 1-16 NMAC describe the program, its purpose, eligibility requirements, coverages and various aspects of the program. "The objective of the SCI program is to reduce the number of uninsured New Mexico residents by implementation of a basic coverage health insurance benefit provided by contracted managed care organizations (MCO), with cost-sharing by beneficiaries, employers, and the state and federal governments." 8.262.400.5 NMAC. The program is designed for working adults, who earn less than 200 percent of the federal poverty level, and is funded with a combination of premium dollars (employer, employee), federal funds, and state general funds.

Neither the program structure nor specific regulations adopted to implement the program contemplate participation by a local government in the payment of premiums, either for the employer or the employee. While the Human Services Department may, in certain circumstances, pay part of the premium, there is no provision allowing a local government to pay premiums for the insurance coverages provided by this program. Thus, Los Alamos County does not have the statutory authority to enroll indigent patients in the SCI program and pay premiums and co-payment amounts from any source, including the county indigent fund or funds available under the Local Economic Development Act, NMSA 1978, §§ 5-10-1 to -13 (1993, as amended through 2003).

### Contracts with Health Care Providers

The county indigent hospital and health care board is specifically allowed to "contract with ... hospitals or health care providers for the provision of health care services." NMSA 1978, § 27-5-6(Q) (2003). "Health care provider" is defined under the Indigent Hospital and County Health Care Act, in part, as: "(6) a drug rehabilitation center; (7) an alcohol rehabilitation center; (8) a mental health center. NMSA 1978, § 27-5-4(N) (2004). "A ... health care provider that has contracted with a board for provision of health care services shall provide evidence of health care services rendered for

payment for services in accordance with the procedures specified in the contract." NMSA 1978, § 27-5-12(B) (1997).

The Act, therefore, provides authority for a county to contract with hospitals or health care providers to provide services associated with alcohol or drug abuse treatment. The authority to contract presumably could include bed reservation, to the extent necessary and in sufficient amount as reasonably determined by the county indigent hospital and county health care board. That necessity should be supported by demonstrable facts. Costs associated with such bed reservation would be a matter of negotiation, and the payment thereof might be treated as the rendering of services, specifically, the reserving of bed space in order to assure availability of space for expected indigent patients of the county who would qualify for indigent fund payments. Specific fees for treatment services that are rendered by health care providers to indigent patients who are admitted to those facilities must be supported by evidence that services have been rendered, as provided by Section 27-5-12(B). Such costs and fees must be consistent with the Act and with board rules, board criteria and cost limitations for medical care furnished by health care providers. NMSA 1978, §§ 27-5-6(C), (D) and (K) (2003).

#### Transfers to Other County Indigent Funds

No provision of the Indigent Hospital and County Health Care Act permits a direct contribution from one county's indigent hospital claims fund to similar indigent funds of any other county. Thus, direct contributions from one county indigency fund to another county indigency fund are not expressly envisioned by the Act. However, the Act imposes a collective duty on the counties to provide the revenues necessary to match federal funds for the state medicaid program, including the provision of matching funds for payments to sole community provider hospitals. Section 27-5-2 (B) provides that a purpose of the Act is:

to recognize that the counties of the state are also responsible for supporting indigent patients by providing local revenues to match federal funds for the state medicaid program, including the provision of matching funds for payments to sole community provider hospitals and the transfer of funds to the county-supported medicaid fund pursuant to the Statewide Health Care Act.

To the extent that other provisions of the Act might be viewed as otherwise limiting the ability of the board to transfer money from the fund necessary to satisfy necessary match requirements for the support of the state medicaid program, the Act clearly removes any such impediments by providing: "[N]othing in the Indigent Hospital and County Health Care Act shall be construed to prevent the [county indigent hospital and county health care] board from transferring money from the fund to the sole community provider fund or the county-supported medicaid fund for support of the state medicaid program." NMSA 1978, § 27-5-3 (A) (2003).

The "sole community provider fund" is created in the State Treasury and is administered by the Human Services Department. NMSA 1978, § 27-5-6.1 (1993). That fund

"consist[s] of funds provided by counties to match federal funds for medicaid sole community provider hospital payments." *Id.* The department makes payments to sole community provider hospitals pursuant to the state medicaid program. *Id.* The department calculates for each county its contribution to the sole community provider fund, and the Act obliges counties to use their indigency funds "to meet the county's contribution for support of sole community provider payments as calculated by the department for that county." NMSA 1978, § 27-5-7.1 (2001). The department is thus authorized to make the necessary calculation for the support of sole community providers from the fund that the department administers. Historically, we are informed, the department has allowed counties to make contributions to sole community provider hospitals both within and without the county.

The Act further imposes on each county board the obligation to "cooperate with appropriate state agencies to use available funds efficiently and to make health care more available." Section 27-5-6 (E). Utilizing counties' available indigency funds to maximize available federal matching funds, which results in a three-fold increase in revenues available to support sole community providers in their provision of services under the state's medicaid program is a cooperative and efficient effort to make health care more available to all indigent patients, such effort redounding not only to the benefit of residents of individual counties but as well of all counties.

Thus, we conclude that, while Los Alamos County does not have the necessary statutory authority under the Indigent Hospital and County Health Care Act to contribute, directly, monies from its county indigent hospital claims fund to those funds of other counties, nothing in the Act prohibits Los Alamos County from transferring money from its indigent fund to the sole community provider fund to match federal funds for the state medicaid program. Los Alamos County may, therefore, indirectly benefit other counties by utilizing the resources of its indigent fund to augment the funds necessary to match federal funds for the support of the state medicaid program.

GARY K. KING  
Attorney General

ANDREA R. BUZZARD  
Assistant Attorney General

[1] NMSA 1978, § 27-10-4 (1993) obliges a county that does not impose a county health care gross receipts tax pursuant to NMSA 1978, § 7-20E-18 to transfer a specified amount of money to the county-supported medicaid fund from authorized county revenue sources. In addition to the gross receipts tax imposition authorized by Section 7-20E-18, a county is authorized to impose, in various increments, a county gross receipts tax and to dedicate amounts of revenue for support of indigent patients, and the county "shall deposit the revenue dedicated for county indigent purposes in the county indigent hospital claims fund and such revenues shall be expended pursuant to the Indigent Hospital and County Health Care Act." NMSA 1978, § 7-20E-9 (D) (2004).