

LEGAL UPDATE MEMORANDUM

TO: WVHA Board of Commissioners

DATE: November 8, 2016

FROM: Theodore W. Small, Jr.

RE: West Volusia Hospital Authority - Update for November 17, 2016 Regular Meeting

Summarized below are updates on active legal matters/issues for which some new information has become available since my last legal e-update dated October 11, 2016. This Memorandum will not reflect updates on matters resolved by a final vote of the Board and thereby already summarized in the 10/20/16 Meeting Minutes.

I. Funding Agreements for 2016-17:

Please note that each Board member is responsible for making his or her own independent determination about whether the terms of a particular contract is consistent with the public interest. Counsel, POMCO as well as the accounting and administrative team at DRT, PA, are available to answer your questions and offer counsel about accounting and business or legal matters, each respectively; but, the Board retains the ultimate authority to approve or disapprove the terms of all proposed agreements after due consultation.

[Refer back to Legal Update Memorandum dated 10/11/16 for additional background details.]

At its October 20, 2016 Regular Meeting, the Board approved the following 2016-2017 Funding and Enrollment Services Agreements:

- A. Global Health Care Systems—Primary Care
- B. Good Samaritan Clinic -- Primary and General Dental Care
- C. Healthy Communities – Kidcare Outreach
- D. The House Next Door Prescreening Services
- E. The House Next Door – Mental Health Services
- F. Rising Against All Odds, Inc. -- HIV/AIDS Outreach and Case Management
- G. The Neighborhood Center of West Volusia “Access to Care”
- H. Northeast Florida Health Services, d/b/a Family Health Source FHS--Clinics
- I. Northeast Florida Health Services, d/b/a Family Health Source FHS—Pharmacy
- J. Northeast Florida Health Services, d/b/a Family Health Source FHS—Prenatal
- K. Global Health Care Systems—Urgent Care
- L. Rising Against All Odds, Inc. – Health Card Enrollment and Retention (Not drafted)
- M. Stewart-Marchman-Act (SMA) – Baker Act Match
- N. SMA – ARNP @ The House Next Door
- O. SMA – Homeless Program
- P. SMA—Level II Residential Treatment

- Q. The Healthy Start --Access to Healthcare Services—SMA Outreach
- R. The Healthy Start --Family Services Coordinator—Deltona
- S. Community Legal Services, Inc. Medical-Legal Partnership program.

The following two agreements were pended for consideration at the November 17th Regular Meeting based on the requirements of those agencies for further review and/or negotiation of rates. Based on follow-up discussions and negotiation with these agencies or their counsel, Counsel anticipates recommending approval of both of the following agreements as to legal form.

- T. Dental Care Services Agreement—WVHA-VCHD 2016-2017
- U. Hispanic Health Initiatives, Inc.'s Taking Care of My Health

Although Counsel anticipates recommending approval of the HHI (Hispanic Health Initiatives, Inc.) funding agreement as currently included in Board Materials, the process and deal points of that negotiation may provide useful guidance for the CAC and Board on how the process for reviewing Applications for Funding can be fine-tuned to lead us all to a simpler contracting process. The below should not be interpreted as singling out the HHI Application as the only one that required closer review. As mentioned during the legal update portion of the October Regular Meeting, Counsel observed that many of the renewal applications and most of the new applications could have benefited from closer scrutiny in the same areas Counsel is listing below about the HHI Application:

1. *The HHI Application for Funding did not contain comparable rate information, which Counsel relies upon to ascertain a rate or fee that is not more than any other private or public payer source pursuant to longstanding Board policy; HHI noted "N/A" in the chart on page 1 requesting "Average Cost/Unit of Service With Comparable Reimbursement".*
2. *The HHI Application contained a long narrative of proposed programming but it did not clearly set forth what specific parts of the overall programming constituted the provision of direct "health care" or "access to health care", which is what is required for programming to qualify for reimbursement under WVHA's Enabling Legislation. WVHA is NOT authorized to fund any and all types of services that are needed by residents experiencing poverty.*
3. *The HHI Application included requests for WVHA reimbursing its start-up costs which does not conform to the Board's general policy that such costs be included in a flat "per unit" or "per hour" or "per half-hour" of service rate.*
4. *The rate that was included in the HHI Application for Funding \$184/unit was non-specific as to which of the three different types of access to health care services that through negotiation we were ultimately able to distinguish from the long narrative of proposed programming.*
5. *The \$184/unit rate proposed in the HHI Application for services that would be provided by licensed Certified Social Workers ("CSW") was substantially more than the rate that the Board reimburses agencies, hospitals and specialists that must hire licensed nurses and physicians to provide direct health care.*
6. *HHI entered the negotiation over the funding agreement under a common misperception that the recommendation of funding by the CAC and the appropriation of a line of funding in the budget by the Board was the same as*

approval of the Application “as is” for purposes of a funding agreement. All applicants should be reminded what is now written in the form application that funding is not guaranteed until a contract is mutually negotiated and signed to include particulars of reimbursement rates. Form funding agreements are made available upon request.

Fortunately after some considerable effort, HHI and Counsel were able to translate the incomplete and non-specific 3 pages of single-spaced narrative in the Application into the following reimbursement provision that Counsel anticipates recommending:

4.2 Reimbursement Rate. *Grantee shall be reimbursed for access to healthcare services provided to Program Participants (as defined in Paragraph 6) by an individual certified by the State of Florida in community health work (or directly supervised by an individual certified by the State of Florida in community health work) at the following rates: (i) a fee of \$100.00 for each health risk assessment (consisting of biological and behavioral screenings for risks of metabolic (diabetes) and cardiovascular disease) which is performed on an individualized basis for a Program Participant by a certified, paraprofessional Community Health Worker (“CHW”), (ii) a health and behavioral education flat-fee capped at \$50.00 per Program Participant for a CHW providing at least one-half hour (30 minutes) of one-on-one health and behavioral education and coaching using evidence based curricula and strategies which the CHW will incorporate into an individualized self-management plan for each Program Participant; (iii) a rate of \$25.00 for each one-half hour (30 minutes) of direct case management activity which is performed by a CHW for a Program Participant including contacting and collaborating with relevant health care providers, providing immediate referrals to appropriate health care providers and connecting with WVHA’s Health Card prescreening enrollment service provider, The House Next Door. These services, as specifically described in the Application for Funding, include active outreach in medically underserved Hispanic adults living in the City of Deltona, FL and the surrounding West Volusia area to engage, screen, case management and make referrals. In no event shall the annual aggregate Reimbursement provided to Grantee by the Authority under this Agreement be required to exceed the annual Funding Limit (as defined above).*

Counsel respectfully requests that CAC and Board members consider these observations about what was required to clarify the programming and rate structure in the HHI Application as a roadmap for how to align better the application review process with the funding agreement process and thereby consider whether the proposed services and rates can really conform to the Enabling Legislation and longstanding WVHA policies that govern rate structure and invoicing.

II. CAC: Revisions to Funding Application and Review Process [See new info. in italics and bold]

Effective August 18, 2016, the WVHA Citizens Advisory Committee (“CAC”) funding application and review process shall be modified as follows:

A. Unless the Board notifies the CAC that numerical ranking would be useful to the

Board's evaluation of a particular set of funding applications, the CAC is no longer required to score and compile a rank comparison of applications. Generally CAC members will only be requested to make recommendations on whether the application should receive full, partial or no funding.

B. The CAC shall utilize two separate tracks to review and make recommendations on funding applications:

1. **Track 1:** For applications submitted by an existing provider to renew an existing funding agreement with WVHA, the CAC shall engage in the same Q&A review and develop recommendations that it has utilized over many years. The CAC shall have discretion to streamline that traditional process when ranking is not requested.
 - a. The deadline for Track 1 applications shall remain 12:00p.m. Noon, on the first Friday in April of each year.
 - b. The Application shall be made available at least 45 days before the Application deadline.
 - c. *If necessary*, a WVHA Funding Application Workshop shall be scheduled at least 21 days before the Application deadline.
2. **Track 2:** For applications proposing that WVHA fund new health care or access to health care services, even if it comes from a currently funded entity, the CAC shall engage in a fast track review process that will allow the CAC to complete its review and make recommendations to the Board within 30-60 days. This fast-tracking requirement is based on an expectation that 5 or less such "new service or access" proposals will be submitted in any given cycle. If more applications are received, the Board recognizes that the review process may take longer than 60 days.
 - a. Only "new service or access" proposals (i.e., those that are NOT already being funded by WVHA for this particular provider) would be eligible for consideration in Track 2 process;
 - b. The two deadlines for submission of these "new service or access" proposals would be at 12:00 Noon on the first Friday in April and 12:00p.m. Noon on the first Friday in October of each year;
 - c. These "new service or access" proposals shall utilize the most recently approved WVHA Application for Funding as the required format and required information; The Application shall reflect that those applying to provide "new service or access" are strongly encouraged to request assignment of a "mentor" from someone at a currently funded agency who can assist them understand application and funding requirements.
 - i. The Application shall be made available at least 45 days before the Application deadline.
 - ii. A mandatory WVHA Funding Application Workshop

shall be scheduled at least 21 days before the Application deadline

- d. To the maximum extent feasible, these “new service or access” proposals would be considered by the CAC as a separate agenda item during its regularly scheduled meetings so that this process does not require scheduling any additional meetings of the CAC;
- e. Unless CAC members determine that there is good cause for expanding consideration to two meetings or there is a lack of a quorum to take action, the CAC shall review, consider and vote to fund in whole, in part or not at all each “new service or access” proposal during a single meeting. This review, consideration and vote shall occur at the next regularly scheduled CAC meeting after the April 1 and October 1 submission deadlines;
- f. The application for funding and recommendation of the CAC concerning these “new service or access” proposals will be added to the Board’s Discussion Agenda at the next Regular Meeting after the CAC has voted upon its recommendations, either all, some or none of the requested funding;
- g. If the Board ultimately approves the “new service or access” proposal after due consideration of the recommendation from the CAC, a new Funding Agreement will be negotiated and presented to the Board for consideration at the next Regular Meeting after the Board’s approval;
- h. Subject to discretion of the Board, it is anticipated that the funding agreements for such approved “new service or access” proposals would have a term of at least six months (for those that apply in October) but no more than 14 months (for those that apply in April) that run from the date of approval and would end on September 30th after that first 6 months so that eventually all these new agreements run from fiscal year to fiscal year;
- i. Once a “new service or access” proposal is funded, that agency will thereafter apply for renewal of funding at the start of the next fiscal year on the next April 1 after it receives funding using the same CAC Track 1 funding process
- j. Both the CAC’s recommendation and the Board’s consideration of these “new service or access” proposals will give due consideration to whether the “Other Healthcare Costs” contains adequate funds for the proposed new services and the Board shall factor the potential for receipt of such “new” service proposals within their annual budget deliberations and votes;
- k. The “Other Healthcare Costs” line item or a new “New

Services or Access” line item should be funded at an agreed level (e.g., \$1 million dollars for the initial year); once the Board approves proposals that would exhaust that budgeted amount, no further applications for “new service or access” would be approved until the Board votes to transfer to that line item unspent monies that is already available within the overall Final Budget approved for that fiscal year.

III. **West Plymouth Professional Center Parking Lot Maintenance.** [*See new info. in italics and bold*]

At the request of a board member, Counsel followed up with the June 28th email and “To Whom It May Concern” memorandum from the Architectural Committee. The following clarifications are noteworthy:

1. Under the relevant deed covenants that run with land which are mandatory upon all owners of property in the complex, a majority vote of the Architectural Committee is akin to a board of a homeowner’s association in a residential development and its decisions are determinative of whether maintenance and improvements of common areas occur and at what costs. There is no appeal process of those decisions. As owner of 3 of the total 12 ownership units in the complex, WVHA owns 25% of the units and accordingly is generally assessed 25% of the total costs for any common area maintenance or improvements. However, WVHA was not one of the original owners and members of the Architectural Committee and therefore, it currently has no vote on its maintenance and improvement decisions. Pursuant to the covenants, Dan Trivett and C. Slaughter are original members of the Architectural Committee.

Swann Realty, the property manager, notified Counsel that Juddson Tyler Spore was elected by a vote of 4 to 1 to fill the vacancy on the Architectural Committee. *Swann Realty sent WVHA notice on behalf of the newly constituted Architectural Committee that it has approved a bid from Finish Line Sealcoating of DeLeon Springs to seal and resurface the parking lot for \$3,957.90. WVHA is assessed 25% of this amount based on its ownership of 3/12th of the office units in the complex.*

IV. **WVHA Health Card Program Eligibility Guidelines.** [*See new info. in italics and bold*]

[Refer back to Legal Update Memorandum dated 4/9/14, 7/19/14, 9/17/14, 11/12/14, 2/11/15, 6/10/2015, 10/7/15, 11/11/15, 3/9/16 and 4/12/16 for additional background details.]

From the inception, the Guidelines were adopted from a legal perspective to establish uniform, fair and non-discriminatory standards to comply with the Enabling Legislation’s requirement that tax dollars are spent on primarily individuals who are both “residents” of the Tax District

and who are “indigent” as defined within the Guidelines.

It is noteworthy that currently the Guidelines are utilized by WVHA in two distinct ways which are often confused by providers, potential providers and applicants for funding:

1. First, they are utilized by WVHA’s third party administrator (“TPA”), currently POMCO, as the governing rules for determining who is eligible to receive a WVHA Health Card. Once deemed eligible by POMCO, an applicant receives a Health Card (effective usually for 6 months) which automatically makes them eligible to receive hospital care, primary care, dental care, specialty care and pharmacy benefits at any provider who has signed a funding agreement to provide such services to those who are currently enrolled in the Health Card Program;
2. Second, the Guidelines are incorporated in whole or part as the governing rules for a funded agency to qualify some of their individual clients to become eligible for WVHA reimbursement (at the contracted rate) for contracted services at that agency only. Even though these individuals are generally required to provide the same information, including proof that they have applied for the ACA and that they are not qualified for Medicaid or other affordable private health insurance, the individuals who qualify through these funded agencies do not receive a Health Card and therefore are not automatically eligible to receive other healthcare services available at other funded agencies, the hospitals, specialty care providers, pharmacy benefits, etc.

For the next round of overall revisions to the Eligibility Guidelines, Counsel will consult with POMCO and develop a joint recommendation regarding Commissioner Dickinson’s concern about the potential overbreadth of “any encumbrances” in the current Eligibility Guidelines concerning what encumbrances will be considered by POMCO when evaluating the equity value of real property. See Eligibility Guidelines Revised 6/16/2016, Section 11:03 Procedures (2. Assets to be considered; b. Equity value of real property other than homestead. The value is verified by the property appraiser of the county in which the property is located. The equity value is determined by subtracting the amount of any encumbrances from the value of the asset).

V. WVHA’s Transition from HSI to New Third Party Administrator [*See new info. in italics and bold*]

[Refer back to Legal Update Memorandum dated 6/10/15, 8/12/15, 10/7/15, 11/11/15, 1/13/16, 2/10/16 and 7/13/16 for additional background details.]

Regarding the DaVita negotiations, POMCO has noted in its February update to the Board that DaVita is only willing to consider agreeing to a lower (\$1200/Visit vs. \$1700/Visit) reimbursement rate if WVHA is willing to do a direct contract with DaVita, as opposed to it signing a contract with POMCO to provide services at that rate to all individuals in POMCO’s specialty care network. If the Board authorizes such negotiations, Counsel will pursue them to their logical conclusion. Fortunately, the Board has approved the Seventh Amendment to the Indigent Healthcare Reimbursement Agreement, which is allowing for WVHA to reimburse FHD for services it purchases from DaVita to provide dialysis to Health Card

members when they are discharged from the hospitals.

VI. **Formal Notice of Potential Claim for Damages against WVHA corporately and Chair Ferrari individually by Travis McBride and Central Florida Mental Health Associates, LLC.** [*See new info. in italics and bold*]

[Refer back to Legal Update Memorandum dated 6/10/15 and 8/12/15 for additional background details.]

In a second certified letter to Counsel dated 5/19/2015, McBride's attorney (Gary J. Boynton, Esq. of Winter Park) notified WVHA that McBride and his company intend to sue Chair Ferrari individually and WVHA "corporately". Regarding the basis for the threatened lawsuit, this second letter modifies the original notice by including the following dates of alleged damage:

"The nature of the claim includes, but is not limited to, defamation, slander and interference with their contractual relationship. The onset of these damages began on June 22, 2014 and again on 07/24/14, 07/25/14, 08/22/14, 08/24/14, 08/25/14, 03/11/15, and continuing."

Based on public record search and shared information from Commissioner Ferrari, Attorney Boynton filed the threatened lawsuit on June 16, 2016 against Andy Ferrari individually and West Volusia Hospital Authority as defendants. The Case is pending in the Volusia County Circuit Court (civil) and it has been assigned to Judge Randell H. Rowe. The docket reflects that a 20-day summons was issued for WVHA, but Ms. Long has confirmed that this summons has not been served upon WVHA at its official address. The Complaint available online reveals that Central Florida Mental Health Associates LLC ("CFMHA") is alleging two counts ("tortious interference with a business relationship" and "deceptive and unfair and trade practices") against both WVHA and Ferrari and one count of "defamation" against Ferrari individually. In layman's terms, both counts against WVHA contend that WVHA is liable because Ferrari made statements or took actions that caused harm to CFMHA while he was acting as the "agent", "servant" or "employee" of WVHA. As previously authorized by the Board, Counsel intends to vigorously defend these claims against WVHA once it has been properly served. Counsel will depend on DRT to notify Counsel as soon as it receives the summons so that an appropriate response can be filed within the 20-day time limit. Counsel was copied on a letter from the County of Volusia's Legal Department notifying CFMHA's attorney that he had misdirected a summons to the Chair of the County Council instead of directing it to the actual named co-defendant, WVHA.

To date Counsel has not received any notification that WVHA has been served with a summons, but Counsel has been contacted by Attorney Boynton's legal assistant acknowledging that the summons was erroneously served on the Chair of the County Council. Counsel advised the legal assistant that WVHA insists upon formal service of such matters and directed the legal assistant to <http://westvolusiahospitalauthority.org/> in order to obtain contact information. *It is also noteworthy that Attorney Tanner Andrews has notified Counsel that he has entered an appearance as defense counsel to represent Commissioner Ferrari individually in this lawsuit.*

VII. Discussion Agenda Item: "WVHA approval to pay legal retainer for Commissioner Ferrari"
[See new info. in italics and bold]

In anticipation of legal questions that may arise from this Discussion Agenda item, Counsel notes the following generally applicable common law rule that requires the Board--not the Board's lawyer, the Florida Attorney General or a court--to determine in the first instance after review all facts and circumstances: 1. whether the subject litigation arises out of or in connection with the performance of Commissioner Ferrari's official duties and if so, then 2. whether the litigation serves a public purpose?

These questions arise from law cited in a string of Florida Attorney General Opinions where various local governments have requested the Attorney General to opine on similar matters. Based on a quick search for such AG Opinions, Counsel is attaching at the end of the August 2016 Legal Update what appears to be the latest such AG Opinion dated August 6, 2013. Also, pasted below is an excerpt from AGO 91-58, which is a concise summary of the relevant common law from The Supreme Court of Florida and is often cited within these AG Opinions:

The Supreme Court of Florida, in *Thornber v. city of Fort Walton Beach*, recognized the common law principle that "public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose." Citing *Chavez v. City of Tampa, supra*, the Court held that for public officials to be entitled to representation at public expense, the litigation must:

- "1) arise out of or in connection with the performance of their official duties and
- 2) serve a public purpose."

VIII. Workers Compensation Case. [See new info. in italics and bold]

[Refer back to Legal Update Memorandum dated 1/7/15, 5/8/13, 11/7/12, 8/10/12, 3/10/15 and 2/10/16 for additional background details.]

Contrary to most common sense expectations, the Authority--which terminated its last employees in 2006 and sold the hospitals in 2000--remains liable on periodic "tail" treatment claims for injuries to its former hospital employees. Since 2000, these treatment claims have been processed (assessed for relationship to original injury and eligibility for payment determined) by Adventist Health System's Worker's Compensation Department ("Adventist"). Adventist has retained specialized worker's compensation counsel (Jeffrey J. Branham of the firm of Dean, Ringers, Morgan & Lawton, P.A.) to handle any of the specialized legal matters that come up from time to time. The undersigned oversees the separately retained counsel by reviewing and giving provisional approval for Adventist to pay their bills. Of the many

worker's compensation claims that were active in 2000, by 2007 only one former hospital worker continues to actively treat and submit substantial claims. *The Adventist Claims Manager, Rhonda Fletcher, who is responsible for this one remaining claim provided Counsel with an update on the current status of Adventist's periodic filings to the State's Special Disability Trust Fund ("SDTF") for reimbursement of WVHA's payments on behalf of this one remaining claimant who is now 81 years old. Ms. Fletcher with counsel from Attorney Branham submitted the latest request to SDTF on September 8, 2016 seeking on behalf of WVHA reimbursement at 100% of its payments of \$62,859.89 which WVHA has reimbursed to Adventists since the last request to continue treatments for this claimant. SDTF's published turnaround on such requests is 36 months, but it has generally processed payments within a year if it doesn't find any errors on the request. Counsel has notified DRT of this anticipated reimbursement so that it can be tracked appropriately on all accounting records.*

IX. General Compliance with the Sunshine Law:

The Government in the Sunshine Law, section 286.011, Florida Statutes, provides in pertinent part:

'All meetings of any board or commission . . . of any agency or authority of any county, municipal corporation, or political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.'

It is impossible to summarize all relevant points of the Sunshine Law, but please note that courts uniformly interpret this provision as prohibiting two or more members of the same board or commission from discussing any matter on which foreseeable action will be taken by the public board or commission. (If your discussion with another board member concerns personal or business matters unrelated to the Authority, the Sunshine Law does not apply)

Please note that the Sunshine Law DOES apply to "off-the record" chats during meetings or during breaks, written correspondence, telephone conversations and e-mails exchanges between two or more board members if such communication concerns matters likely to come before the Board. It also prohibits nonmembers (staff, lawyers, accountants, and members of the public) from serving as liaisons between Board members concerning matters likely to come before the Board.

Please note that as the Board's attorney, Counsel's role is to assist the aggregate Board with legal compliance, not to provide individualized legal opinions to a particular board member. For specific questions concerning your own compliance, please direct those inquiries to the Florida Commission on Ethics. Their website can be found at <http://www.ethics.state.fl.us/>. Although their website material suggests the need for a written inquiry, each individual Board member is a "public officer" and thereby has the right to obtain informal telephone advice on common questions at (850) 488-7864.