

LETTER OPINION
97-L-47

May 14, 1997

Honorable John Dorso
House Majority Leader
N D House of Representatives
P.O. Box 7310
Fargo, ND 58109-7310

Dear Rep. Dorso:

Thank you for your letter advising that it had come to your attention that St. Joseph's Hospital (St. Joseph's) in Dickinson and the Badlands Human Services Center (Badlands) are creating a new company to provide mental health services. You ask whether statutory authority exists which allows a state agency to join with a private entity to form a new company.

Another legislator previously furnished our office with a copy of an article in the Dickinson Press, a copy of which is attached, referring to the formation of a new company that would add inpatient services to the current outpatient services provided by a "consortium, formed last October." The article also states that "the Greater Plains Health Consortium" will provide health care services under the Blue Cross Blue Shield Blue Choice plan, which I understand is a managed care program similar to a health maintenance organization. These references to an existing consortium may actually refer to The Greater Plains Health Group, a nonprofit corporation established in November, 1996, by John S. Studsrud, President and Chief Executive Officer of St. Joseph's and several Dickinson doctors. The purpose of this corporation is to provide "systems . . . of quality health care services." You will note that most of the information in the Dickinson Press article is attributed to Mr. Studsrud.

The tenor of the article suggests that Badlands and St. Joseph's were creating a new company to provide outpatient mental health services. My office has been advised by the director of Badlands that much of the information in the article is inaccurate. The reference to an existing "consortium" between St. Joseph's and Badlands regarding furnishing outpatient mental health services, at most, describes the fact that St. Joseph's has agreed to furnish 120 hours per week of psychological and therapeutic services to Badlands at a cost of \$30

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per hour, plus some secretarial support services, for the period October 1, 1996, through June 30, 1997. A copy of the Purchase of Service Agreement involved is attached for your information.

I am advised by the Badlands' director that St. Joseph's had considered terminating the employment of its psychologists, who provide substantial therapeutic benefits to persons in southwest North Dakota. Contracting for services from these psychologists on a per-hour basis was deemed a cost-saving measure to the Human Service Center and an income-generating measure for St. Joseph's.

Public officials and state agencies have only such authority as expressly given them by the Constitution and statutes together with those powers and duties which are necessarily implied from an express grant of authority. Am. Fed. of State, Co., and Mun. Emp. v. Olson, 338 N.D.2d 97 (N.D. 1983). Certain ventures by a state agency and the private sector are permissible under Article X, Section 18 of the North Dakota Constitution, which authorizes the state to engage in "any industry, enterprise or business." The term "enterprise" has been defined as "[a]n undertaking, esp. one of some scope, complication, and risk." The American Heritage Dictionary 456 (2d. coll. ed. 1991). A variety of enterprises of the state and political subdivisions have been approved by the courts and this office. See, e.g., Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964) (leasing a sugar processing plant by a city was constitutionally permissible). See also 1993 N.D. Op. Att'y Gen. 40 (listing various enterprises); 1993 N.D. Op. Att'y Gen. 4 (state may purchase stock in private corporations through an enterprise created for a public purpose).

Public funds can generally only be used for public purposes. Green v. Frazier, 253 U.S. 233 (1920). "A public purpose or public business has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within a given political division." Gripentrog, 126 N.W.2d at 237 (quotation omitted). Arguably, a health care services organization would promote the public health and general welfare. Therefore, if authorized by state statute, the formation of such an organization could be a legitimate state enterprise.

The 1995 Legislature specifically sanctioned the provision of health care services by a state agency in cooperation with the private sector through "health provider cooperatives." Such a cooperative is a corporation organized under N.D.C.C. chs. 26.1-49 and 10-15 "to provide health care services to purchasers of those services."

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N.D.C.C. §§ 26.1-49-01(3), 26.1-49-02. N.D.C.C. § 26.1-49-07 provides that "[t]he state . . . or any entity or political subdivision of the state . . . may be a member of a health provider cooperative." Other members of such a cooperative may include a professional corporation, partnership or other similar organization that is a licensed health care provider or affiliated with a health care provider. N.D.C.C. § 26.1-49-01(4).

Whether sufficient authority exists under current state law for Badlands or any other state agency to create a new company with a private entity like St. Joseph's could be determined only by looking at the distinct facts and circumstances involved. While legally conceivable, Badlands and St. Joseph's, to my knowledge, have not taken any concrete steps to form a new company providing health care services.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Enclosures