

ROBBINS

LITIGATION AND REGULATORY LAW

Josh Belinfante
DIRECT LINE: 404.856.3262
Email: jbelinfante@robbinsfirm.com

January 9, 2020

VIA: Electronic and United States Mail

Lisa M. Kelly
President
Georgia HEART Hospital Program, LLC
3740 Davinci Court
Suite 375
Peachtree Corners, Georgia 30092

Re: Special Examination of Georgia HEART Hospital Program, LLC

Dear Lisa:

Georgia HEART Hospital Program, LLC (“Georgia HEART”) retained our law firm to represent Georgia HEART in connection with the Special Examination of the Georgia Rural Hospital Organization Expense Credit Program (the “Program”) performed by the Georgia Department of Audits and Accounts (“DOAA”) (the “Special Examination”).

During our representation, after considering the materials provided by Georgia HEART to the DOAA and interviewing members of your executive team, we conclude that:

- Georgia HEART’s provision of marketing and administrative services to the rural hospitals participating in the Program has been indispensable to the implementation, early survival, and long-term success of the Program;
- All of the rural hospitals engaging Georgia HEART have done so on a voluntary basis, with many hospitals having expressly informed Georgia HEART of their satisfaction with the professionalism, performance, and fees-relative-to-service value of Georgia HEART;
- Georgia HEART has operated in a transparent and accountable manner, going well-beyond the requirements of the law and the good faith stewardship of a program having a public impact;

- Georgia taxpayers have wholeheartedly embraced the Program, appreciate having the choice to support rural hospitals, and are very satisfied with the contribution marketing and administration services provided by Georgia HEART;
- Formed as a limited liability company the membership units of which were subsequently donated to Georgia Community Foundation, Inc., since its inception, Georgia HEART has operated on a non-profit basis and has been contractually bound to use any net income in excess of its operational costs in support of rural health care initiatives throughout Georgia;
- It is highly unlikely that the Georgia Department of Community Health and Georgia Department of Revenue (the "DOR") could provide marketing and administrative services to participating rural hospitals in an effective, efficient, and economical a manner as does Georgia HEART;
- During the Special Examination, although, because Georgia HEART is a private business entity and not a state agency, it was not statutorily obligated to provide information and documentation to the DOAA, Georgia HEART provided the DOAA with (and posted to its website) an extensive 33-page narrative and documentation relating to its formation; organizational structure; governance; history; involvement in the implementation, survival, and success of the Program; operations; executive compensation; philanthropic mission; audited financial statements; and federal tax filings (the "Georgia HEART Narrative"); and
- The DOAA never responded to the Georgia HEART Narrative or otherwise communicated with Georgia HEART after submission of the Georgia HEART Narrative; and, contrary to an assurance provided by DOAA officials at the initial and only meeting between the parties, never provided Georgia HEART with the opportunity to review the draft of the DOAA Special Examination Report (the "Report") so that it could clarify, or comment on, its content and conclusions.

Beyond on the fact that the Special Examination suffered from significant substantive and procedural flaws, the Report evidences a general bias against taxpayer and rural hospital choice and the entrepreneurial benefits afforded by lawmakers in designing the Program in a manner that encourages private enterprise and efficiency, rather than government bureaucracy. These structural weaknesses and bias in the conduct of the Special Examination perhaps led to the unsound recommendation of having government agencies take over the successful

work being performed by a private business voluntarily operating on a non-profit basis.

If, after reviewing the Georgia HEART Narrative, the DOAA had spoken to Georgia HEART officials or its participating rural hospitals, it could have learned more about the following Georgia HEART efforts that have been so beneficial to the Program:¹

- Extensive statewide travel to educate tax and financial professionals about the tax benefits of the Program, adverse federal income tax developments in 2018 and 2019, and Georgia HEART's nationally-recognized efforts to restore federal tax benefits for business owners participating in the program;
- Preparing print and video publications, some of which include letters of support from Governor Kemp and Lt. Governor Duncan, that educate taxpayers and professionals about the benefits of the Program;
- Providing participating hospitals with a turnkey online contribution marketing, processing, and tracking solution that has saved rural hospitals thousands of hours, especially those hospitals that otherwise would have been unable to effectively participate in the Program;
- Providing taxpayer contributors with a user-friendly mechanism for submitting their applications for rural hospital organization credits ("RHO Credits") and with attentive and proactive customer service designed to encourage their continued participation in the Program;
- Regularly communicating with donors to thank them, encourage repeat contributions, and resolve any contribution processing and reporting difficulties with the DOR;
- Conducting several hospital surveys to determine the need for Program improvements and to promote transparency in reporting on the uses of the contributions secured under the Program; and
- Assisting the DOR in improving the tax credit application and contribution process.

¹ The Report acknowledges that the government would not provide contribution marketing, management, tracking, and reporting services to the degree provided by Georgia HEART. (Report at 23).

The bottom line is that Georgia taxpayers and all of the participating rural hospitals trust Georgia HEART to process their contributions and operate the Program and want to continue to be able to choose Georgia HEART to do so on their behalf.

Analysis

During the Special Examination, the DOAA's contact with Georgia HEART officials consisted of a one-hour introductory meeting with Georgia HEART's General Counsel and a review of the Georgia HEART Narrative, with no subsequent written documents or other communication. Perhaps, upon realizing that it had no statutory authority to thoroughly investigate and audit Georgia HEART as it could a state agency, the DOAA simply abandoned its promise of transparency, good faith, and fairness while examining a privately-owned hospital consulting firm taking a business-like, not governmental, approach to implementing the Program.

1. Georgia Heart's Transparency and Accountability.

The DOAA conducted a special examination, which is authorized by Code Section 50-6-4.² The Report correctly notes that the DOAA lacks the authority to demand documents and papers from private entities like Georgia HEART.³ Perhaps, this served as an excuse for the Report's failure to describe the thoroughness of Georgia HEART's response, which consisted of its delivery of the Georgia HEART Narrative to DOAA, a copy of which (in the interest of transparency and accountability) Georgia HEART published on its website. The DOAA's failure to describe Georgia HEART's voluntary detailed response to the Special Examination is aggravated by the fact that the Report erroneously implies that Georgia HEART did not provide the bulk of the information sought by the DOAA.

Georgia HEART's General Counsel met with the DOAA's audit team on July 1, 2019. At that time, the DOAA informed Georgia HEART that it would have an opportunity to comment on a draft report before publication. About a week later, the DOAA submitted twelve questions to Georgia HEART.⁴ Georgia HEART responded by providing the Georgia HEART Narrative (including federal tax returns and audited financial statements), which, within the limits of the law, well-exceeded the initial information requested by the DOAA.⁵

² Report at 1.

³ Report at 20.

⁴ The DOAA's document request is attached to this letter as "Exhibit 1."

⁵ All documents are available at <https://www.georgiaheart.org/results>

The Georgia HEART Narrative answered virtually all of the DOAA's requests. Due to contractual privacy provisions and concerns about donor privacy, Georgia HEART did not answer the DOAA's request to provide the "name, address, and amount pledged and/or received by each donor" to the Program.⁶ And while Georgia HEART provided the DOAA with verbatim (except for hospital name) sample contracts with eligible rural hospital organizations, it did not provide copies of the actual 58 Georgia HEART hospital contracts for the same reasons of contractual confidentiality.⁷ Otherwise, the information sought by the DOAA was conveyed by the Georgia HEART Narrative. Surprisingly, the DOAA never asked for a follow-up meeting or subsequent documents. Most disturbing, and contrary to the statement made at the July 1st meeting and fundamental due process, the DOAA denied Georgia HEART the opportunity to comment on the Report before its release to lawmakers and the public.

2. The Importance of Taxpayer Choice.

As an initial matter, the Report's conclusion that taxpayer funds did not reach the neediest hospitals in 2018 has already been addressed by legislation, which the Report acknowledges.⁸ The Report then pivots and blames taxpayer choice as a cause for future concern.⁹ This is because the Program allows taxpayers to direct their contributions to the hospital(s) of their choosing or leave the contribution as undesignated.¹⁰ Throughout the Report, the DOAA decries taxpayer choice as one of the reasons that the neediest rural hospitals did not receive more funds.¹¹ One representative statement opines that: "the state has largely abdicated decision-making authority ... to taxpayers."¹² Indeed, the DOAA recommended to remove individuals' choices altogether and (1) require all contributions to be undesignated; and (2) allow the State – through the political process – to dole out contributions to hospitals.¹³

If lawmakers wisely decide not to convert a taxpayer choice Program that builds community interest in the survival of local rural hospitals into a government-run program that simply awards million of dollars in grants to rural hospitals in order of their financial need, it will be critical to preserve the ability of taxpayers to choose the rural hospitals at which they want their contributions used. The Report concluded that, in 2018, only 32% of the 2018 contributions were

⁶ Request No. 6.

⁷ Request No. 8. Most likely, the DOAA could have requested and secured copies of Georgia HEART Hospital Participation Agreements from one or more of the 58 participating hospitals.

⁸ Report at 9.

⁹ Report at 9.

¹⁰ Report at 4.

¹¹ Report at 9, 18, 19.

¹² Report at 19.

¹³ Report at 21-22.

undesigned.¹⁴ As, in 2019, the vast majority of formerly “undesigned” taxpayers designated the hospitals to which they contributed in 2018, the number and amount of undesigned contributions significantly declined. Plus, because of newly released federal income tax and DOR regulations, in 2019 and beyond, businesses that make payments to one or more designated rural hospitals for business purposes, such as building community or customer goodwill, will be able to take a federal business expense deduction, for which the business owners will be able to claim the Georgia HEART tax credit. If lawmakers eliminate the ability of businesses to make payments to designated rural hospitals and avail themselves of these dual tax benefits, it will not only hurt the Program, but will financially hurt hundreds, or even several thousands, of Georgia business owners.

Given the importance of taxpayer choice, the unique, reliable, and valued turnkey efforts of Georgia HEART are paramount and the DOAA should not so readily dismiss them. As shown above, only Georgia HEART engages in a truly statewide effort to (1) educate tax and financial professionals about the benefits of the Program; (2) communicate directly with contributors about the Program and encourage and facilitate their participation and repeat participation; and (3) work with participating hospitals to maximize their ability to reach taxpayers and implement the Program.

3. The Report's Flawed Recommendations.

The Report also makes two recommendations: (1) DCH take over the collection and distribution of Program contributions; or (2) taxpayers' choice be eliminated and the General Assembly administer the funds through the standard appropriations process. The first recommendation would eliminate virtually all outreach and education efforts, and the second would erase a key aspect of the program's success: the choices of individual taxpayers to designate their local rural community hospitals and of business taxpayers to secure a federal business expense deduction and Georgia tax credit for making payments to designated rural hospitals.

As the cliché goes, “if it ain't broke, don't fix it.” The Program is much more than “ain't broke”—it is thriving. In 2019, in the face of significant uncertainty about the federal income tax treatment of contributions to state tax credit programs, the 58 rural hospitals participating in Georgia HEART secured \$46 million in contributions.¹⁵

¹⁴ Report at 9.

¹⁵ Unfortunately, the DOR approved taxpayers for \$55 million of the available \$60 million in annual Georgia HEART credits, meaning that, most likely, a recent legislative change (to 180 days) for the making of approved contributions has significantly increased (to \$9 million) the amount of unfunded contributions. Under the old deadline of sixty (60) days within which to

Unfortunately, the DOAA did not ask Georgia HEART to provide testimonials from their client rural hospitals, the typical one of which expresses the sentiment that “we could not administer the program without Georgia HEART.” Perhaps, the DOAA solicited hospital opinions regarding their satisfaction levels with Georgia HEART. If they did, the DOAA chose not to include any hospital observations in the Report.

Conclusion

In our opinion, Georgia HEART is playing a vital role in meeting the stated legislative goal of providing taxpayers with a means by which to support financially struggling rural hospital organizations and, as a result, become more aware of Georgia rural health crisis and more invested in helping solve it. The Report egregiously understated the benefits of Georgia HEART, and makes recommendations that are incompatible with the key feature of the program’s success: taxpayer choice. Please feel free to distribute this letter to any interested lawmakers, your rural hospital clients, donors, and other interested stakeholders.

Sincerely yours,



Josh Belinfante

JB:klm
Attachment

cc: Mr. Mark Middleton

contribute, the DOR was required to put any unused credits back into the available pool. With the enhanced federal tax treatment of business payments to rural hospitals, it is likely that demand for Georgia HEART credits will increase in 2020, making it imperative to discourage “wasting” of the available credits.