OPINION NO. 73-112

Syllabus:

1. A board of health of a city health district is, pursuant to R.C. 3709.282, authorized to conduct a family planning clinic.

2. A board of health of a city health district is an agency of the state, and therefore, a family planning clinic conducted by a board of health is immune from liability in tort without regard to any distinction between governmental and proprietary functions.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, November 12, 1973

I have before me your request for an opinion which reads as follows:

> 1. May a city health department, operating under the authority of Chapter 3709 of the Ohio Revised Code and other provisions generally applicable to municipal health departments, conduct a family planning clinic as part of its functions, which family planning clinic would include the provisions of birth control information, medical examinations, blood tests, urinalysis, serology, hematology, physical examinations (general, physical, pelvic, breast, PAP smear, GC culture), the selection and prescription or fitting as required of a contraceptive method (oral, IUD, diaphragm, condoms, foam, jelly, suppositories and rhythm), and other services normally offered by an OB GYN physician, the services to be paid for by the City from funds to be provided to the City by Metropolitan Health Planning Corporation, an Ohio non-profit corporation, from funds received thereby pursuant to Public Law 90-248, Title V, §508, and Public Law 91-572, Title X, §1001 (42 U.S.C. §708 and §300) of the Social Security Act, from the Public Health Service, Health Services and Mental Health Administration for Family Planning, United States Department of Health, Education and Welfare, or, is this program a hospital function, to be conducted in accordance with Chapter 749 of the Ohio Revised Code, and specifically in accordance with Section 749.20 et seq?
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> 2. Is the operation of a family planning clinic

> by a municipality under the direction of its health department or a municipal hospital board of trustees, a governmental function or a proprietary function in which the City would be liable for damages, in view of the case of Sears v. Cincinnati, 31 O.S. 2d 157?

Article XVIII, Section 3 of the Ohio Constitution, which confers upon municipalities the power of local self-government, reads as follows:

> Municipalities shall have authority to exercise all powers of self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general law.

Since, however, the charter of the City of East Cleveland includes no provisions concerning either the health department or hospitals, the pertinent provisions of the Ohio Revised Code are controlling, for it is clear that where a city has failed to enact charter or legislative provisions concerning a subject covered by state statute, the state statute will be applicable. See State ex rel. Canada v. Philips,168 Ohio St. 191 (1958).

R.C. Chapter 749. confers upon the legislative authority of a municipal corporation the power to provide for a public hospital. It should be noted that R.C. Chapter 749. deals exclusively with the subject of municipal hospitals. In determining whether a family planning clinic of the type herein described may be established in accordance with the provisions of thisChapter it is necessary to determine whether or not such a clinic may be properly classified as a hospital.

R.C. Chapter 749. includes no provision specifically defining the term hospital. It is well settled that in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will be given their common, ordinary and accepted meaning in the context in which they are used. See Eastman v. State, 131 Ohio St. 1 (1936) and Carter v. Youngstown, 146 Ohio St. 203 (1946). In its commonly accepted sense, a hospital is an institution providing medical or surgical care and treatment for the sick and injured. It is, I would think, clear that whatever additional characteristics a hospital may possess, it is, irreducibly, a facility administering care to the sick and injured.

The primary function of a hospital for purposes of R.C. Chapter 749., may be readily inferred from language found in R.C. 749.02 which authorizes a municipal corporation to contract with a charitable corporation for hospital services. The provision, which clearly implies that hospital services should focus upon the needs of the sick and injured, reads in part as follows:

> The legislative authority of a municipal corporation may agree with a corporation organized for charitable purposes and not for profit, for the erection and management of a hospital suitably located for the treatment of the sick and disabled of such municipal corporation.
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> (Emphasis added.)

In light of the foregoing, I think it clear that a family planning clinic of the type herein described cannot be properly classified as a hospital under R.C. Chapter 749. A family planning clinic which deals exclusively in preventive medicine, is unable to provide care and treatment for the sick and injured. It cannot, therefore, be properly governed as a hospital in accordance with R.C. Chapter 749.

The boards of city health districts, on the other hand, are, pursuant to the provisions of R.C. Chapter 3709., charged with rather far-reaching powers and duties. These boards are appointed as subordinate departments of the state and are charged with the general supervision of the interests of the community and vested with the power to make regulations for preventing the spread of disease and in other ways to care for the public health. See West v. Mt. Washington, 9 Ohio N.P. (n.s.) 250 (1909).

These boards, however, possess no common law powers. The statutes to which they owe their existence are the source and limit of their powers. Thus, the boards of health possess only the powers expressly conferred by the provisions of R.C. Chapter 3709. or those necessarily implied therefrom. Brenner v. Rhodes, 95 Ohio App. 259 (1953).

Although I am unable to find any provision expressly authorizing the board of health of a city health district to operate the type of family planning clinic in question, it is clear that such a board possesses the implied power to create and operate such a clinic. R.C. 3709.282, which authorizes boards of health to cooperate in the establishment and operation of any federally established program, reads as follows:

> The board of health of any city or general health district may participate in, receive or give financial and other assistance, and cooperate with other organizations, either private or governmental, in establishing and operating any federal program enacted prior to or after November 6, 1969, by the Congress of the United States.

Thus, these boards of health possess an unqualified power to participate in the creation and operation of any federal program.

It is clear that such a federal program exists in the area of family planning clinics. A recent Congressional enactment, the Family Planning Services and Population Research Act of 1970 (Pub. L. 91-572), sought to expand family planning services and population research activities. Section 300(a) of the Act, which is set forth in 42 U.S.C.A. Section 300, reads in part as follows:

> (a) The Secretary is authorized to make grants from allotments made under subsection (b) of this section, to State Health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services. No grant may be made to a State health authority under this section unless such authority has submitted and had approved by the Secretary, a State plan for a coordinated and comprehensive program of

family planning services.

* * * * * * * * *

Thus, by operation of R.C. 3709.282, a city health district is authorized to conduct a family planning clinic.

Your second inquiry requires a discussion of the subject of governmental immunity as it relates to municipal corporations and the state.

Municipal corporations are regarded as possessing a rather curious dual character, which has given the courts a great deal of difficulty in determining whether or not to impose liability upon them for the commission of a tort. On the one hand, they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other, they are corporate bodies capable of many of the same acts as private corporations, and having the same special and local interests, not shared by the state at large. They are, in other words, at one and the same time a corporate entity and a government.

The law has responded to this dual character by bifurcating the functions of municipal corporations into those that can properly be considered "governmental" or "public" and those which are "proprietary" or "private." The courts, while refusing to impose liability arising from the commission of governmental functions, have generally imposed liability if the function has been found to be proprietary in nature.

The distinction, although conceptually simple, has caused much difficulty to courts seeking to determine the nature of a particular activity. In the case of Wooster v. Arbenz, 116 Ohio St. 281 (1927), the Supreme Court, in setting forth the rules to be applied in determining whether a function was governmental or proprietary, stated at 284 and 285 as follows:

> First of all, let us ascertain the tests whereby these distinctions are made. In performing these duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion or preserving the peace and health of citizens and protecting their property it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has the election whether to do or omit to do those acts, the function is private and proprietary.
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> Another familiar test is whether the act is for the common good of all the people of the state, or

> whether it relates to special corporate benefit or profit. In the former class may be mentioned the police, fire, and health departments, and in the latter class utilities to supply water, light, and public markets. Authorities may be found in abundance to establish the immunity from liability in the latter class of cases. There is, however, a dearth of authority upon the question whether improvement of streets belongs to the one class or the other.

Application of the foregoing rules has resulted in a morass of judicial inconsistencies. The distinction has too often turned upon a particular judge's notion of what is "necessary" or "for the common good." It has become virtually impossible to reconcile the several cases dealing with the classification of functions as governmental or proprietary. See, for instance, State, ex rel. White v. City of Cleveland, 125 Ohio St. 230 (1932) (holding that the management of public grounds and buildings is proprietary); Selden v. City of Cuyahoga Falls, 132 Ohio St. 223 (1937) (holding that the construction and maintenance of a park and swimming pool were governmental); Hutchinson v. City of Lakewood, 125 Ohio St. 100 (1932) (holding that the construction of sewers was a governmental function); City of Portsmouth v. Mitchell Mfg. Co., 113 Ohio St. 250 (1925) (holding that the maintenance and repair of sewers after construction was a proprietary function).

It was in this context that the case of Sears v. Cincinnati, 31 Ohio St. 2d 157 (1972), was decided. Writing the opinion for the Court, Chief Justice O'Neill, in holding that the operation of a municipal hospital by a municipal corporation was not a governmental function, stated at 161 as follows:

> Provision is made in R.C. 715.37 for municipally owned hospitals. That section provides that municipal corporations may "* * * erect, maintain and regulate * * * hospitals * * *." This court agrees with the statement in Hyde, supra, [Hyde v. Lakewood, 2 Ohio St. 2d 155 (1965)] that "this legislation [R.C. 715.37] is designed to promote public welfare generally." It observes, however, as did Paul M. Herbert, J., in his dissent in Hyde, that R.C. 715.37 imposes no duty upon municipalities to own or operate a hospital. In addition, this court is of the opinion that the maintenance of a hospital is not essential to the government of a municipality.
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> This court concludes that where a municipality owns a hospital, thereby providing a service not essential to municipal government, there is no basis in logic for granting the municipality governmental immunity as to that hospital. In fact, logic dictates that a municipality owning a hospital should be treated in the same manner as was the charitable corporation in Avellone, supra [Avellone v. St. John's Hospital, 165 Ohio St. 467 (1956)], and should be liable in tort for injuries sustained by its hospital patients due to the negligence of its employes or agents.

It should be noted that the Court in the Sears case, supra, did not abolish the governmental-proprietary distinction, rather, it implied a single and more exacting test to be applied in determining whether a particular function could be properly

classified as governmental. Now, as in prior cases, the nature of a particular activity must focus upon whether or not such an activity is necessary to the proper government of a municipality. Since the Sears case, however, the necessity of a particular function is now to be determined in the context of relevant state statutes. In other words, unless a municipal corporation is required by statute to carry on a particular activity, that activity will presumably be deemed proprietary.

The governmental-proprietary distinction is irrelevant with respect to the sovereign immunity of the state. A number of cases, in holding that the state was not liable in tort for injuries caused by various activities, have appeared to rely in some degree upon the conclusion that the activities were governmental in nature, permitting some degree of inference that a contrary result might have been reached if the activity had been found to be of a proprietary nature. This language may be attributed to the rather unique status that sovereign immunity holds in this state. Constitutionally, the defense of sovereign immunity is no longer available to the state. In the second syllabus of the case of Krause v. State, 31 Ohio St. 2d 132 (1972) the Court explained the position of the state with relation to lawsuits brought against it, as follows:

> Section 16 of Article I of the Ohio Constitution as amended September 3, 1912, abolished the defense of governmental immunity and empowered the General Assembly to decide in what courts and in what manner suits may be brought against the state.

Thus, sovereign immunity exists in Ohio, insofar as suits against the state are concerned, only because the constitutional requirement for legislative consent in the field has not yet been satisfied.

Practically speaking, however, the distinction is of little consequence, for it is well settled that the State of Ohio is immune to suits in tort in the courts of this state without the consent of the General Assembly. Krause v. State, supra; Thacker v. Board of Trustees of the Ohio State University, 35 Ohio St. 2d 49 (1973).

It is clear that the same immunity from suit in tort that exists with regard to the state, applies equally to those entities classified as instrumentalities of the State. See Brown v. Board of Education, 20 Ohio St. 2d 68 (1969), and Wayman v. Board of Education, 5 Ohio St. 2d 248 (1966).

The distinction between the immunity of municipal corporations and that of the state is important to the disposition of the issue at hand because, although it might appear that a city board of health is an agency of the municipal government, it is, in fact, an agency of the state. In discussing the status of the board of health, the Court, in the case of State ex rel. Hanna v. Spitler, 47 Ohio App. 114, 121 (1933) stated that, "[a] board of health of a city health district is a governmental agency separate and distinct from the municipality and not subject to its jurisdiction."

Similarly, in the case of State, ex rel. Mowrer v. Underwood, 61 Ohio App. 103 (1939), the court in concluding that municipal civil service legislation has no application to employees of

the board of health, stated in the first branch of the syllabus as follows:

> A municipal board of health, although organized under a city charter, is nevertheless, since the enactment of the Hughes Act (108 Ohio Laws, pt. 1, 236 et seq.), as amended by the Griswold Act (108 Ohio Laws, pt. 2, 1085 et seq.), an agency of the state.

Although R.C. 143.30, which places the city health districts within the control of a municipal civil service commission, supersedes the precise holding of the Mowrer case, supra, the independence of the city boards of health was unaffected by this subsequent enactment. It is clear, therefore, that as an agency of the state, a city board of health is immune from liability in tort arising from its programs, including the one under consideration, without regard to any governmental-proprietary distinction.

In specific answer to your questions, it is my opinion and you are so advised, that

1. A board of health of a city health district is, pursuant to R.C. 3709.282, authorized to conduct a family planning clinic.

2. A board of health of a city health district is an agency of the state, and therefore, a family planning clinic conducted by a board of health is immune from liability in tort without regard to any distinction between governmental and proprietary functions.