The Senate of The State of Texas

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July 23, 2010

The Honorable Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
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Dear General Abbott:

As Chairman of the Senate Nominations Committee, I am requesting an Opinion from your office on the following issue:

> whether § 32.0248(h) of the Human Resources Code, which prohibits the Health & Human Services Commission from entering into contracts under the Women's Health Program with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions, is constitutional.

Background

In 2005, the State of Texas enacted a statute requiring the Health & Human Services Commission (the "department") to create a "Demonstration Project for Women's Health Care Services." TEX. HUM. RES. CODE § 32.0248. Under the statute, the department "shall establish a five-year demonstration project through the medial assistance program to expand access to preventative health and family planning services for women."

Subsection (h) of the statute (TEX. HUM. RES. CODE § 32.0248(h)) provides:

> The department shall ensure [that] the money spent under the demonstration project, regardless of the funding source, is not used to perform or promote elective abortions. The department, for the purpose of the demonstration project, may not contract with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions.

On December 28, 2005, David J. Balland, the Texas State Medicaid Director, submitted a request

to Kathleen Farrell, the Director of the SCHIP (State Child Health Insurance Program) Division, Centers for Medicare and Medicaid Services, United States Department of Health & Human Services (HHS), for a "waiver" in order to implement the statutorily mandated program. A waiver was necessary, Balland's letter explained, "to expand eligibility for Medicaid-covered health screenings and family planning counseling and contraception to women earning up to 185 percent of the FPL [federal poverty level]."

Under § 1115(a) of the Social Security Act, the Secretary of HHS is authorized to grant waivers from certain requirements of federal law with respect to "demonstration projects" "to the extent and for the period he finds necessary to enable such State or States to carry out such project." Mr. Balland attached to his letter a 36-page § 1115(a) Research and Demonstration Waiver. The proposed waiver was denominated the Texas Women's Health Waiver ("Health Waiver"). Chapter 3 of the Health Waiver deals with, among other topics, eligible services and eligible providers. With respect to eligible providers, the Health Waiver specifies that "[u]nder this demonstration program no funds may be used to perform or promote elective abortions or abortion services, or to contract with entities that perform or promote elective abortions or abortion services." "Promotion of elective abortions," the Health Waiver explains, "includes advocating the choice of, or popularizing (by advertising or publicity) elective abortions." With respect to eligible services, the Health Waiver provides that "[r]eferrals of medical problems for participating Women's Health Waiver clients are limited only to health practitioners who do not perform or promote elective abortions, nor contract or affiliate with entities that perform or promote elective abortions."

Approximately one year later, on December 21, 2006, HHS approved the request for a waiver, as modified by certain "Special Terms and Conditions." Nothing in either the December 21, 2006, cover letter or the eight-page "Special Terms and Conditions" referred to the restrictions placed on eligible providers or suggested that such restrictions were not authorized by federal law.

On January 12, 2009, I wrote to Albert Hawkins, Executive Commissioner of the Health & Human Services Commission, expressing my concern that the department had entered into contracts with entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions under the Women's Health Program. In his letter, I identified Planned Parenthood of North Texas, Inc., and Planned Parenthood of North Texas - Dallas Surgical Center, as two of the entities that are listed on the department's website as Women's Health Program providers in Dallas County.

In his reply of February 4, 2009 (Exhibit A), Mr. Hawkins acknowledged that almost $5,000,000.00 had been paid to 12 different Planned Parenthood entities "for services associated with the Women's Health Program." Mr. Hawkins expressed the view that, for "legal reasons," the department was "unable ... to fully implement the prohibition against contracting with an organization that is an affiliate of an entity that performs or promotes elective abortions." He added that he had been advised by his legal staff that "implementing the subsection (h) ban on contracting with organizations that are affiliates of abortion providers would likely be held unconstitutional by the courts." In support of this conclusion, he cited the Fifth Circuit's decision in *Planned Parenthood of Houston v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), the Eighth Circuit's decision in

Planned Parenthood v. Dempsey, 167 F.3d 458 (8th Cir. 1999), and the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). All three cases, however, as Mr. Hawkins recognized, dealt with the eligibility of providers and affiliates under *Title X* of the federal Public Health Service Act, not *Title XIX* of the Social Security Act, which deals with Medicaid funding and is the source of funds for the Women's Health Program. Nevertheless, his legal staff advised Mr. Hawkins that "a court likely would interpret state laws regarding the use of Medicaid funds distributed under Title XIX of the federal Social Security Act in the same way. That conclusion is discussed below.

Analysis

The legal position taken by Mr. Hawkins–that the limits federal law places on the extent to which States may restrict who is eligible for Title X grants also apply to Title XIX grants–is not supported by the text, the legislative history or the judicial interpretation of Title XIX.

Title XIX

Section 1396a(p) of Title 42 of the United States Code provides:

> Exclusion power of the State; exclusion as prerequisite for medical assistance payments; "exclude" defined.
>
> (1) *In addition to any other authority*, a State may exclude any individual or entity for purposes of participating under the State plan under this *title* [42 USCS §§ 1396 *et seq.*] for any reason for which the Secretary could exclude the individual or entity from participating in a program under title XVIII [42 USCS §§ 1395 *et seq.*] under section 1128, 1128A, or 1866(b)(2) [42 USCS §§ 1320a-7, 1320a-7a, or 1395cc(b)(2)].
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> * * *
>
> (3) As used in this subsection, the term "exclude" includes the refusal to enter into or renew a participation agreement or the termination of an agreement.

42 U.S.C. § 1396a(p)(1), (3) (first emphasis added).

The emphasized language of § 1396a(p)(1)–"[i]n addition to any other authority"–suggests that, entirely independent of those reasons for which the Secretary of HHS may exclude any individual or entity from participating in a program for medical assistance payments, States have the authority by law to exclude any individual or entity from participating in the state plan. That is confirmed by the First Circuit's opinion in *First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007). In *First Medical*, the First Circuit, citing the legislative history of § 1396a(p)(1), held that "this 'any other authority' language was intended to permit a state to exclude an entity from its

Medicaid program for *any* reason established by state law." *Id.* at 53 (emphasis in original). The Senate Report on § 1396a(p)(1) explains:

> This Committee bill clarifies current Medicaid Law by expressly granting States the authority to exclude individuals or entities from participation in their Medicaid programs for any reason that constitutes a basis for an exclusion from Medicare. . . . *This provision is not intended to preclude a State from establishing, under State law, any other bases for excluding individuals or entities from its Medicaid program.*

S. Rep. 100-109 at 20, reprinted in 1987 U.S.C.C.A.N. at 700 (emphasis added). Texas is thus free, under § 1396a(p)(1), to exclude "entities that perform or promote elective abortions or are affiliates of entities that perform or promote elective abortions" from its Medicaid program, which includes the "demonstration project" authorized by § 32.0248 of the Human Resources Code. Mr. Hawkins' conclusion that the restriction in § 32.0248(h) on affiliates is unconstitutional is based upon an analysis of cases (like *Sanchez*) decided under *Title X*, not *Title XIX*.[1] But Title X analysis is inapplicable to programs funded under Title XIX, which, as the above discussion demonstrates, specifically authorizes restrictions on who may participate in a state Medicaid plan.

Conclusion

For the foregoing reasons, I respectfully request an Attorney General opinion stating whether the restrictions imposed by § 32.0248(h) upon eligible providers under the Women's Health Program, including the restriction on affiliates, is constitutional.

Thank you for your consideration in this matter.

Very truly yours,

Bob Deuell

Senator Robert F. Deuell, M.D.
Chair, Senate Nominations Committee

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[1] In *Sanchez* the Fifth Circuit noted that "[t]he parties focus primarily on [the appropriation rider's] effect on Title X funds," 403 F.3d at 328 n. 10, not on the rider's effect on funds distributed under Title V, Title XIX or Title XX. Accordingly, in its opinion holding that the State may not disqualify affiliates of entities that perform elective abortion procedures from receiving federal funds, the court "express[ed] no opinion beyond Title X." *Id.* at 338 n. 68. *Sanchez* has no applicability to the analysis of the State's authority to disqualify entities or affiliates of entities under programs, like the Women's Health Fund, funded through Title XIX. The other two cases cited by Mr. Hawkins in his February 3, 2009, letter–*Planned Parenthood v. Dempsey*, 167 F.3d 458 (8th Cir. 1999), and *Rust v. Sullivan*, 500 U.S. 173 (1991)–are inapposite for the same reason. Neither addressed what restrictions the States may place on the use of Title XIX funds. Both *Dempsey* and *Rust* dealt solely with restrictions on the use of Title X funds.