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# Texas' Women's Health Program and the Tenth Amendment

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In October of 2011, the state of Texas announced it was seeking approval from the U.S. Center for Medicaid and CHIP Services (CMS) to continue the Women's Health Program as part of its Medicaid program. The Women's Health Program, a demonstration project under Medicaid, provides preventative health services for more than 130,000 low-income women a year in Texas. On December 12, 2011, however, CMS indicated that it was planning to deny approval of the program.[1]

At issue in the dispute is a provision in SB 7—passed by the Texas Legislature in June of 2011—that places restrictions on the payment of funds to abortion providers. Section 1.19 of SB 7 provides: "The department shall ensure that money spent for purposes of the demonstration project for women's health care services … is not used to perform or promote elective abortions, or to contract with entities that perform or promote elective abortions or affiliate with entities that perform or promote elective abortions."[2]

The federal government's threatened actions raise matters of state sovereignty that go beyond the politically charged issue of abortion. Under current case law, the federal government may constitutionally place reasonable conditions on the receipt of federal funds by states.[3] However, recognizing the danger that conditional federal grants pose to the independence and sovereignty of the states, the Supreme Court has long required that conditions on federal funding to states must be unambiguous.[4] Conditions cannot be implied, but must be clearly stated in federal law.

Nothing in the federal Medicaid statutes prevents states from imposing additional requirements for Medicaid providers beyond what is federally required. In refusing to approve Texas' application, CMS has cited Section 1902(a)(23) of the Social Security Act, which is codified at 42 U.S.C. § 1396a(a)(23). Section 1902(a)(23)(A) provides that "any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required…" ]."[5] Section 1902(a)(23)(B) further provides that "an enrollment of an individual eligible for medical assistance in a primary care case-management system… a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services.…" ]."[6] According to CMS, the Texas Women's Health Program is inconsistent with Section 1902(a)(23) because it "would restrict beneficiary choice of qualified family planning providers."[7]

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This is a misreading of the statute. As the federal courts have repeatedly held, Section 1902(a)(23) does not apply to state actions that have only an "incidental burden on their right to choose."[8] Instead, Section 1902(a)(23) is designed to prevent cases were a state eliminates all choice of providers.[9]



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In addition, CMS' interpretation is inconsistent with other provisions of federal law and regulations. For example, Section 1902(p)(1) provides that "*[i]n addition to any other authority*, a state may exclude any individual or entity … for any reason for which the Secretary could exclude the individual or entity from participation in [Medicare]."[10] This provision "permit[s] a state to exclude an entity from its Medicaid program for any reason established by state law."[11] This is corroborated by the U.S. Department of Health and Human Services' own regulations, which state that "[n]othing contained in this part [regarding State-initiated exclusions from Medicaid] should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law."[12]

When it comes to ignoring the clear language of federal law and court precedent, CMS is a repeat offender. Last year CMS cut off funding for a similar program in Indiana because it excluded abortion providers from receiving funding. Indiana's petition for rehearing of this denial is currently pending. However the dispute over the Women's Health Program is resolved, the controversy serves to highlight the danger that conditional federal grants pose to state sovereignty. The Supreme Court warned more than 75 years ago that unless the power of the federal government to condition federal grants was checked, it could "become the instrument for total subversion of the governmental powers reserved to the individual states."[13] The current controversy is a timely reminder of this warning. ✯

[1] Cindy Mann, Director of the United States Center for Medicaid and CHIP Services, to Billy Millwee, Associate Commissioner for Medicaid and CHIP Services, Texas Health and Human Services Commission (12 Dec. 2011).
[2] SB7 (82-1), 2011.
[3] *South Dakota v. Dole*, 483 U.S. 203 (1987).
[4] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[5] 42 U.S.C. § 1396a(a)(23)(A).
[6] 42 U.S.C. § 1396a(a)(23)(B).
[7] *See* Mann Letter, *supra*, note 1.
[8] *See Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177-78 (2d Cir. 1991) (holding that Section 1902(a)(23) did not bar Medicaid administrators from unilaterally excluding previously qualified providers without cause).
[9] *See, e.g.*, *Chisholm v. Hood*, 110 F. Supp. 2d 499, 506 (E.D. La. 2000) (holding that a state may not require school-aged children to seek services only at their respective schools); *Bay Ridge Diagnostic Lab. Inc. v. Dumpson*, 400 F. Supp. 1104, 1105, 1108 (E.D.N.Y. 1975) (holding that city may not grant exclusive contracts to providers).
[10] 42 U.S.C. § 1396a(p)(1) (emphasis added).
[11] *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007).
[12] 42 C.F.R. § 1002.2(b); *see also Guzman v. Shewry*, 552 F.3d 941, 950 (9th Cir. 2009) (holding that "not only does the applicable federal statute fail to prohibit states from suspending providers from state health care programs for reasons other than those upon which the Secretary of HHS may act, the governing regulation specifically instructs that states have such authority.")
[13] *United States v. Butler*, 297 U.S. 1 (1936).