



TEXAS DEPARTMENT OF STATE HEALTH SERVICES

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COMMISSIONER

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OPINION COMMITTEE

June 2, 2008

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Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-45725-08
I.D. # 45725

RQ-0719-GA

*Re: Request for opinion as to whether federal law preempts
DSHS from regulating air ambulance EMS provider subscription programs*

Dear General Abbott:

The Department of State Health Services (DSHS) is the licensing authority over emergency medical services (EMS) providers and as such is an authorized agent to request an opinion on the above referenced issue on behalf of EMS providers operating as an air ambulance service. Questions have arisen from EMS providers, utilizing air ambulance helicopters, as to whether the Airline Deregulation Act (ADA) at 49 U.S.C. Section 41713 [and other related federal regulations] preempts requirements outlined in Chapter 773 of the Texas Health and Safety Code (HSC), Section 773.011, entitled: "Subscriptions Programs" and the underlying DSHS EMS subscription rule at Title 25 of the Texas Administrative Code (TAC), Part 1, Chapter 157, Subchapter B, Section 157.11(k), as that state law and agency rule applies to DSHS licensed air ambulance EMS providers.

Background

An EMS subscription program is a concept in which an EMS provider, as defined at HSC 773.003(3) and 25 TAC 157.2(30), offers to residents of a certain geographical area a membership in its subscription program for a single annual fee, generally from approximately \$50 to \$100. Per this contractual arrangement, members are either not charged a fee or are charged a reduced fee for any emergency medical services and transport to a hospital that the EMS provider may give the member when requested or needed. Some EMS providers will discount their fees by accepting what the patient's insurers pay as payment in full in exchange for the advance payment of a subscription membership fee. Some may argue that the advanced payment of a subscription fee is a prepayment for that part of an air carrier's transport fare that is not covered by the patient's insurance.

The EMS subscription concept originated in Louisiana in the early 1970s and then spread to the East Texas area, and then later throughout other parts of Texas. It became popular with small volunteer EMS organizations as a way to subsidize their operations in rural parts of the state, where private for-profit or governmental supported EMS firms did not readily provide emergency medical services.

In 1987 the Texas Board of Insurance judged that this concept of an EMS subscription program was a form of insurance and that EMS providers wishing to continue the practice would have to become licensed by the Insurance Board. The Texas Department of Health (TDH) [predecessor agency to DSHS] recognizing that such concept was popular and helpful to small volunteer and/or small "for-profit" EMS providers operating in rural areas, appealed to the Insurance Board on their behalf. In 1987 the Texas Legislature added language to the Emergency Medical Services Act (codified in Article 4447o, Vernon's Texas Civil Statutes) to allow a municipality, county or hospital district or any combination of those entities to create and operate a "non-profit subscription program" to help fund an emergency medical service in their jurisdictions. This Act also noted that if the creating entities directly controlled and operated the subscription programs (which appeared to be a form of insurance), then said programs would be exempt from the Insurance Code.

In 1989 the Texas Legislature re-codified those provisions into the Health and Safety Code, Chapter 773 and amended the Emergency Medical Services Act to include section 773.011, re-titling the subsection as "Subscription Programs" (no longer just nonprofit). This modification allowed licensed EMS providers to create and operate a subscription program and gave authority to the Texas Department of Health to adopt rules establishing minimum standards for such programs. Additionally, it required a participating provider to post a surety bond and it also continued the exemption from the Texas Insurance Code.

HSC 773.11, entitled: "SUBSCRIPTION PROGRAMS", specifically states:

- (a) An emergency medical services provider may create and operate a subscription program to fund and provide emergency medical services.
- (b) The board shall adopt rules establishing minimum standards for the creation and operation of a subscription program.
- (c) The board shall adopt a rule that requires an emergency medical services provider to secure a surety bond in the amount of sums to be subscribed before soliciting subscriptions and creating and operating a subscription program. The surety bond must be issued by a company that is licensed by or eligible to do business in this state.
- (d) The board may adopt rules for waiver of the surety bond.
- (e) The Insurance Code does not apply to a subscription program established under this section.

During this beginning phase, most, if not all, EMS providers utilized ground ambulance vehicles to transport patients. It was not until the late 1980s and early 1990s that it became more prevalent for EMS providers to use ambulance helicopters to transport EMS patients. It can be argued that when the EMS subscription section was added to the Health and Safety Code, few people contemplated air ambulance EMS providers participating in such program. Today there are approximately twenty air ambulance EMS providers, using mostly rotor-wing verses fixed-wing aircraft that are licensed by DSHS. Of those, approximately five have been approved by DSHS, pursuant to 25 TAC 157.11(k), to create and operate an EMS subscription program.

Legal Analysis

Air ambulance helicopters or air carriers are extensively regulated by the Federal Aviation Administration (FAA) under the Federal Aviation Act, which was amended by the Airline Deregulation Act (ADA) in 1978. Congress enacted the ADA after "determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation and low prices' as well as 'variety and quality' ... of air transportation services." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992).

To achieve this goal, Congress included a broad preemption provision in the ADA intended to protect air carriers from state regulation that might hinder competition. Title 49 United States Code (USC), Chapter 417, Section 417.13(b) states that:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

From a further review of 49 USC Chapters 411, 415 & 417, and related federal regulations at Title 14 of the United States Code of Federal Regulations (CFR), Sections 200 – 399 it appears that such federal preemption includes such specific economic issues as: rates, advertising, scheduling, etc. and some dealing with insurance.

DSHS rules, 25 TAC 157.11(k) state that a DSHS licensed EMS provider must obtain DSHS approval prior to the provider's soliciting, advertising or collecting subscription membership fees. This includes a "Specialized Emergency Medical Services Provider", defined at HSC 773.045, which uses a "Specialized emergency services vehicle", defined at 25 TAC 157.2(67).

Requirements, as set out in 25 TAC 157.11(k), that must be met before DSHS approves an EMS provider to create and/or operate a subscription program:

- (1) have a written authorization from the elected official of the governmental entity within which the provider is to offer the subscription program;
- (2) submit to DSHS for its approval a sample of the contract for subscription service, membership and/or the application used to enroll participants;
- (3) submit to DSHS for its approval a copy of all advertising used to promote the subscription service at the time the EMS provider submits its initial or renewal application for an EMS provider license;
- (4) comply with all state and federal regulations regarding billing and reimbursement for participants in the subscription service;
- (5) provide to DSHS for approval evidence of financial responsibility by:
 - (A) obtaining a surety bond payable to the department in an amount equal to the funds to be subscribed. The surety bond must be issued by a company licensed by or eligible to do business in the State of Texas; or

(B) submitting satisfactory evidence of self insurance if the provider is a function of a governmental entity;

(6) not deny EMS to nonsubscribers or subscribers of noncurrent status;

(7) be reviewed by DSHS at least every two years when the provider license is renewed; and the subscription program may be reviewed by the department during spot inspections;

(8) furnish the names and addresses of all subscribers/members to DSHS at the beginning of each licensure period in a format mutually acceptable to both the department and the provider; and

(9) not offer membership nor accept members into the program who are Medicaid clients.

Arguably, the requirements listed above give DSHS regulatory authority to prevent or delay an air ambulance EMS provider from implementing an EMS subscription program, and could economically affect an air carrier's participation in the air ambulance market.

State law that gives DSHS authority to sanction an air ambulance EMS provider for not meeting the above referenced EMS subscription program requirements, or others that may be directly or indirectly related to creating and/or operating an EMS subscription program, are listed as follows:

HSC 773.061, entitled "Disciplinary Actions" states: "(a) For a violation of this chapter or a rule adopted under this chapter, the department shall revoke, suspend, or refuse to renew a license or certificate of or shall reprimand:...(3) an emergency medical services provider license holder."

HSC 773.065, entitled "Administrative Penalty" (a monetary penalty) states: "(a) The commissioner may assess an administrative penalty against an emergency medical services provider...who violates this chapter or a rule adopted...under this chapter."

HSC 773.064, entitled "Criminal Penalties" states "(b) An emergency medical services provider commits an offense if the provider knowingly advertises or causes the advertisement of a false, misleading, or deceptive statement or representation concerning emergency medical services staffing, equipment, and vehicles. An offense under this subsection is a Class A misdemeanor."

Regulatory authority for DSHS to either revoke, suspend or deny the granting of an air ambulance EMS provider license or assess a monetary penalty to a licensed air ambulance EMS provider for not meeting the above referenced EMS subscription program requirements, or others that may be directly or indirectly related to creating and/or operating an EMS subscription program, can be found at 25 TAC 157.16. Relevant subsections are listed as follows:

25 TAC 157.16(d)(1) - failing to comply with any requirement of provider licensure as defined in §157.11 of this title (relating to Requirements for an EMS Provider License); [25 TAC 157.11(k) outlines the subscription program requirements]

25 TAC 157.16(d)(4) - failing to correct deficiencies as instructed by the department; [could include subscription deficiencies]

25 TAC 157.16(d)(6) - providing false or misleading advertising and/or making false or misleading claims to clients or the public about the service; [could include advertising related to subscription program]

25 TAC 157.16(d)(7) - failing to operate a subscription service/membership program according to provisions in §157.11 of this title;

25 TAC 157.16(d)(11) - obtaining any fee or benefit by fraud, coercion, theft, deception, or misrepresentation; [could include a subscription fee fraudulently obtained]

25 TAC 157.16(d)(19) - having been found in violation of any local, state, or national code or regulation pertaining to EMS operations or business practices; [could include a subscription program/operations/business rule]

Historically, TDH has sanctioned at least one EMS provider with a probated suspension of its license for having violated the subscription regulations. Currently, DSHS is in the process of updating 25 TAC 157.11, which includes the EMS subscription rule. Such proposed rule changes can be found in the *Texas Register, Volume 33, Number 13, March 28, 2008* issue. More air ambulance providers are entering into or are attempting to enter into the EMS subscription program market, causing questions to be raised as to whether DSHS has authority to regulate and oversee the creation and/or operations of air ambulance EMS subscription programs or whether that authority resides solely with the United States Department of Transportation (DOT), via federal preemption.

Questions

1. Does federal law, regulations and/or case law preempt DSHS from regulating any aspects of the creation and/or operation of an EMS subscription program (as described herein) by an EMS provider that utilizes either a fixed-wing or rotor-wing air ambulance in its EMS operations ?
2. Does federal law, regulations and/or case law preempt DSHS from regulating any aspects of the creation and/or operation of an EMS subscription program that utilizes both ground vehicles and fixed-wing or rotor-wing air ambulances in its EMS operations ?
3. Does federal law, regulations and/or case law preempt any Texas state regulatory agency (ie. Texas Insurance Commission) from regulating any aspects of the creation and/or operation of an EMS subscription program (as described herein) by an EMS provider that utilizes either a fixed-wing or rotor-wing air ambulance in its operations ?
4. Does federal law, regulations and/or case law preempt any Texas state agency (ie. Texas Insurance Commission) from regulating any aspects of the creation and/or operation of an EMS subscription program that utilizes both ground vehicles and fixed-wing or rotor-wing air ambulances in its EMS operations ?

In more straightforward language, can DSHS or other state agency regulate the prepayment (an EMS subscription program fee) for transportation services, provided to an EMS patient by an air carrier that is an air ambulance helicopter?

Attached hereto is a copy of a December 2006 letter sent to DSHS from an attorney representing an air ambulance EMS provider operating in Texas, that provides details and arguments that

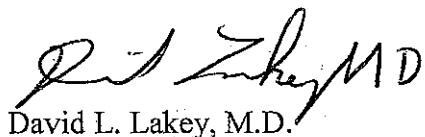
supports the contention that federal law preempts DSHS from regulating the creation and/or operation of an air ambulance EMS subscription program.

Attached is a copy of an August 2002 DOT letter, regarding the City of Austin's attempt, via city ordinance, to prohibit an air ambulance provider from engaging in air EMS operations within the city. The letter makes reference to a Texas Attorney General's opinion, issued on March 4, 1988, that addresses federal preemption.

Also, attached is a copy of a January 2, 2008 investigative news story, published by the Fort Worth Star Telegram, that addresses some of the complex issues, related to air ambulance subscription programs.

If you have any questions concerning this request, please direct your inquiries to Donald Jansky, Assistant General Counsel at (512) 458-7236, Donald.Jansky@dshs.state.tx.us. Thank you for your attention to this matter.

Sincerely,



David L. Lakey, M.D.
Commissioner
Texas Department of State Health Services

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