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OPINION COMMITTEE



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RQ-0958-GA

COMMITTEE ON LOCAL & CONSENT CALENDARS
April 5, 2011

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

FILE # ML-46716-11
I.D. # 46716

Re: Validity of Rider 55 to Article II (Health and Human Services Commission) of the General Appropriations Act for the 2010-2011 biennium

Dear General Abbott:

I respectfully request an opinion on the validity of Rider 55 to Article II (Health and Human Services Commission) of the General Appropriations Act of the 81st Legislature for the 2010-2011 biennium.

Rider 55 background and Agency implementation

Title II of the General Appropriations Act of the 81st Legislature ("Appropriations Act") appropriates \$154,844,362 for the 2010 fiscal year and \$133,620,036 for the 2011 fiscal year for the medical transportation program under the federal state Medicaid program. Acts 2009, 81st Leg., R.S., art. II, at II-80 (Strategy B.2.3). Included in the Appropriations Act is a rider ("Rider 55") specifically directed at the non-emergency medical transportation [NEMT] aspect of the medical transportation appropriation. Rider 55 provides:

To the extent allowed by federal and state law, a portion of the funds appropriated [for medical transportation] shall be used to implement a regionalized full-risk brokerage model which utilizes a pre-payment methodology (capitation) to reimburse the broker or brokers. This program will be for all Medicaid non-emergency transportation under the Medical Transportation program in areas of the state that the Commission finds can sustain a regionalized model. To implement this change, the Commission shall apply to the Centers for Medicare and Medicaid Services for a state plan amendment as provided for in the Social Security Act, Section 1902(a)(70), and in accordance with Federal Regulations 42 CFR 440.170(a)(4).

Appropriations Act, at II-98.

The Texas Health and Human Services Commission ("HHSC") is the state agency charged with responsibility for management and implementation of the joint federal-state
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Medicaid program and is responsible for implementation of Rider 55. It began the implementation process on August 31, 2010, by publishing a Request for Proposals for NEMT Full Risk Broker Services ("NEMT RFP"). See http://www.hhsc.state.tx.us/contract/529110004/RFP_529110004.pdf. A series of addendums to the NEMT RFP followed, culminating with Solicitation Addendum No. 6, published on November 12, 2010. See <http://www.hhsc.state.tx.us/contract/529110004/Addendum6.pdf>. The deadline for submission of proposals was November 29, 2010, and HHSC currently has the NEMT full-risk brokerage proposals under evaluation.

Legal questions posed

I request your opinion on Rider 55's legal validity concerning the following issues:

- Is Rider 55 consistent with the requirement in Article III, Section 35, of the Texas Constitution that substantive legislation cannot be accomplished through appropriations riders?
- May Rider 55 be implemented before HHSC has obtained federal approval of Texas's Medicaid state plan to allow use of the capitation methodology in connection with the NEMT program in Texas?
- Is HHSC's implementation of Rider 55 consistent with the requirements of the federal consent decree in *Frew v. Hawkins*, Civ. Action No. 3:93CV65, U. S. District Court, Eastern District of Texas (Feb. 20, 1996) ("*Frew* consent decree")?

Constitutional validity of Rider 55

HHSC is designated the state agency in Texas responsible for administration and operation of the Medicaid program. TEX. GOV'T CODE §§ 531.0055(b)(1), 531.021. Among the agency's duties in administering Medicaid is the mandatory, non-delegable task of supervising administration and operation of the NEMT program. TEX. GOV'T CODE § 531.02414(b), (c). In carrying out this task, the legislature has provided that HHSC "may" contract with public transportation providers, private transportation providers, or a regional transportation broker for the provision of NEMT services. See TEX. GOV'T CODE § 531.02414(d); see also TEX. GOV'T CODE § 531.0057(b) ("*may* contract with") (emphasis added).

Rider 55 appears to depart from the statutory rules for NEMT in a significant way. Rather than continue with the permissive authorization ("*may*") for HHSC to choose among several options for providing NEMT services, Rider 55 mandates that HHSC "*shall*" use appropriated funds to implement a specific method of delivery of NEMT services: "a regionalized full-risk brokerage model" using capitation as the reimbursement methodology. It further directs that

HHSC “shall apply” to the federal Centers for Medicare and Medicaid Services (“CMS”) for a statement plan amendment to implement this mandated change. (emphasis added).

Under Article III, Section 35, of the Texas Constitution, longstanding Texas law prohibits use of an appropriations rider to alter existing substantive law. “A rider which attempts to alter existing substantive law is a general law which may not be included in an appropriations act.” *Strake v. Court of Appeals for the First Supreme Judicial District of Texas*, 704 S.W.2d 746, 748 (Tex. 1986). Attorney General opinions have consistently invalidated appropriations riders which “attempt to modify or amend a general statute.” TEX. ATT’Y GEN. OP. No. GA-0378, at 2 (2005). Included among the riders which have been found by your office to be invalid under this analysis is one instructing a specific use of Medicaid-related funds. See TEX. ATT’Y GEN. OP. No. H-321 (1974) (invalidating rider directing that dentures funded under the medical assistance fund be made at the Department of Corrections).

In TEX. ATT’Y GEN. OP. No. JM-167 (1984), your office addressed the validity of a rider that appears to parallel Rider 55 in a critical way insofar as the constitutional requirement of Article III, Section 35, is concerned. The rider at issue in that 1984 opinion directed that a certain portion of funds appropriated to the State Commission for the Blind for older blind contracting training be expended on a contract with a particular entity. The underlying substantive statute, however, specifically placed the decision on entering into contracts within the commission’s discretion. JM-167, at 2. Citing a previous Attorney General opinion, your office determined that “the legislature cannot make mandatory by a general appropriation rider that which general law makes permissive or discretionary.” *Id.* Consequently, the rider was held invalid since it attempted to “make mandatory that which general law makes permissive or discretionary.” *Id.* at 3.

Rider 55 appears to suffer from the identical legal infirmity that resulted in the invalidation of the rider addressed in JM-167. Existing substantive law gives HHSC the discretion to choose among various provider alternatives, including regional transportation brokers, in the provision of NEMT services. Rider 55 would eliminate that discretion, and, instead, mandate HHSC both to enter into contracts with a specific type of NEMT service provider—a regionalized full-service broker—and to seek an amendment to its Medicaid state plan to implement the rider’s mandate.

Because of the concerns outlined above, I seek your opinion on whether Rider 55 is valid under the requirements of Article III, Section 35, and longstanding legal principles established by the courts and formal opinions by your office.

Implementation of Rider 55 before CMS approval of state plan amendment

Setting aside the state constitutional issue, there is still another legal issue of concern in connection with Rider 55. The rider’s directive to HHSC is conditional. It only directs use of the

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regionalized full-risk brokerage model, utilizing a capitation reimbursement model, “[t]o the extent allowed by federal . . . law[.]”

A state plan is supposed to contain the information necessary for the federal CMS “to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the state program.” 42 C.F.R. § 430.10 (2010). This appears to suggest that the proper sequence is, first, a state plan amendment for a proposed new program element, second, approval of the proposed amendment, *then*, implementation of the new program element.

The currently approved Medicaid state plan for Texas does not include a capitation methodology for NEMT. *See* Appendix 1(28), at Page 60, to Texas Medicaid state plan (available at <http://www.hhsc.state.tx.us/medicaid/StatePlan.html>). At page 60 of the appendix addressing medical transportation, the state plan indicates that the payment methodology is not risk capitation or non-risk capitation, but “other.”

Based on the foregoing discussion, I seek your opinion on whether HHSC’s initiation of implementation of Rider 55 through the RFP process is consistent with federal law, specifically insofar as it begins implementation of a Medicaid program (the capitation methodology) *before* approval of a state plan amendment which authorizes such a program.

Compliance with *Frew* consent decree

The *Frew* consent decree addresses Medicaid program requirements for Early Periodic Screening, Diagnosis and Treatment (“EPSDT”) benefits, which apply to more than one million Texans under the age of 21 who are Medicaid beneficiaries. Matters concerning NEMT are part of the decree. *See Frew* consent decree ¶¶ 213-247. As a matter of federal law, this decree binds HHSC. *See Frew v. Hawkins*, 540 U.S. 431 (2004) (holding state not immune from enforcement of decree); *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D. Tex 2005) (refusing state effort on remand from Supreme Court to modify consent decree).

Under the consent decree, HHSC is free to contract with others to provide EPSDT services; however, the agency remains responsible for compliance with EPSDT requirements. *Frew* consent decree ¶ 300.

When Rider 55 was being considered for legislative passage, there were concerns that it might clash in some way with the requirements of the *Frew* consent decree. These concerns were raised in a colloquy between Representative Chisum and Representative Pitts, Chair of the House Appropriations Committee and chief sponsor of the appropriations bill. *See* House Journal, 81st Leg., R.S., May 29, 2009, at 5549-5550. The colloquy ended with this exchange:

CHISUM: So, it was your intent when accepting this rider that *before this rider can be implemented*, the Office of the Attorney General and the [HHSC] *must*

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affirmatively find that this program will not jeopardize compliance with the corrective action order in *Frew v. Hawkins*?

PITTS: Yes, it was.

Id. at 5550 (emphasis added).

Through its NEMT RFP, HHSC has begun implementation of Rider 55. In Solicitation Addendum No. 6, referenced above, HHSC specifically instructs that the broker with whom a contract is entered “must conduct *Frew* activities on HHSC’s behalf.” This instruction is ambiguous but appears to be at odds with the consent decree’s ¶ 300 requirement that HHSC remains responsible insofar as EPSDT requirements are concerned. Additionally, there does not appear to be any advance public finding by either your office or HHSC that the full-risk brokerage program mandated by Rider 55 will not “jeopardize compliance” with the *Frew* consent decree.

I seek your opinion on whether HHSC implementation of Rider 55 is consistent with the *Frew* consent decree and whether there has been an advance finding that it is consistent.

Thank you for your assistance in this important matter. Inasmuch as HHSC is moving forward with Rider 55’s implementation in the face of serious legal questions, especially on the rider’s validity under Article III, Section 35, of the Texas Constitution, it is my hope that you can expedite your consideration of, and action on, this request.

Sincerely,


Senfronia Thompson
Chair