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THE STRAIGHT STORY: HEALTH CARE FOR UNINSURED UNDOCUMENTED IMMIGRANTS IN TEXAS

*Readers may have noted recent newspaper coverage of a July 10, 2001 opinion issued by Texas Attorney General John Cornyn. The AG's opinion, requested by Harris County Attorney Michael Stafford, states that provisions of the 1996 federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act make it illegal for the Harris County Hospital District to provide certain non-emergency health care services to low-income uninsured residents who are undocumented residents. PRWORA made a number of complex changes in **legal** immigrants' access to major federal safety net programs. Even less understood were provisions of the 1996 law related to **undocumented** immigrants and their access to public services. This Policy Page describes the collision between federal, state, and local law and policy which has resulted in the recent legal questions over inclusion by Texas county hospital districts of undocumented, uninsured residents in their health care programs.*

PRWORA'S AMBIGUOUS PROVISION FOR STATE AND LOCAL PROGRAMS

At the heart of the recent Texas Attorney General's opinion is a terse clause in PRWORA requiring states to pass **new** legislation to authorize state and local expenditures on undocumented persons (8 U.S.C Section 1621(d)). Presumably, this would mean that states with pre-existing laws requiring or authorizing health care for the undocumented would have to pass a new re-authorization after PRWORA became law. **However, no sanctions of any kind were included in PRWORA for states that fail to comply with this provision.** Usually, federal agencies do not levy sanctions unless either additional legislation or regulations have been created specifying and authorizing those sanctions. No such law or rules have been created since the 1996 Act.

Very few local jurisdictions nationwide (San Diego, California is a notable, and controversial, exception) have terminated non-emergency medical assistance to undocumented persons. New York City, Los Angeles County, and Miami — home to the largest immigrant populations in the country — all provide care to residents in need, even if they are undocumented. In Texas, prior to the recent AG opinion, only Ft. Worth (Tarrant County) had chosen to restrict access by undocumented county residents to subsidized hospital district services that do not fall within the "protected benefits" (described below).

Is the PRWORA Requirement Unconstitutional? Some constitutional scholars believe the PRWORA provision

would not withstand a 10th amendment challenge, as it interferes in state and local governments' authority to spend their own revenues as they see fit.

WHAT DOES THE TEXAS AG'S OPINION SAY?

Besides reiterating the federal law described above, the Texas AG opinion argues several areas or questions of law. Other local and state governments and experts do not agree with the AG's interpretation of these points, and these disagreements form the basis under which so many U.S. cities and counties continue to include all needy residents in their public health programs.

- Texas Hospital Districts do have an obligation under both state law and the Texas Constitution to serve all needy residents (without regard for their citizenship), but the AG asserts that these are "trumped" in this case by federal law.
- The AG believes that recent (1999) Texas law changes and state constitutional amendments (e.g., HB 1398, 76th Texas Legislature) are not sufficient to meet the re-authorization requirement in PRWORA (explained above). Other attorneys disagree. This is clearly an important difference of interpretation.
- Nationally, many legal experts believe that the PRWORA re-authorization requirement violates states' rights under the 10th amendment to the U.S. Constitution. Attorney General Cornyn's opinion disagrees.
- Since 1996, legal experts have noted the absence in law of any federal sanctions linked to the PRWORA provision, and suggested that sanctions were quite unlikely in the absence of

additional law or rule on the matter. The AG's opinion suggests that sanctions could still occur despite the lack of any statutory or regulatory language. Perhaps of even greater concern to local Texas Hospital Districts, the AG suggests that Hospital District officials may be subject to legal challenges based on "unauthorized expenditure of funds."

What is the Legal Significance of the Attorney General's Opinion? State Attorney Generals' opinions can be influential arguments to which judges are likely to pay close attention when rendering a decision in a related case. On the other hand, from a legal standpoint the AG's opinion does not carry special legal power or authoritative value. Thus, an AG's opinion does not have legal force of its own, in the way that a judge's ruling in an actual court case would. Instead, an AG's opinion is more comparable to an academic legal opinion by a respected legal expert. Whether a judge agrees with an AG opinion may depend on how well-written and researched it is, and on the extent to which the AG (an elected official in Texas) is perceived to be a political figure. It is important to recognize that the provision of care by most major U.S. cities (Los Angeles, New York, Miami, etc.) is based on their different legal interpretation of applicable federal and state laws.

WHAT DOES FEDERAL LAW SAY?

Entitlement programs (Medicaid, Food Stamps, SSI, AFDC/TANF) have **never** been available to undocumented persons, and PRWORA made no changes in this area. However, PRWORA did include provisions affecting undocumented persons' access to "federal public benefits." These provisions define a range of "protected" benefits which **must** be available to all persons in need, specifically including the undocumented. Beyond PRWORA, several other federal laws also require health care providers and state and local governments to provide open access to certain kinds of care.

Benefits That May Not Be Restricted for the Undocumented

Emergency Medicaid. The federal Medicaid program requires that all state Medicaid programs must reimburse health providers for the cost of emergency services to undocumented persons who would otherwise be income-eligible for Medicaid, and emergency care is specifically defined as including labor and delivery.

Protected Benefits. Under PRWORA, certain services provided to undocumented persons are completely exempt from any restriction, regardless of their funding source. PRWORA includes an identical exception list for state and local benefits, so **state and local governments may not restrict access to the listed services**, even when those services are funded with local or state dollars. The exempt or protected benefits are:

- emergency Medicaid;
- immunizations;

- diagnosis and treatment of communicable diseases (including treatment of disease symptoms that are initially suspected to be communicable but are later found not to be);
- short-term, in-kind, non-cash emergency or disaster relief services;
- school lunch and breakfast; and
- any program necessary to protect life and safety that is not income-conditional (examples: domestic violence shelters, homeless shelters, food banks, soup kitchens, emergency mental health and substance abuse services).

Providers of the federal, state, or local services on this list not only are exempt from having to screen clients for citizenship status, they actually **may not** impose citizenship screening. To illustrate, a domestic violence agency using public funds **may not** screen out undocumented clients for any of their short-term services necessary for life and safety, e.g. its domestic violence shelter. Similarly, a Hospital District **may not** screen out undocumented clients from emergency care — including labor and delivery and mental health emergencies — diagnosis and treatment of communicable diseases, immunizations, or any other care necessary to protect life and safety. Any local program that provides immunizations, or diagnosis and treatment of communicable disease **may not** screen for citizenship, even if it is purely locally-funded.

Programs Not Designated As Federal Public Benefits May Not Restrict Access. PRWORA did make significant changes in undocumented persons' eligibility for "federal public benefits." Each federal agency determines which of its programs is subject to this ban. If designated a "federal public benefit" a program would have to begin screening clients to exclude the undocumented, while those **not** listed as "federal public benefits" **may not** restrict access by the undocumented.

The U.S. Department of Health and Human Services (USDHHS) released rules in August 1998 defining which USDHHS-funded programs were subject to the new restrictions. **None** of the major public health, mental health, or family planning block grants are defined as having to screen out the undocumented and other "Not Qualified" immigrants (PRWORA defined several categories of legal immigrants as "not qualified" and treats them much like the undocumented for purposes of federal services). **Programs which are not "federal public benefits" and thus may not screen out undocumented persons include:**

- Title V (the Maternal and Child Health Block Grant),
- Title X (Family Planning),
- the Primary Care Block Grant, and funds for Federally Qualified Health Centers.

Federal Programs that Are Subject to Restrictions for the Undocumented

Title XX (the Social Services Block Grant) was defined as a "federal public benefit," and in some cases Title XX-funded programs will now have to screen for citizenship. **However, the list of "protected" benefits above trumps this restriction.** Any program that provides any of the "protected benefits" **may not** restrict access by the undocumented, **even if the funding stream is designated a federal public benefit.** For example, a Title XX-funded program that provides domestic violence, child protective services, or elder abuse protections **may not** restrict access by undocumented clients, because these services are necessary to protect life and safety. (Also, a non-profit agency that receives Title XX funds can use private donations to serve undocumented clients for services that are not "protected benefits.")

Federal Guidelines Control How Restrictions Are Applied

State and Local Governments Cannot Add Restrictions to Federally-Funded Programs In October 1997, the U.S. Dept. of Justice (DOJ) issued interim guidance on how "federal public benefits" (as defined above) would conduct verification of immigration status. This guidance unambiguously states that local and state entities administering federal programs **may not** add additional citizenship/immigration requirements not imposed by the federal program. For example, a hospital district that operates a prenatal care program using federal Title V Maternal and Child Health Block Grant funds **may not** limit access to that prenatal care program by undocumented women.

Locally-Funded Programs May Not Violate or Exceed Federal Rules The same October 1997 interim guidance says that state and local governments **may not** create their own verification rules that are different from the federal guidance. The guidance says that DOJ will eventually promulgate special verification rules for state and local governments for their programs that do not include federal funds. State and local governments wishing to perform verification on non-federal programs are directed to follow the federal public benefits verification guidance until that time. To comply with the verification guidance a local program would be required to:

1. Only require immigration status information from applicants who will actually receive benefits themselves; i.e., a program cannot ask a parent applying for benefits for his child, but not for himself, for information on the parent's status. This directive was reiterated in 9/21/2000 guidance issued by USDHHS and USDA.
2. Apply the same level of scrutiny to, and require the same level of documentation from, all clients. No discrimination based on appearance, race, accent, ethnicity, surname, language, etc. is allowed. In

effect, this means **all** clients must be screened for immigration status if **any** clients are screened.

WHY SERVE THE UNDOCUMENTED?

Most public health experts would prefer to be free from restrictions on their ability to provide health care to all truly needy residents. Some of the reasons are listed below:

- **To protect the public health.** Communicable disease pays no attention to immigration status or borders.
- **Many Texas families are "mixed" — many undocumented persons are parents of U.S. citizen children,** and their well-being as members of our community is our concern. According to U.S. Census data, 18% of all Texas children have one or more non-citizen parent, and 27% of Texas children at or below 200% of poverty have a non-citizen parent. These parents may be either legal or undocumented immigrants. The U.S. Census does not attempt to calculate the proportions of the 2 million who are legal or undocumented. Based on INS data — thought to be somewhat unreliable — Urban Institute experts estimate that the ratio of legal to undocumented immigrants in Texas may be about 2:3. (Sources: U.S. Census, Urban Institute unpublished data.)
- **Local government programs must meet emergency needs and provide "exceptions list" benefits anyway.** The Emergency Medical Treatment and Active Labor Act (EMTALA) is the most recent federal law that clearly requires every hospital with an emergency room to screen every person who requests care, and to treat and stabilize any emergency need that is detected. Hospital district indigent care or uninsured programs must also ensure that the "protected benefits" described above are provided without respect to citizenship. **It would be burdensome and complex to deny access to certain primary and preventive care services, while covering others for this population.**
- **Failing to treat serious, non-emergency medical conditions like asthma and diabetes results in both a human and a fiscal toll for local governments.** Children not treated for asthma end up in the emergency room when they have attacks, which when severe can be fatal. Adults and children with untreated diabetes may end up with organ failure and amputation: a humanitarian failure and a poor stewardship of local tax dollars.
- **Failure to provide and encourage early access to prenatal care services for undocumented residents can result in poor (and expensive) birth outcomes for their infants, who are U.S. citizens.**
- **All people in the community are contributing to Hospital District Tax bases through their sales and property taxes.** Since Texas has no income tax, even individuals working in the "cash economy" cannot escape our tax system. Economists agree that property taxes are borne equally by renters and homeowners — the renters just cannot reap the federal tax benefits of local property taxes.

- **What About Fraud?** When persons re-locate temporarily to an urban county for the sole purpose of getting medical care, the costs to Hospital Districts are just as problematic when the patient comes from East Texas or South Texas as when the patient is from another country. Any solution should lie in a **residency** requirement for all patients, not just for persons who appear to be foreign. Hospital Districts can temper residency requirements with an appeal process for especially needy cases, e.g., a legitimate new resident with a chronic illness requiring prompt treatment.
- **Federal and/or State Interim Statements.** It is possible that federal or state authorities may clarify that local governments do not risk loss of Medicaid or Medicare funds, or other federal penalties, for provision of broad-based care to undocumented residents, or may clarify that Hospital District services are not defined as "local public benefits" for purposes of PRWORA. This could reduce the time pressure for federal or state legislative action.
- **Impact of Federal Negotiations on Immigrant Amnesty and Guest Worker Proposals.** The federal government may act quickly to resolve this issue, formally or informally, in light of the high priority the President has placed on negotiating new guest worker programs as well as new options for immigrants to achieve permanent resident status (amnesty). It clearly makes no sense for the federal government to pursue normalization of immigration status for undocumented workers in the U.S., while simultaneously creating barriers to local and state governments using local tax dollars to provide basic health care services to the same residents.

WHAT HAPPENS NOW?

Status Quo Currently, most urban Texas Hospital Districts, including Harris County, are in a holding pattern, continuing to provide care to all needy residents until the legal options and issues can be further investigated. According to the Tarrant County Hospital District, it only provides the undocumented access to emergency care and diagnosis and treatment of communicable disease as required by federal law, and prenatal care and other services provided under their Title V Maternal and Child Health Block Grant funds, as also required by federal law.

The Nueces County Hospital District contracts with a private nonprofit hospital in Corpus Christi, Christus Spohn Health System, to provide both inpatient and some outpatient care to low-income uninsured county residents. Shortly after release of the AG's opinion, this hospital district board voted to begin limiting district-subsidized care to the undocumented to the "protected benefits": emergency care (including labor and delivery), diagnosis and treatment of communicable diseases, and immunizations. The district appears concerned that their emergency costs may increase due to lack of primary and preventive care, but they also fear that they might face a legal challenge if they continue to provide care. The Montgomery County Hospital District announced on August 6 their decision to take similar steps, based on their concern about legal threats. Hospital District officials there also express regret about the change, and their intention to work for legal changes to allow the district to resume services.

Next Steps. It is too early to predict what changes in policy, rule or law may be needed to remove barriers to local governments providing basic health care as a result of the legal questions raised by the AG's opinion. Some of the possible avenues for removing the concerns that have resulted in actions like Nueces County's include:

- **Changes in federal law.** The PRWORA requirement can be repealed or amended. U.S. Congressman Gene Green of Houston has filed legislation (HR 2635) to amend the 1996 PRWORA requirement.
- **Changes in Texas law.** The Texas legislature could, either in regular or special session, pass a new law explicitly meeting the PRWORA re-authorization requirement.

What You can Do. If your local or statewide organization would like to be notified of opportunities to show your support for allowing access to basic health care services by undocumented immigrants in Texas' local and state programs, please email your contact information (organization name, contact person, address, phone, email address) to dunkelberg@cphp.org, and please cc bbest@childrensdefense.org.

For more information on this topic:

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