



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 17, 1998

William R. Archer, III, M.D.  
Commissioner of Health  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

Letter Opinion No. 98-019

Re: Request for reconsideration and clarification  
of Letter Opinion No. 96-103 (RQ-965)

Dear Commissioner Archer:

You have asked this office to reconsider and clarify Letter Opinion No. 96-103 (1996), which concluded that the Texas Department of Health ("TDH") had no authority to register kinesiotherapists pursuant to section 12.014(a) of the Health and Safety Code, because such persons are already subject to licensing by the Board of Physical Therapy Examiners. The argument has been offered that there are kinesiotherapists practicing in Texas under the authority of the United States Department of Veterans Affairs (formerly the Veterans Administration or "V.A.") in V.A. hospitals who are not required to be so licensed; that the federal statute under which such persons are engaged in kinesiotherapy is in conflict with the requirement of sections 1(2) and 7(a) of article 4512e, V.T.C.S. that any person who holds himself out as a kinesiotherapist in this state be licensed by the Board of Physical Therapy Examiners; that accordingly article 4512e is pre-empted by federal law to the extent of this purported conflict; and that therefore kinesiotherapists employed by the federal government may be registered by the TDH pursuant to section 12.014(a).

Having considered this argument, we conclude that Texas's general regulatory scheme does not impede the V.A.'s authority to employ whom it will; that there is therefore no actual conflict between the laws; that article 4512e is not pre-empted; that the conclusion reached by this office in Letter Opinion No. 96-103 is legally correct; and that, accordingly, Letter Opinion No. 96-103 (1996) is reaffirmed.

Letter Opinion No. 96-103, in response to a request from your office, noted that section 12.014(a) of the Health and Safety Code provides for the establishment by TDH of a registry of health care providers "who are not otherwise licensed, registered, or certified by any state agency, board, or commission."<sup>1</sup> It noted, however, that the practice of kinesiotherapy is regulated by the

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<sup>1</sup>The legal effect of such regulation is highly limited, since under the Department of Health's regulations, "[i]nclusion of an occupation of providers of a specific health-related service on a registry does not constitute an evaluation of a provider's training or competency or a regulation of the scope of practice of the provider," and "[a] person placed on the registry may not represent in any manner that the person is licensed, certified, inspected or otherwise regulated by the Texas Department of Health." Texas Department of Health, 25 T.A.C. 127.2(b-c).

(continued...)

Board of Physical Therapy Examiners under article 4512e, V.T.C.S. Accordingly, it held that kinesiotherapists might not be registered by the department.

The American Kinesiotherapy Association and the Texas Kinesiotherapy Association argue on the contrary that those kinesiotherapists employed by the V.A. cannot be subject to article 4512e, because federal law pre-empts it, and that it therefore follows that, not being regulated by the Board of Physical Therapy Examiners, such persons may be registered under section 12.014(a).

Your office requested reconsideration and clarification of Letter Opinion No. 96-103 in light of these concerns. You ask first “[w]hether it was the intent of the United States Congress to preempt state laws conflicting” with the federal statute under which V.A. hospital standards for the employment, *inter alia*, of kinesiotherapists are set. You further ask if article 4512e conflicts with or impairs the federal scheme by which V.A. hiring is regulated, and in particular whether the requirement that kinesiotherapists in Texas must be licensed by the Board of Physical Therapy Examiners *so conflicts with the federal scheme as to be pre-empted*. If so, you ask whether article 4512e “fails to regulate the practice of kinesiotherapy in its entirety within the [S]tate of Texas,” and if therefore kinesiotherapists not subject to article 4512e—by which, we take it, you mean kinesiotherapists employed by the V.A.—may be registered by the department pursuant to section 12.014.

Federal pre-emption of state law rests, doctrinally, on the Supremacy Clause of the United States Constitution, article six, which reads in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Supreme Court cases define three kinds of pre-emption. “First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . . Pre-emption fundamentally is a question of congressional intent . . . and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.” *English v. General Electric Co.*, 496 U.S. 72, 78-9 (1990). The second kind of pre-emption, so-called field pre-emption, occurs when state law “regulates conduct in a field that Congress intended the Federal Government to occupy exhaustively.” *Id.* at 79. If it is asserted that state law is pre-empted in an area “‘traditionally occupied by the States,’ congressional intent to supersede state laws must be ‘clear and manifest.’” *Id.* The third kind of pre-emption, conflict pre-emption, occurs when state law “actually conflicts with federal law . . . where it is impossible for a private party to comply with both state and federal requirements, . . . or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.*

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<sup>1</sup>(...continued)

Accordingly, even were we to hold that kinesiotherapists employed by the V.A. might be registered by the department, such persons could not hold themselves out as licensed to practice generally in Texas.

The federal law which is asserted to pre-empt state regulation of kinesiotherapists is section 7402 of title 38, United States Code, and in particular section 7402(b)(10), which provides in relevant part, "To be appointed as [any of a number of named health-care positions] or other position [in a V.A. hospital], a person must have such medical, dental, scientific, or technical qualifications as the Secretary [of Veterans Affairs] shall prescribe." Plainly this language does not explicitly pre-empt state regulation of kinesiotherapists; indeed, kinesiotherapists are not even mentioned by name.

Nor, in our view, does field pre-emption apply here. As we have noted, congressional intent to supersede state laws must be "clear and manifest" when the area claimed to be pre-empted is one which states have traditionally regulated. "[T]he historic police powers of the States are not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress." *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Few other of those police powers are so well-established as "the historic primacy of state regulation of matters of health and safety," *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250 (1996), among which matters the licensing and regulation of health professionals is certainly to be included. We fail to see how the statutory language, which at most holds that the Secretary of Veterans Affairs may decide that persons not licensed in a particular state may nevertheless practice their art or profession in a V.A. hospital in that state, calls into question the right of the states to regulate such arts or professions generally within their jurisdictions. The secretary may employ whom he will at the V.A. hospital in Temple. That does not mean that the State of Texas cannot license kinesiotherapists.

For the same reason that we find no field pre-emption here, we find no conflict pre-emption as well. Conflict pre-emption occurs only when there is actual, rather than notional conflict. "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.' The 'teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists.'" *English*, 496 U.S. at 89.

An analogy may perhaps make it clear why there is no actual conflict here. An attorney licensed to practice in Texas and admitted to the bar of the United States Court of Appeals for the Fifth Circuit may argue before a Fifth Circuit panel in the United States Courthouse in New Orleans. But he cannot go down the street to defend a case in the Orleans Parish court unless he is admitted to the Louisiana bar. The two jurisdictions are independent and do not interfere with one another, even though the federal court may be physically located within the State of Louisiana. So here, the fact that the V.A. has hospitals in Texas does not subject its staffing regulations to the scrutiny of Texas state law. At the same time, the Texas lawyer cannot be heard to say that the fact that he can practice in the federal court in New Orleans pre-empts Louisiana from deciding who may practice law there. Nor may a kinesiotherapist not licensed by the Board of Physical Therapy Examiners claim that, because he may practice in a V.A. hospital here, he may practice generally in Texas undeterred by Texas law.

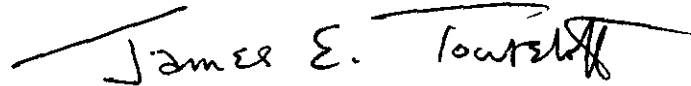
Having found no conflict between state and federal law here, and hence no pre-emption of article 4512e, V.T.C.S., we conclude that the profession of kinesiotherapy is regulated by the Board of Physical Therapy Examiners, and that accordingly kinesiotherapists may not be registered by the

Texas Department of Health pursuant to section 12.014(a) of the Health and Safety Code. The conclusion of Letter Opinion No. 96-103 (1996) is reaffirmed.

S U M M A R Y

Article 4512e, V.T.C.S. is not pre-empted by federal law. Accordingly, the profession of kinesiotherapy is regulated generally in Texas by the Board of Physical Therapy Examiners. Therefore, the Texas Department of Health may not register kinesiotherapists pursuant to section 12.014(a) of the Health and Safety Code. The conclusion of Letter Opinion No. 96-103 (1996) is reaffirmed.

Yours very truly,

A handwritten signature in black ink that reads "James E. Tourtelott". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

James E. Tourtelott  
Assistant Attorney General  
Opinion Committee