Chapter 7

Federal Legal Issues

Contents

Box

Chapter 7
Federal Legal Issues[1]

INTRODUCTION

As discussed in previous chapters, Oregon's Medicaid proposal would substantially change the benefits covered under the program, the populations eligible for those benefits, and the relationships of patients and providers. The State has applied to the U.S. Health Care Financing Administration (HCFA) for permission to waive certain provisions of the Medicaid statute in order to proceed with the proposal as a demonstration project, and HCFA believes it has the authority to grant those waivers.

It is possible, however, that Oregon's proposal might be in conflict not only with existing Medicaid rules but with provisions of other Federal statutes, which only Congress can waive. Congress could also opt to knit any HCFA-approved Medicaid waiver, leaving the Oregon proposal subject to the limits imposed by these other Federal statutes and vulnerable to judicial attack if they are violated.

Of even greater importance, the proposal might come into conflict with the U.S. Constitution. Since neither HCFA nor Congress can overcome constitutional objections (short of a constitutional amendment), examining potential constitutional issues raised by the proposal is a critical first step in assessing its legality from the Federal perspective.

This chapter first analyzes whether certain aspects of the Oregon proposal might be considered violations of Federal constitutional law, either on their face or in their (likely) application. It also considers the applicability of Oregon State constitutional principles that parallel the Federal principles. The chapter then analyzes various important Federal statutes (apart from the Federal Medicaid statute) that might be relevant to the Oregon scheme.

CONSTITUTIONAL ISSUES

Federal Constitutional Issues

The most basic Federal constitutional principle regarding social welfare programs is straightforward. There is nothing in the U.S. Constitution that requires the Federal Government or the States to provide social welfare benefits of any kind *(DeShaney v. Winnebago County Department of Social Services, 489* U.S. 189, 196 (1989)). Congress--or the State of Oregon-can choose to enact or repeal Medicaid, Aid to Families with Dependent Children (AFDC), or any other social welfare program without any judicial oversight of the wisdom or rationale for doing so.

Once a social welfare program has been established, however, there are some constitutional constraints on the government's discretion to limit or condition the benefits that are made available. The most notable of these is the nondiscrimination requirement of equal protection imposed by the 5th and 14th Amendments. Under most circumstances, however, the impact of these constraints on legislative discretion is minimal. Generally, the court need only find that the legislative scheme is ''rational"—e.g., that a spending limit or condition will conserve government resources, ease the administration of the program, or further virtually any governmental policy not specifically prohibited by the Constitution. Under the "rationality" standard of judicial review, the actual motivation behind the legislation is irrelevant, and there is no real judicial examination of the actual effects of the legislation.

There are two circumstances under which a limit or condition imposed on a social welfare program may be subjected to a more rigorous level of judicial review. The first occurs when a legislative scheme to limit a social program "affects" a "fundamental interest. " The second occurs when the scheme will detrimentally affect a "suspect class" of persons.

Protecting "Fundamental Interests"

To be regarded as a "fundamental interest,' an activity must be both extremely important and explicitly protected by the Constitution *(San Antonio Independent School District v, Rodriguez, 411* U.S. 1 (1971)). The latter requirement in particular defines "fundamental interest" inherently narrowly, including only such activities as speech, interstate

[1] **This chapter was written by staff of the Office of Technology Assessment (OTA). Portions of the chapter are based on a series of memoranda authored by K. Wing, School of Law, University of Puget Sound, Tacoma, WA, under contract to OTA, November 1991. OTA bears the responsibility for the content and conclusions of this chapter.**

travel, religion, and a few other interests specifically protected by the Federal Constitution. Other activities--e.g., public school education-may be extremely important, but if they are not explicitly protected by the Federal Constitution they are not considered ''fundamental' for the purpose of enhanced judicial review.

Furthermore, in the U.S. Supreme Court's view, a decision not to fund an activity or interest, even one that is entitled to enhanced constitutional protection, does not necessarily 'affect' that activity or interest (see, e.g., *Webster v. Reproductive Health Services, 492* U.S. *490 (1989); Rust v. Sullivan,* 111 S. Ct. 1759,59 U.S.L.W. 4451 (1991)). Thus, for example, a legislative decision to exclude funding for abortions (but fund childbirth) is constitutional as long as it meets the limited test of "rationality;' and under a "rationality" standard, a claim that the government chooses to encourage childbirth over abortion is sufficient *(Beal v. Doe,* 432 U.S. 438 (1977); *Maher v. Roe, 432* U.S. *464 (1977); Harris v. McRae,* 448 U.S. 297 (1980)).[2] Similarly, the Court has found that disparities in eligibility rules for social programs (e.g., AFDC and Medicaid) generally do not "affect' a "fundamental interest" even when certain individuals are disadvantaged as a result of the rules *(Jefferson v. Hackney, 406* U.S. 535 (1972); *Schweiker v. Hogan, 457* U.S. *569 (1982); Bowen v. Gilliard, 483* U.S. 587 (1987)). The Court has required only that Congress and the States show some ''rational" basis for eligibility differences or rule changes. Saving resources meets this criterion.

There are two narrowly defined, related sets of circumstances under which modern courts may still view a "fundamental interest" as "affected' by a social welfare limit or condition and, therefore, impose a more demanding judicial review on the legislation and its justification. The first is where a condition or limit on a social welfare scheme is viewed as "penalizing" the exercise of a "fundamental interest. ' The second is where the limit or condition prohibits the program participant from engaging (while receiving funds) in a constitutionally protected activity that is outside the scope of the activities funded under the program.

In Shapiro v. Thompson (394 U.S. *618 (1969)),* for instance, the Supreme Court held that a durational residency requirement imposed on AFDC participants was a violation of equal protection because it "penalized" otherwise eligible participants who had recently exercised their constitutionally protected ''right to travel" (more aptly described as a ''right to become a State resident"). As such, the Court was required to 'closely scrutinize" the legislation. It demanded that the State show a "compelling interest" for the limit on welfare eligibility and that the impact on the excluded individual's fundamental right was minimal. Furthermore, *Shapiro* implied that under "close scrutiny" any social welfare program limit or condition that was imposed merely to save government funds would be unconstitutional *per se.*

The Court has indicated that it also may view a ''fundamental interest' as ''affected" when a recipient is prohibited from engaging in a protected activity as a condition of the receipt of funds for other activities. For example, the Court has held that a Federal prohibition on "editorializing" by noncommercial radio and television stations that receive Federal funds "affected" the speech of those stations because it prohibited editorials that might be funded from nonpublic sources (FCC v. *League of Women Voters of California, 468* U.S. *364 (1984)).* As with the "penalty" cases, the Court was apparently attempting to distinguish between circumstances where the spending limit or condition merely fails to subsidize or fired an activity, as in the Medicaid abortion decisions cited above, and those where the limit or condition is intended to inhibit other nonfunded activities or interests that are constitutionally protected.

Protecting "Suspect" Classifications

The other major exception to the general rule that legislation need only be ''rational' to be constitutional involves legislation that is characterized as discriminating on the basis of a "suspect' classification. Under such circumstances, a court may subject the legislation to the same demanding 'close scrutiny ' ' as it would legislation that "affects" a "fundamental interest. " Again, the application of such a standard is usually tantamount to a determination that the legislation is unconstitutional.

[2] The Court has in the past applied the "rationality" standard in such a manner as to impose greater restriction on legislative discretion *(U.S. Department of Agriculture v. Moreno, 413* U.S. 528 (1973)). However, most experts regard that case to be no longer authoritative, and it was even aberrant in its own day (see *Jefferson* v. *Hackney, 406* U.S. 535 (1972)).

The rhetoric and underlying rationale for the exception of 'suspect' classifications evolved from the judicial invalidation of school and public service segregation laws and other legislative schemes based on purposeful racial classifications. In those contexts, the courts modified traditional notions of judicial deference to legislative discretion in light of the history and realities of governmentally sanctioned racial discrimination. This enhanced judicial review of racial classifications may also be applied to legislative classifications that discriminate on the basis of an individual's national origin or against a few other "suspect" classes, such as legal aliens. However, the Supreme Court has been extremely reluctant to recognize additional categories of suspect" classifications beyond these three categories. Thus, for example, the Court has rejected attempts to classify as "suspect' legislation that discriminates against the handicapped, the elderly, striking workers, indigent teenagers seeking abortions, and close relatives.[3] It has also rejected the notion that gender-specific legislation is constitutionally "suspect, but it has nonetheless applied an intermediate level of judicial review (somewhat higher than mere ''rationality' to such legislation.

In general, the Court has insisted that enhanced judicial scrutiny of legislation is limited to circumstances where the 'suspect' (e.g., racial) classification is intentional or, at least, where a discriminatory intent can be inferred from sufficiently persuasive statistical evidence. Disparate impact alone, without some showing of legislative intent, is not constitutionally significant. The Court also has rejected attempts to characterize limits or conditions on welfare, Medicaid, or other programs that provide benefits exclusively to the poor as inherently ' 'suspect' (see, e.g., *Maher v. Roe, 432* U.S. 464 (1977)).

There are a few cases in which the Court has applied "suspect' class analysis to legislation that discriminates between those who can pay and those who cannot. But most of those legislative schemes involved a complete denial of access of indigent people to some important public service otherwise available to nonindigent people—specifically, access to judicial process.[4]

Constitutional Principles and Oregon's Proposal

With a very few possible exceptions, Oregon's proposed demonstration project to revise its Medicaid program need only be "rational' to meet constitutional requirements. This standard could easily be satisfied by any of the claimed purposes originally set out in Oregon's Senate Bill 27 (SB 27).

One aspect of the program, the fact that it would initially limit the new prioritized scheme of Medicaid coverage to those current Medicaid beneficiaries who are AFDC-related, while exempting Supplemental Security Income (SSI) beneficiaries, parallels a scheme upheld in *Jefferson v. Hackney*, which found that the States and the Federal Government are free to treat different categories of welfare recipients differently. It is thus unlikely that a challenge to this aspect of the Oregon program would be successful.

Even if Oregon opted not to fund services that somehow involved the exercise of ''fimdamental" interests, the Supreme Court, in its many abortion-related decisions, has insistently demonstrated that not funding an activity has no enhanced constitutional significance. A possible exception would arise if Oregon implemented its prioritization scheme in such a way as to impose a ''penalty' or unconstitutional condition on receipt of Medicaid benefits or, alternatively, if it were to discriminate on the basis of a ' 'suspect" classification. But nothing on the face of the statute or in the early stages of its implementation suggests that this is likely.

While the basic scheme for reforming Oregon's Medicaid program appears to be within these constitutional limits, there are at least two provisions of the original legislation that may possibly be vulnerable to constitutional attack. The first of these provisions, codified in Or. Rev. Stat. § 414.725(7) (Supp. 1990), requires that:

> Health care providers contracting to provide services under [the Medicaid program statutes revised pursuant to SB 27] shall advise a patient of any service, treatment, or test that is medically necessary but not

[3] For a full discussion of "suspect" classifications, see *Cleburne, Texas v. Cleburne Living Center, 473* U.S. 432 (1985); see also *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers, 485* U.S. 360 (1988).

[4] In *Griffin v. Illinois (351* U.S. 12 (1956)), the Court held that requiring indigent defendants to purchase transcripts of their trials (to prepare for an appeal) was a violation of equal protection; in *Boddie* v. *Connecticut* (401 U.S. 371 (1971)), the Court invalidated a filing fee required for a petition for divorce. *Tare v. Short* (401 U.S. 395 (1971)) invalidated a state law that incarcerated indigent people who could not pay criminal frees; *Little* v. *Streater* (452 U.S. 1 (1981)) invalidated a fee charged for a blood test necessary for a defense to a (criminal) paternity charge.

covered under the contract *if an ordinarily careful practitioner in the same or similar community would do so under the same or similar circumstances* [emphasis added].

The second provision, Or. Rev. Stat. § 414.745 (Supp. 1990), protects Medicaid providers from criminal prosecution, civil liability, and professional disciplinary action when they refuse to provide unfunded services.

The scope and meaning of these provisions are, unfortunately, unclear. Presumably they are intended to apply only to providers participating in the reformed Medicaid scheme. However, both provisions have been codified in such a way as to imply that they would continue to apply to Medicaid providers even if the demonstration project does not go forward (see box 7-A).

While section 414.725(7) appears to impose a "duty to advise" and to specify how that duty can be fulfilled, it is not clear whether and how its implementation would affect Oregon's existing statutory informed consent law. The existing statute, reflected in Or. Rev. Stat. § 677.097 (1989)), requires physicians and podiatrists to undertake certain steps in obtaining informed consent from any patient prior to performing a procedure (e.g., describing the recommended treatment and any alternative treatments, notifying the patient of possible risks or outcomes of the procedure, asking the patient if he or she would like any further information). This statute does not specify that cost or coverage of the treatment be discussed as possible factors. In contrast, Or. Rev. Stat. § 414.725(7) directs *all* contracting providers (not just physicians and podiatrists) to inform *Medicaid* patients when they intend not to provide a medically necessary treatment ***because it is not covered*** by Medicaid.

Section 414.745, which waives provider liability for refusing to treat when treatment is unfunded, has even more far-reaching effects. This waiver would reduce substantially the common law and State statutory protections that are currently available to Medicaid patients in Oregon. Existing common law principles limit the discretion of a provider to refuse or terminate treatment in several important ways (see below). The limits imposed by criminal and licensure sanctions are less clearly defined, but they still provide Medicaid beneficiaries with alternative remedies if treatment is denied or terminated.

Box 7-A—The Legislative Language or the Code? Potential Implications of the Codification of Oregon Senate Bill 27

The provisions of Oregon Senate Bill *27* (SB **27) were codified in various and separate portions of the** Oregon code. Even if some of these provisions are repealed or modified, others could be retained; and it is possible that some elements of the proposal may be regarded as valid while others are not (i.e., the manner in which the statute was drafted and later codified makes it appear "severable"). If the proposal was not authorized, but the State legislature took no action to repeal the various provisions of the Oregon code that were added by SB 27, it would be possible to read some of these provisions as applicable to the existing Medicaid program.

In addition to the apparent severability of the provisions of the law, some provisions as codified do not follow the exact wording of the statute. For example, the codified versions of both sections 414.725(7) and 414.745 (Or. Rev. Stat., Supp. 1990) are worded slightly differently than the original provisions in SB 27 (see sections 6(7) and 10 of SB 27). The original language of SB 27 makes it clear that these provisions would only apply to those Medicaid recipients who are subject to the new proposal. Consequently, they would not have any effect unless or until that proposal was implemented. The Oregon code language, however, substitutes a reference to the entire Medicaid program for SB 27's language "under this Act." This change could be interpreted as rendering these provisions applicable to the ***existing*** Medicaid program, not just the reformed program anticipated by the Act. This would appear, however, to be in conflict with the original intent of SB 27.

SOURCE: K. Wing, University of **Puget Sound, Tacoma, WA,** memorandum to E. Power, Office of Technology **Assessment, November** 1991.

The net effect of this provision would be to greatly disadvantage the Medicaid beneficiaries subject to the waiver, and to do so in a manner that discriminates between indigent Medicaid beneficiaries and all other Oregonians. (Pending the expansion of the Oregon proposal to include all Medicaid beneficiaries, section 414.745 would also discriminate between categories of Medicaid beneficiaries).

Whether the deprivation of common law and statutory rights of Medicaid beneficiaries in this manner has any constitutional significance is not clear. States have wide latitude to amend their

common law principles of tort liability and, of course, existing statutory remedies. But viewed in the broadest sense, sections 414.725(7) and 414.745 in tandem could constitute a discrimination based exclusively on "wealth"—a discrumination that would totally deprive Medicaid beneficiaries, who are by definition indigent as a class, of important rights that would continue to be available to nonindigent Oregonians. In some ways, the denial of an indigent participant's rights to pursue certain legal remedies is similar to the few cases in which the Supreme Court has recognized wealth-based distinctions as "suspect"—i.e., when it relates to a denial of access to the courts.[5]

On the other hand, in a recent Supreme Court decision relating to the filing fee required for a bankruptcy petition, the Court indicated that such a fee does not create a ''suspect classification *(Kadrmas v. Dickinson Public Schools, 487* U.S. 450 (1988)). Some experts read this opinion to have tacitly signaled that the present Court is really intent on abandoning the notion of 'wealth' as a suspect class, and confining more rigorous review of discriminations between indigent and nonindigent people to those circumstances where the interest or rights denied are entitled to enhanced constitutional protection. Whether the importance of the interest denied to indigent people by the Oregon proposal—access to the courts to pursue various remedies—would be regarded as comparable to a' 'fundamental right" is not clear.

It is worth speculating as to what the implications of closer judicial scrutiny might be if applied to sections 414.725(7) and 414.745. The State's interest in encouraging providers to participate in the Medicaid program could be regarded as compelling. Medicaid is structured voluntarily, and without the participation of physicians and other providers, the underlying objectives of the program fail. On the other hand, a waiver of all civil and criminal liability is not necessarily the only means to encourage participation under the proposed demonstration. Indeed, it is not the only way to protect providers from the risks and costs of liability (the State could, for example, further subsidize the malpractice insurance costs of providers). In any event, there are a number of ways in which a court could view this legislation as invasive or overly broad, the touchstones of close scrutiny analysis-all premised on the possibility that the courts would apply to this legislation the more rigorous test only applied to legislation that discriminates on the basis of 'suspect" classifications.

Oregon Constitutional Issues

Whereas the Federal constitutional interpretations of the Federal courts (and the Supreme Court) must be followed by the State courts, the State courts themselves are the ultimate interpreters of the their own constitutions. The Oregon Constitution includes a' 'privileges and immunities' provision that parallels the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.[6] The Oregon courts' analyses of the requirements of this clause generally track the same "fundamental interest"/ ''suspect' class rhetoric that has been adopted in the Federal equal protection cases.

Nonetheless, on several occasions the Oregon courts have also indicated that the application of those principles may be somewhat broader under the State constitution. In a school financing case, for example, the Oregon Supreme Court concluded that the "privileges and immunities" clause requires a judicial evaluation of the justification for the discrimination if important interests are involved, even if these interests are technically not "fundamental" (under the Federal definition) *(Olsen v. State, 276 Or. 9, 554* P.2d *139 (1976)).* Similarly, in a more recent decision, a State court held that the ' 'privileges and immunities" clause required that the denied interests (in this case, unrestricted access to abortion) be balanced against the interests of the State, rather than requiring the State to show only that the limits imposed by legislation were "rational" *(Planned Parenthood Association v. Department of Human Resources, 63 Or.* App. 41,663 P.2d 1247, *aff'd on other grounds, 297 Or. 562,687* P.2d 785 (1984)).

It is important not to read *too* much into these cases. The Oregon courts have only indicated a willingness to broaden the requirements of nondiscrimination in some circumstances. Even while drawing some distinction between Federal equal protection analysis and analysis under the "privi-

[5] **See footnote 4.**

[6] **Article I, section 20 of the Oregon Constitution states: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities,** which upon the same terms, shall not equally belong to **all** citizens. '

leges and immunities' clause, these cases also insist that in most circumstances the "privileges and immunities clause of the State constitution requires no more than the "rationality" standard applied in Federal equal protection cases. A somewhat loosened definition of a "fundamental interest" may allow more judicial protection of important interests such as public education or medical assistance for abortion. To extend that notion to include more judicial scrutiny of discrimination involving Medicaid benefits would be a far greater departure from the Federal equal protection cases than the decisions in *Olsen* or *Planned Parenthood* have signaled.

The most interesting and, unfortunately, unanswerable question is whether Oregon's somewhat broadened application of its "privileges and immunities" clause would result in a loosening of the definition of 'suspect' class or would allow Oregon courts to more closely examine ''wealth' discrimination. The Oregon courts have given little specific guidance as to the application of the ''privileges and immunities' clause to limits or conditions on social welfare programs, and virtually none as to the application of "suspect" class analysis in this context. In other situations, the Oregon Supreme Court has emphasized that "close scrutiny" under the 'privileges and immunities' clause only applies where there is a definable ''class' apart from the classification created by the statute (see *State v. Clark, 291 Or. 231,630* P.2d 810, *cert. denied, 454* U.S. 1084 (1982)). Although indigent people are a definable class, it is not clear whether Oregon would further insist that only the traditional "suspect" classes are entitled to a higher level of judicial review or consider a classification based on ''wealth' as also entitled to a higher level of judicial scrutiny.

FEDERAL STATUTORY ISSUES

"Anti-Dumping" and Other Federal Laws Relating to Health Care Access

Or. Rev. Stat. *§* 414.745 would modify the common law protections currently available to Medicaid beneficiaries. Apart from issues relating to the discriminatory effects of this provision, and their constitutional implications, section 414.745 creates a potential conflict with Federal "anti-dumping" legislation, as well as with other Federal laws relating to health care access.

In most jurisdictions, the civil liability of providers for denial or termination of treatment is determined by common law tort principles. Under common law, no private party, even a provider of health care, has a duty to protect or provide assistance to any other, unless there is an established relationship between the parties, or unless some affirmative act of the one party has created a risk of harm to the other. Once a duty has been recognized, however, the common law imposes a duty of reasonable care. A violation of that standard can result in civil liability for all resulting damage. Medical malpractice cases are the prototypical examples.

"Abandonment" of an established patient-i. e., a unilateral decision by a physician or other provider to terminate ongoing treatment-also may be regarded as negligence. Although it is not clear from the case law whether this rule is always absolute, the courts have rejected the patient's inability to pay as anon-negligent reason for terminating ongoing care. Once a provider-patient relationship has been established, a provider generally must continue treatment even if a patient is indigent.[7]

On the other hand, the "no duty" rule is as harsh as the abandonment principle is generous. In its strictest application, the true 'bystander' can watch another person die without rendering aid; if there is no duty to violate, there can be no liability. The 'no duty" principle has been cited repeatedly with approval-although relatively rarely applied-in cases involving refusal to provide medical care by both physicians and hospitals (224).

Not surprisingly, the harsh implications of the "no duty" rule have led many modern courts to avoid it or to find exceptions to its application, particularly in the context of hospitals rendering emergency care. Specifically, courts in many jurisdictions have recognized what could be regarded as a duty to provide first aid--namely, that a hospital with the capacity for emergency services has a duty in medical emergencies to assess potential patients and to at least provide the treatment necessary to stabilize the patient *(Wilmington General Hospital v. Manlove, 54* Del. 15, 174 A.2d 135 (1961); *Jackson v. Powers, 743* P.2d 1376 (Alaska 1987); *Thompson v. Sun City Community Hospital, Inc.,*

[7] For a broader discussion, see K. Wing, ***The Law and the Public's Health,*** 3d Ed. (St. Louis: C.V.Mosby Co., 1990), pp. 265-271.

141 Ariz. 597,688 P.2d 605 (1984); *Mercy Medical Center v. Winnebago County, 58 Wis.* 2d 260, 206 N.W.2d 198 (1973)).

The courts have not been entirely clear or consistent in defining the limits on this exception to the general rule (313). To bring some clarity and uniformity to this situation, Congress passed legislation in 1985 that effectively codified the common law exception to the ''no duty' rule and interpreted its reach rather broadly (Public Law 99-272, as amended by Public Law 101-239; 42 U.S.C. § 1395dd). The statute, commonly referred to as the Medicare ''anti-dumping' law, requires hospitals that participate in Medicare (i.e., virtually all hospitals) to screen all emergency patients, and to stabilize those in need of further treatment. It also limits drastically the discretion of hospitals to discharge or transfer patients once they are stabilized. And while it is a subject of much controversy, the Federal statute also has been interpreted to impose the same requirements on individual physicians who work in emergency rooms (see, e.g., *Burditt v. U.S. Department of Health and Human Services, 934* F.2d 1362 (5th **Cir.** 1991)).

In contrast, Or. Rev. Stat. $424.745 allows both individual and institutional providers of all types to either refuse to initially accept or to terminate treatment for Medicaid beneficiaries when the services they need are not financed under the Oregon Medicaid scheme. In essence, the preexisting common law limits imposed by the law of abandonment, the no duty exception, and any other potential for liability based on State law is waived by section 414.745 for those Medicaid beneficiaries subject to the reform proposal.

The conflict of this provision with existing common law does not invalidate it; the Oregon legislature is free to amend or modify the common law as applied in that jurisdiction. Nor is section 414.745 invalid simply because it conflicts with the requirements of the Federal ''anti-dumping' legislation. However, the result would surely be confusing to providers, since the State law might ''lower' or waive liability under the same circumstances where the Federal law ''raises' or specifies higher standards. Medicaid beneficiaries that have been denied treatment would be allowed to pursue private claims based on the Federal law or to request administrative action based on the Federal law, but they would be prohibited from doing so under State law.

A potential for conflict could also arise if Congress itself authorized the Oregon proposal or exempted the proposal from the requirements of the Federal Medicaid statute. If congressional intent were not clarified, a vague or broadly worded Federal authorization or waiver could be read as also waiving the application of the Federal anti-dumping or other relevant legislation. Assuming that it is not Congress' intent to do so, any Federal authorization or waiver legislation should explicitly recognize this potential conflict and, where desired, specifically affirm the continuing application of the Federal legislation to the Oregon Medicaid program even after it is reformed.

A congressional authorization or waiver should also clarify the continuing application of other Federal laws that currently impose restrictions on providers' discretion to deny access to or abandon indigent patients. For example, the ''tiee care' and "community service' mandate of those hospitals that have received Hill-Burton* funds continue to impose requirements relating to the treatment of indigent patients, general admission policies, and emergency room access. In particular, the community service" provisions require Hill-Burton recipients to accept all Medicaid patients and limit their discretion to deny patients services in emergencies (42 CFR § 124.500, § 124.600 (1990)). Section 414.745 cannot waive these requirements.

Similar requirements are imposed on hospitals that are given Federal nonprofit status. The Federal revenue rulings interpreting these requirements, while not models of clarity, clearly intend to limit the discretion of nonprofit hospitals to deny admission to indigent patients, emergency patients, and, in particular, Medicaid beneficiaries (242).

It is clear that section 414.745 contrasts markedly with the requirements of these Federal laws in a number of important ways. As with the anti-dumping legislation (and again assuming that Con-

8 The ''Hill-Burton' Act (Public Law 79-725) and later amendments established a program that gave construction grants to hospitals between 1946 and 1974, when the program was abolished. Hospitals receiving these funds were required to provide a certain amount of free care and to make their services available to all community residents. The free care requirement was time-limited (usually 20 years), but the community service requirement-which prohibits the denial of emergency care to the indigent-is not.

gress does not intend to waive these requirements as part of any authorization of the Oregon Medicaid proposal), these potential conflicts should be noted and the continuing application of these other Federal laws should be explicitly clarified in the event of a congressional authorization or waiver.

Protection of Human Research Subjects

Federal law provides safeguards to protect human subjects at risk in research projects and other activities supported by the U.S. Department of Health and Human Services (DHHS) (45 CFR 46). If the Oregon proposal were subject to these safeguards, it would be required to establish an Institutional Review Board (IRB) that would have to independently approve the proposal before it went forward. Such a requirement would delay implementation until a properly structured IRB had conducted a review, which could consider such factors as whether other alternatives would have less impact on Oregon's Medicaid population. In the event of IRB disapproval, the proposal could not be implemented. The primary legal question is whether these requirements apply to the Oregon Medicaid proposal.

45 CFR Part 46 has both specific and general statutory authority. The regulations were originally enacted as a response to a mandate from Congress (Protection of Human Research Subjects Act, Public Law 93-348).9 Both the original regulations and their subsequent amendments, however, claim as their authority the general rulemaking authority of DHHS. The requirements of Part 46 apply to all DHHS-supported activities, including those funded by HCFA (45 CFR § 46.101).

After a 1976 lawsuit, in which a Federal court held that a Georgia proposal to impose copayments on Medicaid beneficiaries was "research" and consequently subject to these regulations *(Crane v. Mathews, 417* F. Supp. 532 (N.D. Ga. 1976)), the regulations were expanded to include as ''research" any "systematic investigation designed to develop or contribute to generalizable knowledge. " The revised regulations specified that ''some 'demonstration' and 'service' programs may include research activities" (45 CFR § 46.102(e)). The Oregon proposal is almost certainly ''research" by this definition.

But while 45 CFR Part 46 has broad scope, it also provides for specific exemptions for certain kinds of activities and it reserves for DHHS the discretion to exempt individual projects from these regulations. Research projects that DHHS can exempt include:

1. Programs under the Social Security Act, or other public benefit or service programs;
2. Procedures for obtaining benefits or services under those programs;
3. Possible changes in or alternatives to those programs or procedures; and
4. Possible changes in methods or levels of payment for benefits or services under those programs.

On their face, these provisions appear to exempt from Part 46 the type of "research" or demonstration that is proposed by Oregon. Alternatively, Part 46.101 also reserves for DHHS the discretion to waive these requirements as they apply to an individual project. Notably, these provisions were added in 1983, at least in part as a response to the implications of the *Crane* decision (48 F.R. 9,266).

Critics of the Oregon Medicaid proposal have claimed that the 1983 amendments to Part 46 were invalid and beyond the statutory authority of DHHS (220). However, although the underlying rationale for issuing a regulation maybe subject to some level of judicial review, the discretion of an agency to amend or rescind its own regulations is extremely broad, particularly where the underlying statutory authority has no specific standards for a reviewing court to apply. In the introduction to the 1983 amendments to section 46.101, DHHS stated that its own review process for demonstration projects was extensive and that it considered IRB review for such projects, such as Oregon's Medicaid proposal, to be duplicative and unnecessary (48 F.R. 9,266).

While this position can be argued as a matter of public policy, it is unlikely that a reviewing court would consider it to be an abuse of discretion under general principles of administrative law, particularly

9 The original 45 CFR Part 46, setting forth department-wide policies, was published a few days before the 1974 legislation was passed (39 F.R. 18,914). The 1974 legislation required Department of Health, Education, and Welfare (DHEW) (later DHHS) to enact regulations protecting subjects in projects funded by the Public Health Service and to establish a commission to make recommendations for department-wide policies. In response to these mandates, the original regulations were amended subsequently on several occasions (see 46 F.R. 8,386; 46 F.R. 19,195; 47 F.R. 9,208; and 48 F.R. 9,269).

since the Oregon proposal has been reviewed repeatedly by State and Federal officials.

The regulations at section 46.10l(i) do specify that:

> If, following review of proposed research activities that are exempt from these regulations under paragraph (b)(6), the Secretary determines that a research or demonstration project presents a danger to the physical, mental, or emotional well-being of a participant or subject of the research or demonstration project, then Federal funds may not be expended for such a project without the written, informed consent of each participant or subject.

This provision apparently imposes a limited requirement of review on DHHS even if the Oregon proposal is exempt from the IRB and other requirements of Part 46. That requirement would presumably be satisfied by the current DHHS review of Oregon's proposal. Some advocates have argued, however, that language in a recent DHHS appropriations bill suggests that, if DHHS does find that some current Medicaid beneficiaries might be harmed under the proposal, Oregon could be required to obtain ''written, informed consent' of all individuals affected by the new plan (222).

Federal Civil Rights Statutes

Title VI of the Civil Rights Act of 1964

Title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (42 U.S.C. § 2000d).

All recipients of Federal assistance subject to Title VI are required to execute an assurance of compliance with its requirements as a condition of receipt of Federal funds.

Title VI clearly applies to State Medicaid programs and Medicaid providers (42 U.S.C. § 2000d-4a, 45 CFR § 80.2 and App. A). As such, it prohibits intentional discrimination within a Medicaid program, including circumstances where an underlying intent may be inferred from circumstantial evidence. In this regard, Title VI can be viewed as an enforcement mechanism for the constitutional prohibition of discrimination based on race and other ''suspect' classifications. Although there is nothing in the language or legislative history of the Oregon proposal that could be regarded as intentional discrimination, there is the possibility that such a problem would arise in the implementation of the Oregon scheme. Thus, Title VI would impose a continuing obligation on Oregon to avoid overt discrimination in the implementation of its Medicaid proposal.

In addition to intentional discrimination, the DHHS regulations that interpret the statutory language of Title VI also prohibit some forms of de *facto,* or "disparate-impact," discrimination. The language of the regulations prohibits practices and criteria that have a disproportionate effect based on race, color, or national origin, even if this effect is not linked to a discriminatory intent.

The validity and specific meaning of these regulations are not entirely clear. The U.S. Supreme Court on at least one occasion has referred to the language of these regulations in a manner that implies that they are valid (see *Lau v. Nichols, 414* U.S. *563 (1973)).* More recent pronouncements of the Court have been more equivocal *(Guardians Association v. Civil Service Commission, 463* U.S. 582 (1983); *Alexander v. Choate, 469* U.S. 287 (1985)).

Even assuming that these regulations are valid, it is not clear from the language of the regulations (or from the Court's references to them) what sort of justifications would be accepted in defense of a "criteria" or "method of administration' that did result in a disproportionate effect based on race, color, or national origin. There are several possibilities. Any practice or policy that is regarded as intentional discrimination is almost certain to be treated as illegal. Alternatively, a court could regard a finding of disproportionate impact as establishing *a prima facie* case and then focus on the underlying justifications for that impact.[10] As a third alternative, the courts could apply the limited standard of ''rationality' to circumstances involving disproportionate impact or effect, requiring little more than some colorable justification for the practice or activity that results in the disproportionate impact.

10 This is the approach taken in employment discrimination cases under Title VII of the Civil Rights Act of 1%4 (42 U.S.C. § 2000e *et* seq. (Supp. 1991)). Under Title VII, where an employee shows that an employer's practices result in a disproportionate impact on a protected group, the employer has the burden of showing that there is a legitimate business reason to justify the practice and its effect.

Unfortunately, since so few Title VI cases have been fully litigated and have applied these regulations, there is little guidance on this crucial issue.[11] In *Bryan v. Koch (627* F.2d 612 (2d Cir. 1980)), the Federal court of appeals analyzed New York City's decision to close a public hospital under the requirements of Title VI. The court found *a prima facie case* of disparate impact on racial minorities, but the court held that the city need only show that the decision was rationally related to a legitimate objective (essentially applying the constitutional standard applicable in most equal protection cases).

In *NAACP v. Medical Center, Inc. (657* F.2d 1322 (3d Cir. 1981)), a case involving the decision of an inner-city hospital to build a new facility in a suburban location, the lower court found a disproportionate racial impact but concluded that the defendant hospital had legitimate interests in relocation and that there were no other alternatives that would have less discriminatory impact. The court of appeals held that the lower court's review ''more than adequately serve[d]" the requirements of Title VI, and strongly implied that a level of review comparable to that taken in *Bryan* would have been acceptable.[12]

The interpretation that will be given to these regulations is crucial in defining the implications of Title VI for the Oregon Medicaid proposal. If future courts adopted the limited view of Title VI requirements reflected in the decisions discussed above, the implications of Title VI would be minimal. Even if the Oregon reforms had a disproportionate impact on the minority groups protected by Title VI—an outcome that is at least possible under several different scenarios[13]--Oregon could still offer as justification any of the underlying objectives of its current proposal, not the least of which is (long-run) savings of State and Federal funds. If the judicial inquiry in Title VI cases where there is a finding of disproportionate impact requires no more than the ''rationality' standard generally applied under constitutional analysis, then it is very unlikely that any court would invalidate all or any part of the Oregon Medicaid reforms--even if it finds that the proposal would have a disproportionate result.

Title VI would have greater meaning in this context only if a court were inclined to inquire further (e.g., to consider the availability of other cost-saving or reform measures that would have a lesser impact on racial or other minorities). Thus far, however, the courts have not been inclined to do so. As a practical matter, therefore, Title VI may impose limits on the reamer in which Oregon implements its proposals only in those circumstances where there is disproportionate result and that result can be linked to an underlying intent to discriminate.

As one final qualification of the implications of Title VI in this context, it should be noted that Title VI is structured in such a way as to rely heavily on administrative enforcement by Federal funding agencies. Individual plaintiffs have been allowed to pursue lawsuits challenging the failure of DHHS or other agencies to enforce their own regulations, and in a few cases, seeking independent judicial determination of compliance with Title VI where the agency has failed to do so. On the other hand, some current members of the Supreme Court read Title VI more narrowly and may be prepared to restrict or even prohibit privately initiated enforcement actions (see *Guardians Association v. Civil Service Commission, 463* U.S. 582 (1983)). Thus the practical implications of Title VI for the Oregon proposal may be determined in large part by DHHS's willingness to apply and enforce these requirements.

The Rehabilitation Act of 1974 and the Americans With Disabilities Act of 1990

29 U.S.C. § 794 (1991 Supp.), codifying the original section 504 of the Rehabilitation Act of 1973, provides:

> No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

11 Title VI issues have arisen and been litigated extensively in school desegregation cases. These cases, however, have little utility in clef@ the meaning of Title VI in other contexts.

12 The *NAACP* court also pointed out that in *Jefferson v. Hackney, discussed* above, the Supreme Court (in a footnote) had rejected a Title VI claim that paralleled the equal protection claim that was the central focus of that decision. While *Jefferson* did not consider the validity of the Title VI regulations, the factual similarities between the scheme reviewed and upheld in *Jefferson* and the Oregon Medicaid proposal cannot be overlooked.

13 For example, the prioritization of services covered under the new scheme could result in a distribution of benefits that has a disproportionate impact or effect on protected groups. Although OTA's analysis of the list indicates that a disproportionate impact is not likely to occur with the line drawn at 587, future upward movement of the line could increase the potential for such a result.

The requirements of section 504 clearly apply to both private and public recipients of Medicaid funds and would therefore apply to Oregon in the implementation of the Medicaid reforms it has proposed.[14]

The DHHS regulations interpreting the scope and meaning of section 504 track closely those of Title VI (see 45 CFR 84.4). The language of these regulations appears to prohibit both intentional or overt discrimination against the handicapped, and acts or practices that have a disparate impact on the handicapped. As with Title VI, the courts have interpreted the requirements of section 504 somewhat more narrowly than these regulations may suggest.

In *Alexander v. Choate (469* U.S. *287 (1985)), the* Supreme Court considered both section 504 and its interpretative regulations and attempted to outline the types of activities that would be regarded as discrimination for purposes of section 504. *Choate* involved an attempt by the Tennessee legislature to reduce the costs of the Medicaid program by setting a maximum limit of 14 days of Medicaid coverage for inpatient hospitalization. The plaintiffs in *Choate* argued that since handicapped Medicaid beneficiaries have greater needs for hospitalization, the result would disproportionately affect the handicapped and therefore violate section 504.

In its decision, the Court held that while Title VI and section 504 are similar in many regards, the two mandates may be interpreted and applied in different ways. According to Justice Thurgood Marshall, the underlying purpose of section 504, unlike that of Title VI, is to prohibit discrimination that derives from "indifference," "neglect," or ' 'apathetic attitudes" rather than "invidious animus' (469 U.S. at 295-96). On the other hand, Marshall argued, the concerns of 'disparate impact resulting from these sources must be balanced by ''the need to keep section 504 within manageable bounds' and avoid unduly burdensome "Handicapped Impact Statements" (469 U.S. at 299).

Thus, according to the *Choate* decision, section 504 does apply to some circumstances of disparate impact discrimination. However, the prohibition of disparate impact discrimination requires a ' 'balancing' ' test under which "reasonable" efforts to modify a program or accommodate the handicapped may be required, but substantial or 'fundamental' modifications will not.

Choate upheld the Tennessee Medicaid limit primarily because it did not overtly distinguish between handicapped and nonhandicapped beneficiaries; both categories have ''meaningful' access to the same benefits, notwithstanding the acknowledged fact that handicapped beneficiaries are in greater need of those benefits. In this regard, *Choate* has been widely read as largely eviscerating the application of section 504 to disparate impact discrimination. The *Choate* opinion, however, does allow that some forms of disparate impact discrimination would *not* satisfy the ''balancing' test of section 504. For example, the Court notes that "the benefit itself cannot be defined in a way that effectively denies otherwise qualified handicapped individuals meaningful access . . . .' It also argues that "criteria that have an exclusionary effect" cannot be employed in determining limitations on benefits.

Under *Choate*, it is clear that Oregon can limit or restrict covered services in a facially neutral manner, even if the result disadvantages groups that qualify as handicapped under section 504. However, in implementing the proposal, particularly the proposed prioritization of covered services, it is conceivable that services would be defined or categorized in such a way that services might be covered for the nonhandicapped but comparable services would not be covered for the handicapped. If this were done explicitly, it could be regarded as intentional discrimination and a violation of section 504 per se. Even if it were not, it may be regarded as the kind of disparate impact discrimination described in *Choate* and a court would have to apply the "balancing" test described in *Choate* and other decisions. Ultimately the determinative issues would be much like those in Title VI cases: what sorts of justifications would be considered "reasonable" and what level of judicial review would be required under the "balancing test. ' It is simply not possible under current law to anticipate how future courts would answer these questions.

The passage of the Americans With Disabilities Act in 1990 (Public Law 101-336) presents another potential avenue by which the Oregon proposal

[14] Section 504 requirements are enforceable through administrative action or through privately initiated lawsuits (subject to the qualifications discussed above).

might be challenged. The focus of this law, as confined by its legislative history, is on access of persons with disabilities to transportation, employment, and places of business. Nonetheless, one passage of the act could be construed to place a broader interpretation on its reach. The passage states that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity (Public Law 101-336, Section 202).

For the purpose of this act, a‘ ‘public entity’ is a State or local government, an agency or special district of such a government, and certain transportation authorities. The intent of this definition is apparently to ensure that disabled persons are not treated inconsistently or inequitably by government entities simply because some receive Federal funding (and are thus subject to the strictures of the Rehabilitation Act) while others do not (268)).

The focus of this legislation and its legislative history appear to imply that it places no additional burden on the discretion of a State Medicaid program beyond those already in place as a result of the Rehabilitation Act. However, at least one legal advocate has suggested that the Disabilities Act does indeed place additional requirements on Medicaid programs. In particular, this advocate argues that the use of the public survey to assign values to health states gives inadequate weight to the opinions of persons with disabilities and therefore biases the ranking process against services for disabled persons (150).

Any assumption regarding how Oregon’s proposal would fare under a Disabilities Act challenge is necessarily speculative, since there is no case law. (The act, although passed in 1990, did not take effect until January 26, 1992.) Ironically, OTA analyses of the list showed that the weights from the public survey had relatively little effect on the final rankings on the list (see ch. 3). Furthermore, where survey responses differed according to the health experiences of the respondent, the result in at least a few cases could be to increase the relative weight assigned to a given treatment that would reduce the disability. However, because the Oregon Health Services Commission has not made its ranking process explicit and because it is possible that in future revisions of the list public survey information could be more determinate, the Oregon plan might still be vulnerable to challenge under the act.

The Child Abuse Prevention and Treatment and Adoption Act

One issue that could well generate legal controversy for the Oregon proposal as it is implemented—and also one that cannot be addressed definitively—involves the discriminatory treatment of newborn infants with severe handicaps, the focus of the ‘‘Baby Doe” debates. In the early 1980s, in response to reports that hospitals were allowing parents to refuse treatment for certain categories of handicapped newborns, DHHS attempted to promulgate additional regulations under the authority of section 504 (see 49 F.R. 1,627). Among other provisions, these regulations would have required States to use their child abuse authority to prevent “medical neglect of handicapped infants. ’

The application of these regulations to circumstances where parents have asked for treatment to be terminated, as well as some of the procedural requirements of these regulations, was eventually invalidated by the Supreme Court *(Bowen v. American Hospital Association, 476* U.S. 610 (1986)). However, while the result of the *Bowen* decision was the invalidation of these particular regulations, the decision validated application of section 504 to circumstances where State policy overtly discriminates against treatment of certain categories of handicapped infants.

Again, it is unclear what section 504 requires or allows in this setting, but the ***Bowen*** case clearly indicates that it will be applied. Furthermore, in this context section 504 may be applied both to the State in its decisions to prioritize covered services *and* to providers such as hospitals. Section 504 thus represents another potential conflict between the requirements of Federal law and the immunity from State law created by section 414.745 of the Oregon statute, as discussed above.

As part of the political fallout from the “Baby Doe” debate, in 1984 Congress amended the Federal Child Abuse Prevention and Treatment and Adoption legislation (42 U.S.C. § 1501 *et seq.* (Supp. 1991)). Those amendments give DHHS additional and alternative authority for regulating discrimination against handicapped newborns. Among other things, they explicitly define the withholding

of medically indicated treatment and nutrition from handicapped infants as a type of child abuse. The amendments also require each State, as a condition on the receipt of Federal funds under the original statutory scheme, to enforce State laws prohibiting child abuse in such circumstances. The implementing regulations, issued in 1985, prohibit the withholding of "medically indicated treatment" in the face of a ''life threatening condition," except under narrowly defined circumstances (see 45 CFR § 1340 (1990)). Thus, assuming that Oregon is a recipient of funds under this program, this statutory scheme may also impose restrictions on Oregon's discretion to overtly discriminate against certain categories of beneficiaries, as well as limit the discretion of providers to terminate or refuse treatment despite the statutory immunity of section 414.745.

The Age Discrimination Act of 1975

The Age Discrimination Act of 1975 (ADA), codified in 42 U.S.C. §§ 6101-6107 (Supp. 1991), generally prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance, paralleling the prohibitions of Title VI and section 504. Although the specific language used in the statute and regulations relates to all distinctions based on age, the legislative history of the ADA indicates that the primary concern of the legislation was discrimination against the elderly (241).

The ADA legislation differs from other civil rights statutes in several ways. First, it is not clear whether the requirements can be enforced through privately initiated lawsuits; some lower courts have read the statute as providing only for administrative enforcement (see *Rannelsv.Hargrove,731* F. Supp. 1214 (E.D. Pa. 1990); *Mittelstaedt v. Board of Trustees of University of Arkansas, 487* F. Supp. 960 (D.C. Ark. 1980)).

Second, while the ADA clearly applies to States receiving Federal Medicaid funds, it also specifically exempts overt age distinction that is authorized by Federal or State statute.[15] It does not appear, however, to exempt age distinctions that result from the administration or implementation of the program at the State level. Thus, in the implementation of the Oregon proposal, if an age distinction is made by an administrative policy or body—the obvious example is an age distinction drawn by the Oregon Health Services Commission that prioritizes a covered service separately for two different age groups under the scheme-that distinction would not be exempt from the ADA under this particular provision.

There remains the question of whether age distinctions authorized by an administrative body fall under any other exceptions allowed by the ADA statute. Section 610 of the statute exempts ''actions [that] reasonably take into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity." The DHHS regulations interpreting the ADA specify that, to be exempted, actions must meet four criteria:

1. Age is used as a measure or approximation of one or more other characteristics;
2. The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;
3. The other characteristic(s) can be reasonably measured or approximated by the use of age; and
4. The other characteristic is impractical to measure directly on an individual basis (45 CFR §§ 91.12, 91.13).

It is difficult to determine the implications of section 6103(b)(l)(A) for the Oregon Medicaid proposal with any certainty. The argument can be made that a prioritization of services that uses age as a criteria is an attempt to assess the value of the service to the individual denied that service; that age is a ''reasonable measure' of that value because it approximates life expectancy or social value; and that it is impractical to measure these characteristics in a more direct or individualized manner. It could also be argued that the Oregon scheme has been specifically authorized by State legislation to make these "value" determinations (and may be authorized to do so under a Federal statutory waiver as well).

On the other hand, the language of both the ADA statute and the DHHS regulations premises the exception on a finding that the age distinction is ''necessary' to the normal operation of the program

15 The DHHS regulations read this exemption to apply to laws adopted by a general legislative body, including local governments (45 CFR § 91.3(b)(l)).

or to the achievement of a programmatic objective. Drawing age distinctions is one way to prioritize Medicaid benefits, but it is not "necessary" in the stricter sense of the term. The assertion that age is a ''reasonable' measure of life expectancy or of social value can also be challenged.

Unfortunately, there has been virtually no prior application of these regulations-or the ADA statute--in this sort of context, either judicial or administrative. The only clear principle is that the ADA allows for overt age distinctions *only if they* fall under the ''statute' exceptions of sections 6103(b)(2) or under § 6103(b)(l)(A).

The extent to which the ADA prohibits *de facto,* or disparate impact, discrimination is likewise unclear. Section 6103(b)(l)(B) of the ADA does allow for actions or policies that draw distinctions based on "reasonable factors" *other than age;* and the DHHS regulations interpret "reasonable" to mean factors that have a "direct or substantial" relationship to the same factors that can justify age distinctions under the exceptions of sections 6lO3(b)(l)(A): the normal operations of the program or the program's statutory objectives (45 CFR §§ 91.11, 91.14). The statutory term "reasonable" and the "direct and substantial" language of the regulations, however, would require some judicial or administrative review of a policy or practice that results in *de facto* discrimination--certainly more than the "rationality" standard applied in other contexts.[16]

Nonetheless, the discretion allowed in the implementation or administration of the proposed scheme should be quite broad. Indeed, read broadly, the exception of section 6103(b)(l)(B) nearly swallows the general rule. If Oregon were to adopt a policy or practice that would have the effect of creating an age distinction-a good example might be the exclusion from Medicaid coverage of a service that is more often provided to the elderly than younger program participants-Oregon would only have to show that the prioritization of the service was part of the ''normal operation' of the program, or was consistent with the statutory objectives of the scheme. In most circumstances, it would probably be able to do so.

SUMMARY OF CONCLUSIONS

With one possible exception, Oregon's Medicaid proposal appears not to conflict with the Federal Constitution. The exception concerns provisions of the proposal that might permit a separate standard of care, and a different level of legal protection against substandard care, for Medicaid beneficiaries than for other State residents. This differential could be interpreted as a violation of the equal protection clause of the 14th Amendment. These provisions are also vulnerable to a State constitutional challenge under comparable provisions of the Oregon Constitution.

The provision in SB 27 that exempts providers from liability for not providing care to Medicaid beneficiaries when that care is not covered by the program is valid on its face; the State can pass legislation that overrides existing common law principles. However, this provision conflicts with existing Federal statutes that require most hospitals to provide basic emergency care to all patients. Thus, it is possible that hospitals could be prosecuted under Federal statute for not providing some services even if they were exempted under State law.

Federal law requires certain protections for human research subjects (e.g., IRB review of research proposals), but it also provides certain exceptions for public benefit programs. The Oregon proposal appears to fall within these exceptions, although some critics have claimed that language in a 1992 DHHS appropriations bill indicates otherwise.

Federal statutes prohibiting recipients of Federal funds from discrimination on the basis of race, handicap, or age clearly apply to the Oregon proposal. Implementing regulations further prohibit certain kinds of 'disparate-impact' discrimination. The Oregon proposal is on its face not vulnerable to a challenge on this basis, although it is possible that in its implementation the proposal could violate either of these Federal statutes or their interpretive regulations. It is probably also not very vulnerable to

16 It appears from the Federal regulations that DHHS would regard any age distinction-whether overt or *de facto*—invalid *unless* that *distinction is* a result of a policy or practice that is specifically excepted from the ADA by the statutory language of section 6103(b). Under this reading of the ADA, the scope of the justification inquiry is framed exclusively by the exceptions outlined in the statute, regardless of whether the distinction is intentional or eve% or whether it is merely a disparate effect or result. Although this appears to be a reasonable and consistent interpretation of the ADA, there has been virtually no judicial examination of the scope and meaning of the ADA in this context. Thus, it is impossible to predict definitively how the statute would be interpreted should this reading ever be contested.

challenge on the basis of handicapped or age discrimination, unless in its implementation the denial of benefits can be shown to fall disproportionately on protected groups (e.g., because the services they use tend to appear below the cutoff point on the prioritized list). Based on OTA's analysis of the list, it appears unlikely that this would happen at the current benefit threshold; however, the potential for such a challenge could increase if the line moved up. The proposal could conceivably be vulnerable to challenge on the basis of certain provisions of the American with Disabilities Act, but lack of legal precedents for such a challenge makes it difficult to predict how future courts would react.

If Congress should decide to grant the waiver statutorily, it could explicitly exempt the program from other existing applicable statutes (e.g., the discrimination laws). However, ambiguous wording in such a statutory waiver could lead to questions of congressional intent regarding the applicability of the other statutes to the program. Thus, ambiguous legislative wording could actually create rather than resolve future judicial controversy.