National Association of State EMS Officials – Air Medical Services Committee

Brief Outline of the Federal Pre-emption Issues in Regulating Air Medical Services
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- Helicopter EMS (HEMS) programs in the United States were largely not-for-profit hospital or public safety operations until the late 1990's. These programs were generally well integrated with state and local EMS system.

- An increase in Medicare reimbursement for air ambulance transports in the early 2000's appears to have contributed to a significant increase in the number of HEMS programs, medical helicopters, and for-profit operators.

- The number of air medical transports doubled between 2000 and 2010.

- The number of helicopter crashes increased as well, drawing public and National Transportation Safety Board attention to the issue.

- Some for-profit operators use aggressive tactics and marketing to increase flights.

- Unlike passengers who choose an air carrier to use on a vacation or business trip, patients typically have little or no say in what service is utilized to transport them by air ambulance.

- As states have attempted to regulate HEMS programs and ensure their integration with state and local EMS systems, operators have responded with lawsuits asserting the exclusive authority of the Federal Aviation Administration under the Airline Deregulation Act (PL 95-504) of 1978 (ADA).

- The ADA pre-empts states from regulating the rates, routes, or services of an air carrier.

- When Congress passed the ADA, there were very few HEMS programs in the United States, and it is doubtful that there was any consideration of the impact of the ADA on the regulation of air ambulances by states.

- Court decisions have found in favor of the HEMS programs when states have attempted to require certificates of need, regulate hours of service, or address air safety issues.

- The US Department of Transportation (US DOT) in attempting to clarify the limits of federal regulation, has indicated that the while the FAA regulates air safety, states are free to regulate medical safety. Unfortunately, some of the US DOT efforts to clarify federal authority have created ambiguity as to what constitutes air verses medical safety and therefore, what state regulations may be pre-empted.

- In a US DOT letter to Hawaii, the state was told that they could establish requirements for medical equipment on the aircraft as long as it was not so expensive as to constitute economic regulation.

- Federal legislation to clarify state authority to regulate air medical services has not been successful.

- A GAO report was not sympathetic to states concerns and the report writers indicated that the US DOT has clarified the federal pre-emption issues well and can do so in the future.

- NASEMSO is working to develop model air medical regulations that will medically protect patients and enhance a systems approach without conflicting with the FAA's authority.

- NASEMSO believes that both air safety and medical safety must be regulated and that one should not interfere with the other.

At the present time, pre-emption issues may be categorized into three categories.

<u>Areas where federal preemption has been asserted</u>

- Requirement for 24/7 service
- Requirement for a CON
- Regulation of rates, response times, bases of operation, bonding requirements, and accounting and reporting systems
- Matters concerning aviation safety including equipment, operation, and pilot qualifications
- Requirements for certain avionics/navigation equipment
- Requirements for general liability coverage
- Safety aspects of medical equipment installation, storage on aircraft and safety training of medical personnel

<u>Areas where states retain authority</u>

- Medical equipment and supplies (as long as it does not amount to economic regulation)
- Delivery of medical services (regulation of medical staff qualifications and sanitary conditions)
- Regulating EMS providers to prevent helicopter shopping
- Requirement to transport to the nearest appropriate hospital (some questions still exist)

- Market approaches – the state in contracting with air ambulance services could chose to not do business with HEMS services that did not meet certain standards or requirements
- Voluntary approaches
- Medical environment: providing access to patient and control of temperature in aircraft

Areas that have not been specifically addressed

- **"**Quality, availability, accessibility and acceptability" from the US DOT letter to HI – this raises many questions
- Requiring air ambulance mutual aid agreements
- Personnel: requiring training for ground communications; requiring pilot to be medical responder
- Documentation: requiring written criteria for patient transport and destinations; patient transfer protocols
- Requiring communications with EMS, hospitals, and between crew and pilot
- Integration with local EMS system

If you have any questions, please contact:

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