

# Federalism: Finding the balance

BY TRENDS RESEARCH AND RESPONSE GROUP OF THE COUNCIL OF STATE GOVERNMENTS

New federal policies continue to change the balance of power between the states and the federal government. In our federalist system of government, the states form a union and agree to subordinate some of their powers to the federal government in order to further common goals. Throughout American history, the balance of power between the states and the federal government has continued to shift with historical circumstances and changes in state and federal policies.

Now, as the federal government gears up for sweeping

changes in funding social programs, health and education, while focusing intensely on homeland security and international affairs, the reality of American federalism continues to change. In several areas, states find their relationships with the federal government, and the shifting balance of powers, often frustrating.

CSG's Trends Research and Response Policy Staff examined how the states are coping with shifting attitudes and programs at the federal level and how these shifts are shaping the course of current and future state/federal relationships.

## Health: States skeptical of new Medicaid plan

**O**n January 31, U.S. Health and Human Services Secretary Tommy Thompson announced a Medicaid reform proposal that would radically change the relationship between the federal government and the states with regard to Medicaid. Thompson said the new proposal was designed to assist states in their efforts to control their health care spending, while maintaining coverage for the nation's lower-income families and seniors.

In the press conference announcing the proposal, Thompson said state participation in the new program would be optional. Participating states would receive additional funds over the next three years and would have complete flexibility to redesign eligibility and benefits for "optional" groups – those groups for which the federal government does not mandate Medicaid coverage. Optional groups, such as the elderly and disabled, currently make up about one-third of enrollees but account for two-thirds of Medicaid spending.

States would still be required to continue services for mandatory populations according to current guidelines.

Medicaid is a health care program for low-income individuals jointly funded by the states and the federal government.

The federal government provides matching funds to states ranging from 50 percent to 80 percent of Medicaid's cost. On average, states provide 43 percent of the funds spent for the program. In addition, Medicaid accounts for about 20 percent of the average state budget and is the largest source of federal funds for states, according to the Kaiser Commission on Medicaid and the Uninsured. Only education is a larger portion of state budgets.

Traditionally, states have had to apply

for waivers from federal program requirements in order to redesign coverage or benefits within their Medicaid programs. Applying for a federal waiver is often a lengthy, convoluted and politically complex process. States often do a great deal of work to restructure their Medicaid programs with no guarantee that their plans will receive federal approval. In addition, states are required to navigate complex federal Medicaid regulations, which sometimes require states to cut whole categories of benefits or enrollees in order to manage rising costs.

Few state leaders would argue with the need for fundamental reform of Medicaid. With state budgets in crisis and Medicaid the fastest growing budget item, states are looking for ways to rein in costs without having to cut benefits or services to the needy.

But some have reservations about the nature of the administration's plan, especially its funding. The proposal calls for an additional \$12.7 billion over seven years, with \$3.25 billion coming in fiscal year 2004. Federal funds would then be cut significantly in the final three years of this 10-year plan.

Supporters of the plan say it will give states the flexibility they need both to



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save money and to continue coverage for low-income individuals and families in the most efficient manner. Critics say the proposal is nothing more than pretense for turning Medicaid into a block grant. If so, this proposal could place state budgets at risk in the future, if Congress cuts funds for Medicaid.

In any case, Congress must approve the

proposal before it can be implemented. Thompson and others at HHS have appeared before Congress and are looking to governors and other state officials for input into the details of the plan. At the National Governors Association meeting in February 2003, governors neither rejected nor endorsed the administration's Medicaid proposal but submitted a

list of questions to elicit more information. One area of consensus among the governors was that the federal government should assume the financing for care for individuals dually eligible for both Medicare and Medicaid. ★

— *Trudi Matthews, chief health policy analyst – tmatthews@csg.org*

## Education: No Child Left Behind moves forward

Secretary Rod Paige and the U.S. Department of Education were spared a showdown with the states when all 50 state education departments submitted preliminary accountability plans to Washington by the January 31, 2003 deadline.

When Washington ignored pleas by the National Governors Association and the Council of Chief State School Officers to extend the January 31 deadline because of governance issues and delayed final guidelines, it appeared likely that states would balk and defy federal demands for the preliminary accountability plans spelled out in No Child Left Behind legislation.

The next crucial deadline for compliance with the federal NCLB Act, signed into law January 8, 2002, arrives May 31, when states must submit final drafts of their accountability plans. Between now and then, federal and state officials will meet to negotiate and hammer out the plans' details. Some states, it appears, still



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have much work to do to comply with the federal requirements. (See "NCLB report card" and "Federalizing education" in this issue for an in-depth look at the act and its implications for states.)

Washington and state education officials

must also settle issues relating to the reading initiative supported through Title I Reading First grants. If technical assistance and panel reviews for Reading First are any indication of how peer reviews and technical assistance will go for accountability plans, states could face a rocky road between now and May 31.

With math and science initiatives just beginning in Washington, states could expect more federal influence on curriculum, instruction, textbook adoption, and software programs for their local school districts if they want federal funding.

For state legislators, the debate over "choice" is not only about charter schools or vouchers, but also about state budgets and state autonomy. States must either learn to live with NCLB's requirements, or reject the federal funds that accompany them. ★

— *Charlotte Cornell Postlewaite, chief education policy analyst – cpostlewaite@csg.org*

## Energy: Regulation increasingly encounters federalism debate

Last year, spurred by the California energy crisis of 2000-2001 that saw manipulation of electricity prices and reportedly cost the state \$45 billion, the federal government and the Federal Energy Regulatory Commission announced a plan to implement a set of standard rules that would govern wholesale electricity markets.

Known as Standard Market Design, the plan would be implemented through several measures, mainly reforming the

tariffs public utilities charge for open access to the transmission grid and grouping power markets into regional boards to create a standardized national system. These boards would oversee transmission and generation construction through regional transmission organizations that would control operation of local electricity markets.

By standardizing electricity markets, FERC seeks to reduce transaction costs, improve reliability and service, create

greater market transparency, and increase investor confidence through greater certainty about market rules. However, the plan, through its Standard Market Design blueprint, would essentially solidify FERC's authority over state and regional power markets and would create a uniform national power grid with standardized rules enforced by FERC.

Many states and their regulatory agencies have risen up in opposition, arguing that this effort reaches far beyond the



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commission's jurisdiction by asserting control over components of the energy markets normally overseen by state and local utilities. The opposition has been most forcefully voiced by state legislators and energy regulators from the South and


West. They argue that the plan would allow their regions' cheaper electricity to be exported through heretofore unnecessary transmission lines they would be forced to build as members of standardized regional markets and that states' rights to regulate their own energy markets would be usurped.

As the battle over the regulation of energy markets continues, the outcome could help further define the changing face of federalism in the United States. States have been joined in their battle by certain members of Congress who advocate the states maintaining greater authority in areas related to enforcement, regulation and oversight of energy markets. They believe that state governments will be able to tackle these issues more effectively and efficiently than Washington, if not individually, then at least from the group perspectives that emerge from the regional energy markets.

These lawmakers, along with many of the states, believe that if FERC is successful, it will pre-empt the rights of state legis-

latures and other state constitutional bodies to determine appropriate retail energy policy. Therefore they see the impending result as not only a confrontation with many states' energy laws, but also the usurping of states' abilities to protect consumers from unfair energy prices.

A more favorable enhancement to the Standard Market Design plan could result from the efforts of several U.S. House lawmakers, who will introduce electricity reform legislation that would encourage, but not require, U.S. utilities to join regional electricity markets, therefore reviving a broad energy bill to boost energy production and update power-market rules.

Whether or not a more favorable approach toward states' concerns on energy regulation will emerge remains to be seen, but much suggests that principles of federalism will continue to play a large part in the outcome. 

— Barry Hopkins, lead infrastructure policy analyst – [bhopkins@csg.org](mailto:bhopkins@csg.org)

## Environment: Clearing the air over federalism

**F**ederalism plays an important part of our country's environmental regulatory system, with states and the federal government sharing responsibility for pollution control.

Historically, state and local governments were responsible for regulating pollution, preceding significant federal regulations by decades. In the mid-1950s, federal regulatory oversight began to dominate with passage of the Water Pollution Control Act. The evolution toward more federal control continued throughout the 1960s and early 1970s, with increasing federal authority over water and air pollution enforcement. But the two most significant acts to change the state and the federal roles were the 1970 Clean Air Act and the 1972 Clean Water Act. These acts fully placed the federal government in the dominant position of setting pollution standards and increased the federal enforcement role. While these acts moved more regulatory power into federal hands,

the U.S. Environmental Protection Agency increasingly looked to the states to implement the pollution programs.

During the 1970s, states appreciated the federal government's help enforcing environmental laws. But, by the mid-1990s, many states became increasingly frustrated with federal oversight. More and more, states were beginning to develop the professional skills needed to administer pollution programs. They increasingly favored decentralized solutions and resisted "unfunded mandates" – new federal requirements without adequate funds to meet them.

For the most part, state pollution control laws are set up to carry out federal statutes with states adding their own unique touches to reflect their priorities. States are allowed to be more stringent than federal law, but cannot be less stringent. In recent years, several states have approved legislation prohibiting state standards to be more stringent than federal standards. According

to the U.S. EPA "about one-third of the states have statutory provisions that limit or condition the ability of their regulatory agencies to adopt regulations that are more stringent than any federal environmental regulation."

In recent months, an environmental battle between Northeastern states and the U.S. Environmental Protection Agency has been waged over changes to the Clean Air Act's New Source Review permitting program. This battle illustrates the complex relationship between the states and the federal government.

In late 2002, the EPA released both proposed and final reform plans for the NSR permit program. For 13 states, the deadline for implementing these changes was March 3. For the rest of the country, the new NSR changes do not have to be implemented until 2006.

Led by New York State's Attorney General Eliot Spitzer, 14 states (California, Connecticut, Delaware, Illinois, Maine,

Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont and Wisconsin) and the District of Columbia are challenging the EPA changes and are seeking a stay of the new rules. They argue that EPA has exceeded its legal authority and its actions are contrary to the law, putting communities and their air pollution control efforts at risk. They contend the rules would roll back the Clean Air Act and allow thousands of aging facilities to upgrade without installing state-of-the-art pollution control devices. The states are concerned that these changes will prohibit states from requiring stronger air quality measures for industries, risking the states' capabilities of meeting federal smog and soot reduction requirements.

For years, a number of industries have argued that the New Source Review rules



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are too stringent and discourage new investments in power plants. EPA said the

NSR changes will remove barriers to innovation and increase productivity, but clean air advocates and the attorneys general argue that the changes will gut the law that has been responsible for improving the country's air quality for the last three decades.

In early February, highlighting the complexity of the federalist system, eight states filed a legal motion supporting the Bush administration rule change. These states (Indiana, Kansas, Nebraska, North Dakota, South Carolina, South Dakota, Utah and Virginia) like the increased flexibility in enforcing the CAA and contend that revisions will benefit their parts of the country. ★

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## Agriculture: Federal oversight vs. state control

As air- and water-quality requirements become increasingly stringent, state legislatures and agriculture departments are wrestling with interpreting EPA regulations as they relate to agriculture operations.

California is at the forefront of these issues, with new air- and water-quality requirements looming over agriculture. This year, the federal government will require California farmers to obtain air-quality permits under Title V of the federal Clean Air Act as stationary sources of air pollution. The EPA gave the state's farmers until May 14 to submit applications for permits to govern diesel engines on irrigation pumps, and until August 1 to submit applications for other major stationary pollution sources, although as of mid-March, it had not yet specified what the other sources are.

In the Northwest, the focus has been on the burning of grass seed fields, a practice designed to control diseases and pests, and to stimulate growth. There are currently no viable alternatives to grass field burning that also build soil and prevent erosion. State regulations on field burning ensure that air quality meets or exceeds federal standards and records show that emissions from the practice do

not exceed federal air-quality standards. However, according to the EPA, this is not sufficient. While the EPA says it recognizes that states have primary responsibility for addressing field burning, it insists that a regional approach is needed, which would supersede state regulations.

Other states face nonpoint source pollution water-quality problems. The U.S. 9th Circuit Court of Appeals recently decided that nonpoint pollution sources are subject to EPA regulations. Many states and farm groups point out that in the Clean Water Act, Congress restricted federal regulation only to point source pollution, such as pipe discharges. Nonpoint sources, such as runoff from lawns, forests and farms, were to be regulated by states under a separate section of the Clean Water Act. According to Nancy McDonough, general counsel for the Farm Bureau Federation, Congress did not authorize the EPA to regulate agriculture and forestry runoff as point source. "Congress clearly left these issues to local and state control to be managed as land-use activities," she said.

Pending petitions ask the Appellate Court to determine if the Clean Water Act requires a state to identify all substandard waters within its boundaries and establish Total Maximum Daily Nutrient Loads for



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those waters. It also questions if allowing the EPA to establish TMDLs for waters impaired only by nonpoint source pollution, and thereby imposing corresponding land-use controls, constitutes an "impermissible federal intrusion into a core state function" without a clear statement from Congress. ★

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